The decisions of the Madras High Court in *Sundram* v. *The Queen*—*Ponnusami* v. *The Queen* (1) and *Muthialu Chetti* v. *Bapun Saib* (2) are appropriate for the purpose of showing the legal rights of the plaintiff, but do not support the proposition that in case of obstruction his proper remedy is by civil suit. The former of these was the judgment in a criminal case, and the latter in a suit for which the cause of action was not any alleged obstruction to the road, but the procurement of an improper order from a Magistrate. It was admitted that in Second Appeal No. 527 of 1891, in which the point now under consideration might have been raised, it was not taken by the respondents, who were defendants and made no objection to the decree of the Courts below. Consequently that case cannot be relied on as a precedent. The present case seems governed by *Satku* v. *Ibrahim* (3). We trust that the parties to this suit will come to some reasonable compromise, and would suggest that they should either accept the First Class Subordinate Judge's opinion, or, if they cannot do so, refer their dispute to the arbitration of the Collector and agree to abide by his award. A prolongation of this quarrel may compel the interference of the Magistrates and lead to much trouble, which can be avoided by the exercise of forbearance on both sides. We reverse the decree and reject the claim. The parties to pay their own costs throughout.

Decree reversed.

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18 B. 696.

[696] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice.

KASHINATH BALLAL AND OTHERS (*Original Plaintiffs*), *Appellants* *v.* GANPATRAO AMRITESHVAR JOSHI (*Original Defendant*), *Respondent.** [10th November, 1879.]

Stamp—Valuation—Court Fees Act (VII of 1870), s. 7, cls. 1—9—Foreclosure suit—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage-debt by sale of mortgaged and other property—Valuation for the purpose of Court fees.

A suit instituted by the mortgagee against the heir of the original mortgagor, to have the mortgage-debt paid by sale not exclusively of the mortgaged property, but also of all the other property in the hands of such heir liable for the debts of the original mortgagor, is virtually a suit for money, and should be valued, not at the principal debt, but the entire amount including interest.

[R., 7 Bom. L. R. 194 (195).]

THIS was a reference by the Taxing Officer under s. 5 of the Court Fees Act (VII of 1870).

The plaintiffs sued in the Court of the First Class Subordinate Judge of Nasik to recover the sum of Rs. 8,236-14-0 (being Rs. 7,000 principal and Rs. 1,236-14-0 interest) due upon a mortgage-bond executed by the deceased defendant Ganpatrao in favour of the deceased father of the plaintiffs, and prayed that the amount might be realized by the sale of the mortgaged property and of the other property of defendant.

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* First Appeal, No. 23 of 1879.

(1) 6 M. 203. (2) 2 M. 140. (3) 2 B. 457.

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The First Class Subordinate Judge decreed the claim with costs, and ordered that the plaintiffs should recover the amount awarded by the sale of the mortgaged property.

From this decision the plaintiffs appealed to the High Court, contending that they were entitled to recover the amount decreed from the whole or any portion of defendant's property.

The appeal was presented with a Court fee of Rs. 355, valuing the claim at Rs. 7,000, as an appeal in a foreclosure suit, under s. 7, sub-s. 9 of the Court Fees Act (VII of 1870), the principal amount of the mortgage being Rs. 7,000. The Shirastedar being of opinion that the memorandum of appeal was chargeable with a Court fee of Rs. 405 as an appeal in a suit for money [697] under s. 7, sub-s. 1 of the Court Fees Act, required the appellants' pleader to pay the deficient Court fee.

The appellants' pleader (*Pandurang Balibhadra*) objected to the valuation by the Shirastedar, and contended as follows:—

"No doubt, the plaintiffs do not, in this suit, ask that the defendant's right in the property should be foreclosed in the technical sense of that term, but they ask to have this right extinguished by the sale of the property for the satisfaction of their debt. In effect, the suit is of the same nature as a foreclosure suit. There is no reason why such a suit should be valued differently from a foreclosure suit, or why, as contended by the Shirastedar, the plaintiffs should be asked to pay stamps on the amount of the principal and of interest. In determining the amount of the stamp duty under the Stamp Act, the amount of principal only is taken into consideration, and in the same way the amount of Court fees chargeable in suits coming within the words of s. 7, cl. 9, is calculated on the amount of the principal only. The same principle ought to apply to suits by a mortgagee when he asks the payment of his debt by the sale of the property instead of the property itself. Such a construction would be reasonable, looking to the practice of mortgagees in the Mofussil, who seldom bring what would strictly be a foreclosure suit."

In support of his contention the pleader cited the case of *Ganpat Pandurang* v. *Adarji Dadabhai* (1) and the English cases quoted therein with approval at p. 320 of the Report.

The question was referred to the Taxing Officer for decision.

The Taxing Officer referred the point to the Chief Justice under s. 5 of the Court Fees Act (VII of 1870). His reference was as follows:—

"The only question for determination is, whether the suit can be regarded as a foreclosure suit or not for the purposes of the Court Fees Act. If it can, the appellant is right in his contention that the valuation taken in respect to principal only is sufficient. The section of the Court Fees Act which applies to the [698] case is s. 7, cl. 9, and if the suit comes under cl. 9, the principal debt, *viz.*, Rs. 7,000, is to be taken as the basis of valuation. The suit was to realize Rs. 8,236-14-0 by sale of certain mortgaged property, and though the result of a decree ordering such a sale may be of the same effect as a foreclosure decree, still it is not, strictly speaking, the same. I think to arrive at the intention of the Legislature, the whole of cl. 9, which deals with mortgage suits, must be taken and read together. In the third clause of it, express provision is made as regards a conditional sale, in which case valuation is

(1) 3 B. 312.

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allowed on the same favourable terms as in cases of redemption and foreclosure. The present is not a case of conditional sale, and I think the common maxim of '*expressio unius*' must be taken to apply. As the law makes express provision as to redemption, foreclosure, and conditional sale suits, it must be presumed to have intentionally excluded other cases of sale; and although I am not prepared to hold a very positive opinion, still, I think, the Shirastedar is right, and that the appeal should be valued, not at Rs. 7,000, but at Rs. 8,236-14-0. I do not think the appellants' argument on the analogy of the Stamp Act a sound one. That Act is quite distinct from the Court Fees Act, and under the Court Fees Act, when a suit is brought upon a simple money bond for principal and interest, the plaint is always valued at the total amount of principal *plus* interest."

Pandurang Balibadra, for the appellants.

JUDGMENT.

SARGENT, C. J.—As this suit is instituted against the heir of the original mortgagor, not exclusively for the purpose of having the mortgage-debt realized by sale of the mortgaged property, but also out of all other property, presumably meaning any other property in the hands of such heir which would be liable for the debts of the original mortgagor, it is virtually a suit for money brought against the representative of the original debtor. I am, therefore, of opinion that the appeal should be valued, not at the principal debt, but the entire amount including the interest.

Order accordingly.

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18 B. 699.

[699] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

TANUDIN AND OTHERS (*Original Plaintiffs*), *Appellants v.* PANDU AND OTHERS (*Original Defendants*), *Respondents.**

[13th November, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 30—Burial ground—Land belonging in common to all the Mahomedan inhabitants of a village—Encroachment by some of the Mahomedans—Right of suit of some members of a community.

Where certain Mahomedans of a village brought a suit against other Mahomedans of the same village for the removal of a wall built by the defendants upon land which was found to belong in common to all the Mahomedan inhabitants of the village for the purpose of a burial ground, the Judge, in appeal, dismissed the suit on the grounds that all the Mahomedans were not joined as parties to the suit and that the plaintiffs had not obtained the permission of the first Court to file the suit under s. 30 of the Civil Procedure Code (Act XIV of 1882). On second appeal,

Held, reversing the decree, that s. 30 of the Civil Procedure Code was not applicable to the suit, which must be regarded as one in which the plaintiffs claimed to restrain the defendants from violating the common interest they all had in the land.

Held, further, that the defendants having erected the wall in dispute so as to exclude the plaintiffs from a part of the common land, there was a violation of the plaintiffs' right, and that, therefore, the plaintiffs were entitled to bring the suit for the removal of the wall.

[R., 18 P.R. 1903=78 P.L.R. 1903=52 P.W.R. 1903; 91 P.R. 1901=113 P.L.R. 1901; 105 P.R. 1901.]

* Second Appeal, No. 241 of 1892.