

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.

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.

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 18 B. 699.

SECOND appeal from the decision of Rao Bahadur Kashinath Bal-krishna Marathe, First Class Subordinate Judge of Ratnagiri with appellate powers.

This action was instituted by Tanudin valad Abdul Rajam and thirty-two others against defendants Pandu valad Shekh Yakub and twenty-six others to remove a new compound wall erected by the defendants, alleging that the land in dispute, which was to the east and west of a certain masjid, was the joint burial ground of the parties to the suit, all of whom were Mahomedans and resided in the same village; that the defendants by erecting the wall in dispute included this land in the land appertaining to their masjid, and that the plaintiffs had been thus dispossessed. They, therefore, prayed for the removal of the wall and that the land might be kept in the joint *vahivat* (management or user) of the parties.

[700] Defendants Nos. 2 to 5, 6, 8, 9, 15, 18, 20, 23 and 25 set up their exclusive ownership of the lands, and contended that the plaintiffs had no right to them.

The heirs of defendant No. 16 answered that the suit was barred by ss. 13 and 43 of the Civil Procedure Code (XIV of 1882) and also by the Statute of Limitations.

The other defendants were absent.

The Subordinate Judge (Rao Saheb N. G. Phatak) found that the lands in dispute were in the joint possession of the parties, that they had a joint right to them, and that the suit was neither time-barred nor barred by ss. 13 and 43 of the Civil Procedure Code. He, therefore, allowed the claim.

On appeal by the defendants the Judge reversed the decree on the following grounds:—

“*Issue 1.*—The land in dispute as a burial ground appears to be the joint property of all Mahomedans of the village. The plaintiff-respondents’ pleader is not prepared to say that all Mahomedans have been joined as parties to the suit. The lower Court’s permission to file the suit according to s. 30 of the Civil Procedure Code (XIV of 1882) does not appear to have been asked or granted, and the suit is, therefore, informal.

“*Issue 2.*—Assuming that all persons interested in the subject matter of the suit are parties to the suit, according to the plaintiffs’ admission the property in dispute is joint property. If it is joint property, each one of the owners is entitled to make such use of it as will suit his convenience and taste. The defendants as joint owners were entitled to raise the wall sought to be removed until and unless the plaintiffs should manifest an intention to divide the land and stop the defendants from raising a wall by a temporary injunction. The time for an injunction is gone, because the wall is complete. The plaintiffs must now sue for partition of their interest and get the land divided. The present suit for retaining the property joint and for restraining the defendants from exercising an act of admitted ownership cannot lie.”

The plaintiffs preferred a second appeal.

[701] *Ganesh K. Deshmukh* for the appellants (plaintiffs):—Section 30 of the Civil Procedure Code (Act XIV of 1882) is not applicable; and even supposing that it is applicable, the suit ought not to have been dismissed summarily. It ought to have been remanded, because s. 30 of the Civil Procedure Code was not relied on by the defence, nor was the point taken in the first Court.

Section 30 is not applicable, because the Court has not found that there are other necessary parties. We say that all the persons who were necessary parties have been joined in the suit. Our contention was that the lands in dispute were the joint property of the parties, and that contention has not been traversed. The defendants do not say that there are other persons interested in the lands. Their contention is that they are the exclusive owners. Under these circumstances, s. 30 of the Code can have no application—*Hira Lal v. Bhairon* (1). When property is joint, one member cannot act in such a manner as would exclude access of the other members to it. The defendants built a wall in the midst of the land, and have appropriated to their use a portion of the common ground.

Manekshah J. Taleyarkhan, for the respondents (defendants):—The frame of the suit is wrong. The suit as it is brought seems to be one with respect to a common family property. But the Courts below have found that the property is the joint property of the whole Mahomedan community of the village. Therefore, the Judge was right in dismissing the suit under s. 30 of the Civil Procedure Code.

JUDGMENT.

SARGENT, C. J.—The Courts below have found that the property belongs in common to all the Mahomedans of the village for the purpose of a burial ground. Section 30 of the Civil Procedure Code has, therefore, no application to the present suit, which, according to that finding, must be regarded as one in which the plaintiffs claim to restrain the defendants from violating the common interest they all have in the land—*Hira Lal v. Bhairon* (1).

[702] The suit, therefore, being maintainable, the only question which arises is, whether the wall in question which the defendants have erected so as to exclude the plaintiffs from a part of the common land, is a violation of the plaintiffs' rights. As to this there can be no doubt, on the finding, that as the land is held in common by all, the defendants' conduct amounts to such a violation.

We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge. The appellants to have their costs here and in the lower appeal Court.

Decree reversed.

18 B. 702.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

CALLIANJI HARJIVAN (*Plaintiff*) v. NARSI TRICUM (*Defendant*).*

[19th July, 1894.]

Specific performance—Injunction—Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I of 1877), ss. 22, 56 and 57.

The plaintiff was a milliner carrying on business in Bombay and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left it he was indebted to the

* Suit No. 537 of 1893.

(1) 5 A. 602.