must be construed to mean "admittedly mortgaged property," and that the provisions of s. 10 could not apply to cases where the mortgage was denied and title had to be proved. The point, however, is concluded by authority—*Rupchand Khemchand* v. *Balvant Narayan*(1) and *Gobind Singh* v. *Kallu*(2)—and I follow that authority. At the same time I must express my opinion that an amendment of the Act is necessary, for it is not right that under an Act passed only to relieve the agricultural classes from indebtedness, Subordiante Judges of the Second Class should be authorized to deal with questions which affect titles to immoveable property, and to dispose of them with final effect, on the mere allegation of the plaintiff that such property was mortgaged, and that the amount due on the mortgage at the date of suit was less than Rs. 100.

Decree reversed.

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13 B. 493.

[493] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

GURPADAPA BIN IRAPA (*Original Plaintiff*), *Appellant* v. NARO VITHAL KULKARNI (*Original Defendant*), *Respondent.** [28th August, 1888.]

Stamp Act (*I of* 1879), *s.* 34, *cl.* (3)—*Instrument admitted as duly stamped—Appellate Court's power to question the admission—Reg. XVIII of* 1827, *s.* 10—*Practice.*

Where a Court of first instance has admitted a document in evidence as duly stamped, s. 34, cl. 3 of the Stamp Act (I of 1879) precludes the appellate Court from questioning the admission of such document. If the appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act.

Section 34 of Act I of 1879 applies to all instruments whenever executed, and must, therefore, be held to over-ride the special provision of s. 10 of Bombay Reg. XVIII of 1827, according to which no instrument requiring a stamp thereunder was valid unless duly stamped.

[F., 18 B. 737; R., 17 B. 235 (240).]

SECOND appeal from the decision of E. M. H. Fulton, acting District Judge of Belgaum, in appeal No. 164 of 1885 of the District File.

The plaintiff sued to establish his title to a yard, to recover Rs. 8, being the cost of building a wall, and to restrain the defendant from obstructing the building of the wall. He alleged that the yard in dispute had been mortgaged to him with possession by Vishnu, Naro and Venkaji, sons of Gopal, under a deed dated 5th June 1879; that the defendant illegally demolished a wall to the west of the yard, and thereby obstructed the plaintiff's enjoyment of the yard.

The defendant denied the mortgagor's title to the yard in question, and set up his own title to it by right of purchase from one Govind Sakbaram, a cousin of Gopal, to whom he alleged it had been allotted on a partition.

The plaintiff relied, in support of his mortgagor's title, on a certified copy of a partition deed executed between Gopal and Govind in A.D. 1852. The original appeared to have been written on a four-anna stamp

* Second Appeal No. 465 of 1886.

(1) 11 B. 591. (2) 2 A. 778.

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paper and filed by Govind in a suit instituted by him in 1862 against Gopal. In that suit it was held that the deed was not sufficiently stamped.

[494] In the present suit the Subordinate Judge held that the stamp of four annas was sufficient under Reg. XVIII of 1827, which was the stamp law in force at the date of its execution. He, therefore, admitted the certified copy in evidence, and held that the yard in dispute had fallen to the share of Gopal. He, therefore, passed a decree in plaintiff's favour.

On appeal the District Judge held that the plaintiff's title to the yard in dispute was not proved. With regard to the partition deed, he observed as follows:—

"In appeal No. 20 of 1864 between Govindrao and Gopalrao, through whom defendant and plaintiff respectively claim title, it was decided that the stamp was insufficient. This decision operates as a *res judicata* between the parties, and it must, therefore, be held that Ex. 61 (*i.e.*, the certified copy of the partition deed) is insufficiently stamped and consequently invalid, (s. 10 of Reg. XVIII of 1827). It was said that, having regard to cl. 3 of s. 34 of Act I of 1879, this point could not be entertained on appeal. But here no question arises as to the admissibility or otherwise of the document in evidence, but simply as to its validity (see *Girdhar Nagjishet* v. *Ganpat Moroba* (1).) Exhibit 51 is, therefore, absolutely ineffectual, and must be put out of consideration. Setting it aside it is obvious there is no sufficient proof of plaintiff's title."

On these grounds the District Judge reversed the decree of the Subordinate Judge and rejected the plaintiff's claim.

Against this decision the plaintiff preferred a second appeal to the High Court.

Manekshah Jehangirshah, for appellant:—The decision in the former suit on the question of stamp is not conclusive. The question was only incidentally raised in that suit, and a mere expression of opinion on an incidental question does not operate as *res judicata*. The ruling in *Girdhar Nagjishet* v. *Ganpat Moroba* (1) is practically overruled by s. 34 of the Stamp Act (I of 1879). This section precludes a Court from rejecting a document which has been already admitted as stamped.

[495] *Ganesh Ramchandra Kirloskar*, for respondent:—Under Reg. XVIII of 1827, s. 10, no document is valid unless it is duly stamped. The question of the validity of the partition deed was raised and decided in the former suit. It cannot, therefore, be re-opened now—*Manjunath Badrabhat* v. *Venkatesh Govind*(2); *Pahlwan Singh* v. *Risal Singh*(3).

JUDGMENT.

BIRDWOOD, J.—The Subordinate Judge admitted in evidence, as duly stamped the memorandum of partition which the plaintiff filed as part of the evidence in support of his claim to the property in suit. It would appear that the Subordinate Judge rightly admitted the document, as under the decision of this Court in regular appeal No. 5 of 1866, decided on the 28th April 1868, such a document would not come within the description of deeds given in s. 10 of Regulation XVIII of 1827, and therefore required no stamp at all. But whether that be so or not, it was not, we think, competent to the District Judge, on appeal, to question the admission of the document, and to hold that the

(1) 11 B. H.C. R. 129. (2) 6 B. 54. (3) 4 A. 55.

decision in the former suit between Gopal, through whom the plaintiff claims, and Govind, through whom the defendant claims, was conclusive between the parties as to the insufficiency of the stamp, it having been decided in that suit that the document was insufficiently stamped. The Judge says that in the present case no question arises as to the admissibility of the document, and that the only question is as to its validity. It having been found in the former case to have been insufficiently stamped under Reg. XVIII of 1827, and that decision being, in his opinion *res judicata*, the document is, he thinks, absolutely ineffectual, and must be put out of consideration. He relies on the decision of this Court in *Girdhar Nagjishet* v. *Ganpat Moroba*.(1) Certainly under s. 10 of the Regulation no document requiring a stamp thereunder was valid unless duly stamped, and under Act XXXVI of 1860, which repealed the Regulation and under subsequent Stamp Acts passed before Act I of 1879 became law, the provisions of s. 10 of the Regulation still continued to apply to instruments executed while the **[496]** Regulation was in force. But a change in the law seems to have been made by Act I of 1879, which by giving in s. 3, cl. 5, a wider meaning to the word "chargeable," as used in the Act, than had been given to it in any of the prior Acts, brought within the scope of s. 34 all instruments to which otherwise the provision in s. 10 of the Regulation of 1827, to which we have referred, would have been applicable. There can be no question that s. 34 of Act I of 1879 applies to all instruments whenever executed, and it must be held to override the special provision of s. 10 of the Regulation as regards the instrument now in dispute, if it be assumed for the moment that it is not sufficiently stamped. That instrument having been admitted by the Subordinate Judge as duly stamped under the Regulation, it ought to have been held under cl. 3 of s. 34 of Act I of 1879 to have been duly stamped when it came under the consideration of the appellate Court. If that Court considered it to be insufficiently stamped, it could only question the decision of the Subordinate Judge under s. 50 of the Act. For the purposes of the appeal, it was bound to deal with it as duly stamped, and that being so, no question of its validity under the Regulation could arise. We must, therefore, reverse the decision of the District Judge and direct that the appeal be heard on the merits. Costs to abide the result.

Decree reversed, and case remanded.

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13 B. 496.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BALANATHA, (*Original Plaintiff*), *Appellant v.* BHIVANATHA (*Original Defendant*), *Opponent.** [10th January, 1889.]

Civil Procedure Code (Act XIV of 1882) s. 629—Order on application to review—Appeal from decree as amended—Second appeal—Practice.

A second appeal lies against an order of a lower appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882) where the appeal to the lower appellate Court has been, not from the order allowing a review, but **[497]**

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* Second Appeal, No. 290 of 1887.

(1) 11 B.H.C.R. 129.