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s. 6 of the Act, that there was no impediment, under the above section, to the grant of the certificate; and there is no suggestion that the will was one to which the Hindu Wills Act applied. As to the validity of the will, *i.e.*, of "the right under which the petitioner claims," that is one of the averments in the petition (see s. 6 (*d*)) as to which the Court is to satisfy itself as provided by s. 7 (1); and the case of *Kalidas* v. *Bai Mahali* (1) shows that the Court cannot decline to do so; indeed, here the Court would appear to have already satisfied itself in appeal No. 41 of 1892.

We must, therefore, make the rule absolute and reverse the order of the Court below and restore that of the Subordinate Judge. Applicant to have his costs in the Court below.

Rule made absolute.

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18 B. 611.

[611] APPELLATE CIVIL.

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

GAVRISHANKAR PARABHURAM AND ANOTHER (*Original Defendants*), *Appellants* v. ATMARAM RAJARAM AND ANOTHER (*Original Plaintiffs*), *Respondents*.* [5th October, 1893.]

Hindu law—Partition—Property left undivided at the time of partition—Suit to recover share of the produce—Partition—Amendment of suit—Changing character of the suit.

The circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them, alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family.

A claim to a share of the produce of the property left undivided at a partition does not lie, because such a claim is based on the right to a particular share in the property itself which has no existence in the case of an undivided family.

A suit for a share of the produce or the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character.

[R., 23 B. 597 (601); 10 C.L.J. 503 (509)=3 Ind. Cas. 247; 14 C.W.N. 221 (224)=3 Ind. Cas. 9; 10 Ind. Cas. 967=4 S.L.R. 225; 15 M.C.C.R. 308 (309); 1 S.L.R. 133 (136); 2 S.L.R. 43.]

THIS was a second appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad.

The plaintiffs sued in 1889 the defendants to recover Rs. 122-4-0 as their half-share in the produce, for three years prior to the suit, of a certain filed which they alleged was left undivided at the time of partition which was effected between themselves and the defendants in the year 1876-77.

The defendants admitted that the field was left undivided at the time of partition, but alleged that two days after the partition the plaintiffs had sold their share in it to the defendants. They also pleaded limitation.

In the course of the suit the plaintiffs and their pleader admitted that there was other undivided property besides the field in dispute.

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* Second Appeal No. 329 of 1892.

(1) 16 B. 712.

The Subordinate Judge (Rao Saheb Vadilal T. Parekh) found that the plaintiffs had not sold their share in the field to the defendants, and awarded the claim to the extent of Rs. 59-2-4.

[612] The defendants appealed, contending (*inter alia*) that the suit for a share of the produce would not lie, and that the claim was time-barred. The Judge, however, confirmed the decree.

Defendants preferred a second appeal.

Govardhanram M. Tripathi, for the appellants (defendants).—The plaintiffs' case was that though the other family property was divided, the field in dispute was left joint. The burden of proof ought to have been thrown on them. When once a partition is effected, the presumption is that the whole property is divided.

It is admitted that there is other property still undivided besides that in dispute. That property ought to have been included in the present suit. There cannot be separate suits for partition of separate properties. The suit should be dismissed—*Trimbak Dixit* v. *Narayan Dixit* (1); *Parbati Churn Deb* v. *Ain-ud-deen* (2); *Haridas Sanyal* v. *Pran Nath Sanyal* (3); *Jogendra Nath* v. *Jugobundhu* (4); *Nanabhai* v. *Nathabhai* (5). The plaintiffs' remedy is to bring a suit for general partition. If they cannot sue for a share of a particular property, much less can they sue for a share of the produce of that property. Here they claim a share of the produce without asking for a partition of the property itself.

Manchabhai K. Choksi, for the respondents (plaintiffs).—There was a partition in the year 1876-77, and our share in the property which was divided and also in that which was left undivided was ascertained; and that being so, we are entitled to recover the produce of our share in the property in dispute. The cases relied on merely show that where there has been no partition, a suit for the recovery of a share in a particular property, or of the income of a particular property, will not lie. In order to constitute partition, it is not necessary to have actual division by metes and bounds. An agreement to divide is sufficient—*Anant Balacharya* v. *Damodhar Makund* (6). The property in dispute being left undivided at the time of the partition, an agreement to [613] divide it can be inferred, and then there can be no objection to award us our share in the produce. If our plaint is wrongly framed, it can be amended so as to convert the suit into one for partition—*Desai Chhagan* v. *Desai Parshotam* (7).

JUDGMENT.

SARGENT, C. J.—The plaintiffs' case is that the land in question was left undivided at the time of the partition of 1876-77, and they ask for three years' share of the produce of it in the hands of the defendants. The defendants by their written statement contended that the plaintiffs had sold their share to them, but both the Courts found the sale not proved. It was admitted, however, by the plaintiffs and their pleader that there was other undivided property besides that in suit, and the question is, whether under those circumstances, the present suit will lie.

The cases of *Trimbak Dixit* v. *Narayan Dixit* (1) and *Haridas* v. *Pran Nath* (3) apply. The circumstance that there had been a partition in 1876-77 would not, in the absence of any special agreement between the parties, alter their rights as to the property still undivided, as to which they would continue to stand to one another in the relation of members of

(1) 11 B.H.C.R. 69. (2) 7 C. 577. (3) 12 C. 566. (4) 14 C. 122.
(5) 7 B.H.C.R.A.C.J. 46. (6) 13 B. 25. (7) P. J. (1889), p. 166.

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an undivided Hindu family, and no such agreement amounting to a partition of the fields in question is alleged by the plaintiffs. As to the claim to share in the produce, that must be based on the right to a particular share in the property itself which has no existence in the case of such a family.

We are of opinion, therefore, that the suit cannot lie to recover a portion of the produce, as the suit was not for partition of the field, but only to obtain a portion of the produce received by the defendant from it. *Desai Chhagan* v. *Desai Parshotam* (1) does not apply. The present suit cannot be amended by making it a suit for partition without entirely changing its character. We must, therefore, reverse the decree of the Court below and dismiss the plaint with costs of this appeal on the plaintiffs. Parties to pay their own costs in both the Courts below.

Decree reversed.

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18 B. 614.

[614] APPELLATE CIVIL.

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

FATECHAND HARCHAND (*Original Plaintiff*), *Applicant v.* KISAN (*Original Defendant No.* 1), *Opponent.** [10th October, 1893.]

Limitation— Acknowledgment— Stamp— Unstamped balance of account— Evidence— Stamp Act I of 1879, *s.* 34.

Though an unstamped acknowledgment cannot be "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold.

[R., 19 M. 255; 11 C.L.J. 426=14 C.W.N. 703 (708)=6 Ind. Cas. 549; **Doubted,** 21 B. 201 (204).]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of A. Steward, District Judge of Khandesh.

The plaintiff sued the defendant to recover Rs. 226-7 principal and Rs. 59-9-0 interest, alleging that the defendant at different times purchased piece-goods from him; that an account of the transaction had been made, and that the first defendant had taken the account of his *khata* and struck the balance in his own handwriting.

The defendants admitted the acknowledgment or account alleged by the plaintiffs, but pleaded part-payment to the plaintiffs' gumasta (agent) of Rs. 115 and denied their liability to pay interest.

At the hearing a question arose as to whether the acknowledgment or account was admissible, being unstamped. See Stamp Act I of 1879, s. 34.

The Subordinate Judge (Rao Saheb K. S. Risvadkar) found that the part-payment alleged by the defendants was not proved; that out of the amount claimed, the plaintiff was entitled to recover only the amount of the principal, Rs. 226-7-0, and not interest, and that the claim was not

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* Application No. 62 of 1893 under extraordinary jurisdiction.

(1) P. J. (1889), p. 166.