1893 OCT. 5. APPELLATE CIVIL. 18 B. 611.

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.

---

18 B. 614.

[614] APPELLATE CIVIL.

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

FATEGHAND 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

---

* Application No. 62 of 1893 under extraordinary jurisdiction.

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

1893
OCT. 10.

APPELLATE CIVIL.

18 B. 614.

time-barred. He, therefore, allowed the claim to that extent. As to the document, the Judge said :—

"I do not think that the acknowledgment is intended to supply evidence of the debt in suit; for on an adjustment of [615] accounts between plaintiff and defendants, the latter simply thereby seem to acknowledge their liability in respect of the balance found due. I should think that the acknowledgment is only intended to renew the period of limitation, and hence I hold that it is not required to be stamped.

"The defendants' pleader further contends that the suit is improperly based on an acknowledgment. He argues that as an acknowledgment does not contain any promise, no suit can be based thereon. His argument is correct, but I cannot accede to his contention. I do not think from the recitals in the plaint, that this suit is based on the acknowledgment."

On appeal by defendant No. 1, the Judge reversed the decree and rejected the claim, holding that the acknowledgment was inadmissible in evidence for want of stamp, and that in the absence of the acknowledgment the claim was barred by limitation.

The suit being of the nature of a Small Cause Court suit, in which no second appeal is allowed, the plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon defendant No. 1 to show cause why the decree of the Judge should not be set aside, contending that the Judge was wrong in excluding the acknowledgment, because it was not stamped.

Ghanasham Nilkant Nadkarni, appeared for the applicant (plaintiff) in support of the rule.—The acknowledgment is admissible although not stamped. It is merely an acknowledgment of the liability and not of the amount of the debt. It, therefore, does not require a stamp. Further, the Judge ought to have gone into the question of part-payment. If part-payment be held to be proved, our claim would be in time independently of the acknowledgment.

Manchubhai N. Choksi, for the opponent (defendant), showed cause :—The acknowledgment being unstamped is inadmissible in evidence—*Chenbasapa* v. *Lakshman* (1); Act I of 1879, s. 34. No penalty could be paid, because the document requires only one anna stamp. Even supposing that the acknowledgment [616] is admissible to prove liability to pay, still the plaintiff must fail, because he has not proved the amount of the liability.

JUDGMENT.

SARGENT, C.J.—We agree with the Joint Subordinate Judge that this suit is not brought on the acknowledgment (Ex. 13), but is a suit for goods sold and delivered, the claim in respect of which was not disputed at the trial by the defendants except as regards interest which was not allowed. The case of *Chenbasapa* v. *Lakshman* (1), which was a suit on the *hundis* improperly stamped, does not, therefore, apply.

As regards the question of limitation, Ex. 13, although for want of a proper stamp it could not be "acted upon" as an acknowledgment of a particular sum being due, might, we think, without violating the intention of the Stamp Act, be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold.

(1) P. J. (1893), p. 224 ; 18 B. 369.

1893
OCT. 10.
APPELLATE CIVIL.
18 B. 614.

We must, therefore, in the exercise of our extraordinary jurisdiction reverse the decree of the Court below and restore that of the Joint Subordinate Judge. Applicant to have his costs here and in the Court below.

Decree reversed.

18 B. 616.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

CHUNILAL MANCHARAM (*Original Defendant*), *Appellant v.* MANISHANKAR ATMARAM (*Original Plaintiff*), *Respondent.**
[16th October, 1893].

Easements—Easements of necessity—Light and air—Severance of tenements by grantor—Implied grant—Implied reservation of easement—Derogation of grant—Reservation of easements of necessity—Injunction—Easement Act V of 1882, *s.* 13.

One Wallabh was the owner of a certain house behind which was a courtyard or *chok*, half, of which belonged to him and the other half to one Mancharam (the defendant's father), who owned a house close by. Two of the rear rooms of Wallabh's house abutted upon his portion of the *chok*, and had two doors opening out into the *chok*. In 1861, Wallabh sold (*inter alia*) his half of the *chok* to Mancharam. The conveyance contained no reservation of any rights over the [617] *chok*. Wallabh having died in 1875-76, his widow Jamna sold his house to the plaintiff, and shortly afterwards the defendant (Mancharam's son) put up a boarding on the *chok* which blocked up the above-mentioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The plaintiff sued for an injunction.

Held, that as Wallabh had made an absolute sale to Mancharam of his portion of the *chok*, expressly reciting that he had reserved no interest in the *chok*, it would in the circumstances of this case be contrary to equity and good conscience to hold that he impliedly reserved a right of light and air over the *chok*, so as to prevent B. from building on the *chok* and thus obstructing the windows and doors in Wallabh's house overlooking the *chok*.

Held, also, that the case was not governed by s. 13, cl. (c) of the Easements Act (V of 1882), which was not extended to the Bombay Presidency till Act VIII of 1891 was passed.

[R., 16 C.L.J. 417 = 17 Ind. Cas. 966.]

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, in appeal No. 38 of 1891 of the district file.

Certain land which originally belonged jointly to Wallabh and Brijkuver was in 1839 partitioned equally between them. On the half share allotted to Wallabh stood his house which he had built two years before, *viz.*, in 1837, and immediately behind the house was a *chok*, or a courtyard, half of which came to him on the partition and the other half went to Brijkuver.

Subsequently Brijkuver sold her half of the land, including her share of the *chok*, to Mancharam (the defendant's father).

In 1861 Wallabh sold (*inter alia*) to Mancharam his (*i.e.*, the remaining) half of the *chok*, so that Mancharam was now owner of the entire *chok*. Wallabh, however, still retained the rest of the land and his house which he got at the partition. Two rear rooms of his house abutted on the *chok* and had two doors opening into it. The conveyance of his half

* Second Appeal No. 81 of 1892.