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certain particulars the powers both of Additional and of Assistant Sessions Judges. It does so, for instance, in section 31 in the matter of the sentences which an Assistant Sessions Judge can impose. It does so in section 193 in the matter of the trial of cases. It does so in section 409 in the matter of power to hear appeals. An Additional Sessions Judge has power to hear appeals, an Assistant Sessions Judge has not. But the theory of the Code to my thinking is quite clear. The Additional Sessions Judge has those powers of the Court of Session which he is not by some specific provision of the Code prohibited from exercising. He is certainly not prohibited from exercising the power to hear an appeal or an application, whichever you call it, against an order of sanction, or refusal to grant sanction, made by a lower Court. It seems to me, therefore, that it is not made out that the Additional Sessions Judge acted without jurisdiction. There is no other reason of importance why his order should be interfered with.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

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January 20.

NILKANTH BHIMAJI SHINDE (ORIGINAL PLAINTIFF), APPELLANT *v.* HANMANT EKNATH SHINDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Registration Act (XVI of 1908), sections 17 and 49—Partition—Unregistered receipts acknowledging acceptance of shares—Receipts relied on to prove fact of partition—Admissibility of receipts.

The plaintiff claimed to be entitled to certain property alleging that the same was allotted to his share on a partition between himself and his brothers.

* Second Appeal No. 682 of 1918.

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NILKANTH BHIMAJI v. HANMANT KENATH.

For the purpose of proving the alleged partition the plaintiff relied upon unregistered receipts signed by his brothers in which they acknowledged having accepted certain portions of the family property :

Held, that the receipts required registration and were, therefore, inadmissible in evidence.

SECOND appeal against the decision of A. Montgomerie, Assistant Judge at Belgaum, varying the decree passed by A. K. Asundi, Subordinate Judge at Gokak.

Suit to recover possession.

The property in suit originally belonged to two brothers Bhimaji and Jiwaji who constituted a joint Hindu family. The family owned properties in British India and in Kolhapur State.

Bhimaji and Jiwaji were long separated in interest and to effect a partition of the family properties an arbitrator was appointed. He made an award partitioning the property in Kolhapur State, but there was no record to show whether a partition was made of the property in British India.

In 1915 the plaintiff as the son of Bhimaji sued to recover by actual partition one-half share of Bhimaji in suit property alleging that at a partition between himself and his other four brothers, the entire half share of Bhimaji in plaint lands was given to him; that his brothers signed receipts in 1900 in which they acknowledged having accepted certain portions of the family property; that the plaintiff was enjoying the profits of the plaint lands jointly with the descendants of Jiwaji till 1906 when the defendants obstructed the plaintiff's enjoyment of half the profits and hence the suit.

Defendants Nos. 1 to 7, who were plaintiff's nephews, contended that though the arbitrator made an award

about the property in Kolhapur State, no division was effected of the property in suit which was situated in British India and that the property was joint property of the sons of Bhimaji.

Defendants Nos. 8 and 9 who were descendants of Jiwaji had no objection to the plaintiff's claim being awarded.

The Subordinate Judge admitted in evidence the receipts signed by the plaintiff's brother on the ground that they did not amount to a partition deed, but were only lists made by arbitrators showing what division they proposed to make. Relying on these receipts he held that there was a partition in the family of the plaintiff and defendants Nos. 1 to 7 and therefore allowed the plaintiff's claim for one-half share in the plaint lands by actual partition.

On appeal, the District Judge found that the four receipts together constituted an instrument of partition and in so far as they related to the property in British India they required registration and therefore they were inadmissible in evidence. He, therefore, varied the decree by awarding the plaintiff only one-eighth share in the lands in suit.

The plaintiff appealed to the High Court.

Bhulabhai Desai with *Nilkanth Atmaram*, for the appellant.

S. R. Bakhale, for respondents Nos. 1, 2, 4 and 6.

D. R. Gupte, for respondents Nos. 7 and 8.

MACLEOD, C. J.:—The pedigree of the parties in this suit is set out at page 7. The property in suit originally belonged to two brothers, Bhimaji and Jiwaji who were separate, although this particular property had not been divided by metes and bounds.

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NILKANTH BHIMAJI v. HANMANT RAGHUNATH.

It is admitted that Jiwaji's branch has an eight annas share in the suit property. Nilkanth, one of the sons of Bhimaji, claims to be entitled to the other half against his brothers, alleging that at a partition between the sons of Bhimaji the half share in the plaint lands was given to his share. It appears that the family had property not only in British India, but also in Kolhapur. An arbitrator was appointed for partition of the family property. He issued an award partitioning the property in Kolhapur, but there is no record as to whether a partition was made of the property in British India. In 1900 the four brothers signed receipts in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property. The plaintiff in 1915 filed this suit against the children of his brothers to obtain his half share in the suit property. He also joined the sons of Jiwaji.

The trial Court declared that he was the owner of a half share in the plaint property. In appeal this decree was set aside on the ground that "these receipts constitute an instrument of partition and in so far as they relate to the property in British India, they required registration, and therefore not being registered, they are inadmissible in evidence."

We have been referred to the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*[1]. There, there had been a compromise which purported to extinguish the equity of redemption in certain property. That was not registered, but a decree was passed in the suit between the parties which recognized the compromise. For thirty years the compromise had been acted upon as was proved by the evidence, and I think their Lordships, in holding

[1] (1914) L. R. 42 I. A. 1.

that the right to redeem the mortgage was extinguished, arrived at their conclusion not on the deed of compromise which was unregistered, but on the evidence of what had occurred since the compromise was executed. Having found that the parties had acted under the terms of the compromise for thirty years, they considered that as evidence of what had been done, so that the terms of the compromise were proved not by the document itself but by the acts of the parties after it had been executed. Now if in this case it had been proved that the four brothers since 1900 had been in separate occupation of the various properties detailed in the four receipts up to the date of the suit, I think that might well be taken as evidence that there had been a partition in 1900 and the Court would have come to the conclusion that there had been a partition without referring to the receipts. But in this case the plaintiff seeks to prove the partition by the evidence of the receipts themselves, and except that there seems to be some evidence that the plaintiff had been in possession of the plaint property until 1903, there is no evidence in the case that in other respects these four brothers acted in conformity with the alleged partition.

I think, therefore, that the Assistant Judge was right in coming to the conclusion that these four documents required registration and were therefore inadmissible in evidence, and that the rest of the record was not sufficient to prove that a partition had taken place.

I think, therefore, the appeal must be dismissed with costs to respondents Nos. 1, 2, 4 and 6.

HEATON, J.:—I also think the appeal must be dismissed with costs.

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MUKANTH BHIMAJI v. HANMANT KENATH.

I make one preliminary remark. I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa's case* (*Mahomed Musa* v. *Aghore Kumar Ganguli*[1]) did not intend either to modify or to limit that part of the enactments of the Indian Legislature which appears as sections 17 and 49 of the Indian Registration Act; nor do I believe that the Privy Council ever have intended by their judgment to modify or limit that which has been enacted by the Legislature in India. So the effect of sections 17 and 49 of the Registration Act remains as totally unaffected as before, by anything that is said in the case of *Mahomed Musa*[1].

Now the four documents with which we are concerned may be looked at in two ways. They may be taken together and read together as one whole. In that case they constitute an instrument of partition and would be totally ineffectual, because they were not registered. In another way they may be looked at as four individual lists of property, each one signed by one of the four sharers, made after the partition had been effected and made merely to indicate as a matter of mutual convenience what share had fallen to each sharer. If that is the true nature of the documents, they might be of very great importance for the purpose of corroborating or contradicting what witnesses might depose to. They would be useful also as establishing the fact that it was probably understood at the time that particular lands had fallen to particular persons; but they would not in themselves prove a partition. That would have to be done by somebody who had personal knowledge of the partition. So that we are left in this position: If it is sought to prove the fact of the partition by these documents, that cannot be done,

(1) (1914) L. R. 42 I. A. 1.

because the law of registration prevents it. If it is sought to use them in any other way, they can only be used as subsidiary papers and are of no use whatever until there is evidence altogether outside them, that the partition was made and was given effect to in some such way as these papers suggest. But that is not proved in this case.

I think, therefore, as I began by saying, that the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Heaton, and Mr. Justice Kajiji.

VITHALDAS KAHANDAS SONI (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* JAMETRAM AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS[*].

1920. *January*, 21.

Pre-emption—Mahomedan law—District of Bulsar—Hanafi School of Mahomedan law—Neighbours entitled to pre-empt in equal rights—Exercise of right not contrary to the principles of justice, equity and good conscience.

In the District of Bulsar where the Hanafi School of Mahomedan law prevails, neighbours will have equal right to pre-empt and there is nothing which is contrary to the principles of justice, equity and good conscience in allowing two neighbours who have equal rights of pre-emption to exercise them.

Gokaldas v. *Partab*[1], not followed.

Amir Hasan v. *Rahim Bakhsh*[2], followed.

SECOND appeal against the decision of W. Baker, District Judge of Surat, reversing the decree passed by T. N. Desai, Additional Subordinate Judge at Bulsar.

[*] Second Appeal No. 509 of 1918.

(1) (1916) 18 Bom. L. R. 693.

(2) (1897) 19 All. 466.