1874.
Reg.
v.
Govind
Babli Rául.

[His Lordship then went on the consideration of the evidence against both prisoners, and Babaji was acquitted and discharged, while the conviction and sentence against Govind were confirmed.)

Order accordingly.

....

[APPELLATE CRIMINAL JURISDICTION,]

August 26.

REG v. ARJUN MEGHA AND MÁNÁ JEESÁ.

The Code of Criminal Procedure, Section 249—Appeal against exercise of discretion.

The purpose of section 249 of the Code of Criminal Procedure, as amended by section 20 of Act XI. of 1874, is to make depositions given before Magistrates in the preliminary inquiry evidence in the trial before the court of Session, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But the exercise of this discretion considering it as a matter of fact or law, is open to review by the Appellate Court.

THE appellants, with two other accused, were tried and convicted of murder by W. H. Newnham, Session Judge of Ahmedabad, and sentenced to death,

The appeal by two of the prisoners and the reference for confirmation of the sentences of death were heard by WEST and NÁNÁBHÁI HARIDÁS, JJ.

Shantaram Narayan for the appellants :-There are discrepancies in the depositions made by some of the witnesses for the prosecution before the committing Magistrate and the Session Judge. Section 249 of the Code, as modified by the amending Act of 1874, implies that the Session Judge must, in proper cases, exercise a discretion, and make the depositions given in the preliminary inquiry evidence in the trial. Where he fails to do this, we have a right to appeal to this Court to review his proceeding, and ask it to exercise the discretion itself, or order the Session Court to do so in a proper manner. It should appear on the Session Judge's proceedings how he exercises any discretion which the law vests in him.

1874.
Reg.
v.
Arjun Megha and Máná Jeesá.

Dhirajlal Mathuradas, Government Pleader, for the Crown: —The Session Judge is not bound to give reasons for omitting to make previous depositions evidence in the trial before him, though he should give reasons when he does admit those depositions on the trial.

WEST, J., in giving judgment, said:-We think that the purpose of Section 249 of the Criminal Procedure Code, as recently amended is to make depositions given before magistrates in the preliminary inquiry, evidence for the purposes of the trial in the Court of Sessions, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But we think that the exercise of this discretion, considering it is a matter of fact or of law, is open to review by this Court in appeal. When a case is under trial in a Court of Session, the Session Judge has the depositions given in the Magistrate's Court before him. If he finds that the statements of the witnesses in his own court differ materially from those proviously made by the same witnesses, it is his duty to examine them as to the discrepancies, and this is more especially his duty when the prisoners are undefended, and contradictory testimony is given for the prosecution. But if he thus examines the witnesses, he ought (see Tayler on Evidence, Sections 1300 1301, and Indian Evidence Act, Section 155,) in ordinary cases to make the depositions upon which he has examined them evidence in the case; he is at liberty to do so, and the power should be exercised so as to bring all relevent matter, so far as possible, under consideration in forming a judgment on the case. If the Session Judge has omitted to examine witnesses on obvious and important discrepancies in their statements, this Court will in general direct that such an examination be made, and the Session Judge having the witnesses before him for such a purpose, will, in most cases, feel it his duty to make the former depositions evidence *quantum valeant* for the purposes of the final adjudication in appeal. The alternative is for this Court in such, cases to order a new trial, on the grouud that there has been a misuse of the Session

Judge's discretion which may have caused a defeat of justice; but a new trial will not be ordered except in special cases.

[After going into the merits, the Court confirmed the convictions, and directed the prisoners to be transported for life.]

....

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 85 *of* 1874.

October 5.

LILA MORJI, deceased, by his son and heir RAVI.... } *Defendant and Appellant.*

VASUDEV MORESHVAR GANPULE........................ } *Plaintiff and Respondent.*

Hindu law—Joint family property—Mortgage—Onus probandi—Redemption—Cause of action.

Where joint family property is mortgaged by one parcener, in order that it may bind the other co parceners, the mortgagee must prove *affirmatively* that the mortgage was assented to by the other co- parceners, or was necessary for family purposes.

A mortgage deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of fifteen years from date. In a suit brought in 1867 to recover part of this property, the Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that Court passed its decision, the time fixed for redemption in the mortgage deed had already expired :

Held in special appeal in reversal of the decree of the lower court that in 1867, when the suit was brought, the right even to redeem the mortgeged property even as a whole had not accrued, and that, therefore, the action was premature.

THIS was a special appeal for the decision of E. Cordeaux, Assistant Judge at Ratnágiri, affirming the decree of the Subordinate Judge of Chiplun.

The case had originally come before the High Court in special appeal No. 185 of 1872, against the decision of H. J. Parsons, Assistant Judge at the same place.