

The plaintiff appealed to the Judge who, without going into the first question, affirmed the decision of the Court below by which the suit was dismissed, on the ground that the suit could not be entertained during the life-time of the father; that the suit should have been for partition and for a declaratory order; and that, after the death of the father, the alienation made by him could not affect the plaintiff's right.

1870
 AGHORI RAMA-
 SARG SING
 v.
 J. COCHRANE.

From this decision, the plaintiff has presented a special appeal to this Court.

The point taken is that the lower Appellate Court is wrong in holding that a suit in the present form will not lie, a son according to the Mitakshara being co-owner with his father.

We think it clear that the case must go back to the first Court, and be tried upon the merits.

According to the Mitakshara, a son in the life-time of his father has a right to sue to set aside alienations of the ancestral property made without his consent, and his cause of action arises from the date when possession is taken by the person in whose favor such alienation is made. See *Rajaram Tewary v. Latchman Persaud* (1), and the same case in the later stage (2), *Sadabart Prasad Sahu v. Foolbask Koer* (3).

The case must be remanded to the first Court.

Before Mr. Justice Bayley and Mr. Justice Markby.

MUSSAMAT JADU AND ANOTHER (PLAINTIFFS) v. SHEIKH HIFAZAT HOSSEIN AND OTHERS (DEFENDANTS). *

1870
 April 22.

Stamp, Insufficient—Plaint, Return of—Act VIII of 1859, s 30—Jurisdiction.

Held in special appeal that the lower Appellate Court was right in setting aside the proceedings of the Moonsiff, on the ground that the property in suit was valued at an amount beyond his jurisdiction; but the plaintiff was entitled to have the plaint returned to him that he might present it with the proper additional stamp before the proper Court.

This was a suit for possession of 2 pies 5 krants share of Kusba hewan, in Pergunna Tara, &c., laid at rupees 159-6-9, being ten times the Government revenue, and for mesne profits, the total valuation of the suit being rupees 230-6-9.

The defence set up was (*inter alia*) that the suit was under-valued.

The Moonsiff held that, as the suit was for a fractional share, it was sufficient to pay stamp duties according to ten times the amount of the Government revenue; and that the defendants' objection to the insufficiency of the stamp duties, on the ground that the value of the property was greater, was not tenable. On the merits, he passed a decree in favor of the plaintiffs.

* Special Appeal, No. 2801 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 28th August 1869, reversing a decree of the Moonsiff of that district, dated the 10th March 1869.

(1) Case No. 228 of 1865; June 7th, 1867. (2) 4 B. L. R., A. C., 118.

(3) 3 B. L. R., F. B., 91.

1870
 MUSSAMAT
 LADU
 v.
 SHEIKH HIFAZAT
 HOSSEIN.

On appeal, the Subordinate Judge held that, under Appendix (A), Act XXVI of 1867, suits respecting immoveable properties paying revenue to Government, valuation was to be made at ten times the jumma of the rent-roll, unless it was proved to the contrary; whereas, according to the plaintiffs' own allegation, it was evident that contrary was the case, inasmuch as the plaintiffs had stated in their petition that the approximate value of the property in suit is rupees 4,000; that when, from the statement of the plaintiffs themselves, it was evident that the value of the property far exceeded ten times its Government revenue, the suit ought to have been valued at the market value of the property in dispute; that if the suit had been properly valued, the Moonsiff would have had no jurisdiction. He accordingly dismissed the plaintiffs' suit.

The plaintiff appealed to the High Court.

Mr Gregory (Munshi Mahomed Yusuff with him) for appellants.

Baboo Taraknath Dutt for respondents.

The judgment of the High Court was delivered by

MARKBY, J.—We think that this special appeal should be dismissed with costs, because it has been found, although, no doubt, upon but slender evidence and upon an unguarded and unnecessary admission on the part of the plaintiffs' pleader, that the property in suit was valued at an amount beyond the jurisdiction of the Moonsiff; and therefore it is quite clear that, in entirely setting aside the proceedings of the Moonsiff, the lower Appellate Court was perfectly right.

But there is a question which is wholly independent and apart from this special appeal. The plaintiff, appellant, urges that he is entitled to the benefit of the stamp he filed for the plaint, and that the plaint ought to have been returned to him, in order to be presented with the proper additional stamp before the proper Court.

This seems to me to be a prayer which we ought to grant, and have power to grant, under the law, and which is contemplated by section 30 of Act VIII of 1859. I think that the true construction of that section is that, when it is discovered that there is an error in the plaint, the party should not lose the benefit of the stamp duty that he had already paid, but that he should have the plaint returned to him, in order that he may present it in the proper way. It is quite true that this ground is not taken in the petition of special appeal, but the question is, as has been before observed, apart from any consideration of the special appeal. The only doubt in this matter arises on a decision of Mr. Justice Seton-Karr and Mr. Justice Macpherson in *Shaikh Muzhur Ali v. Mussamat Baso* (1), but that is a mere expression of opinion apparently without argument.

In a case decided by Mr. Justice Bayley and Mr. Justice Hobhouse, *Nussurut Ali Chowdhry v. Mahomed Kanoo Sikdar* (1), where this point was argued, the learned Judges say that a Court of Appeal has power to make such an order; and if the lower Appellate Court has such a power, it is clear that this Court which has all the powers of the Court below, has also that power. On the authority, therefore, of the decision last cited, which is fully in support of the view that we now take, we are of opinion that this contention of the pleader for the special appellant is a proper contention; and that as soon as the error was discovered, the plaint ought to have been returned to him, whether that was discovered in the first Court or in appeal before the lower Appellate Court, or in this Court.

We dismiss the special appeal with costs, but direct that the plaint be returned to the plaintiff, in order that he may present it in proper form.

1870

MUSSAMAT
LADU
v.
SHEIKH HIFAZAT
HOSSEIN.

Before Mr. Justice Bayley and Mr. Justice Mitter.

SHEO GOBIND RAWUT (PLAINTIFF) v. ABHAI NARAYAN SING AND OTHERS
(DEFENDANTS).*

1870
April 26.

Valuation of Suit—Jurisdiction—Appellate Court.

When it appears, on appeal, that the suit has not been rightly valued, and, if rightly valued, the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below.

This suit was brought in the Moonsiff's Court of Sarun, for recovery of possession of a one anna eight gundas share of Mauza Futehpore, valued at rupees 105, being ten times the Government revenue payable for the said share. The plaint disclosed that the market value of the whole property was about rupees 31,100.

The defendants took no objection to the valuation.

The Moonsiff, after trying it on the merits, dismissed the suit.

On the appeal of the plaintiff, the Judge held that since, from the statement of the plaintiff himself, it is evident that the value of the property in dispute far exceeds ten times the Government revenue, the claim should have been valued at rupees 2,700, being the proportionate value of the share sought to be recovered. That as the plaintiff had not done so, the suit had been undervalued, and the Moonsiff had therefore no jurisdiction to try the suit. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo Kalikrishna Sen for the appellant.

Baboo Anukul Chandra Mookerjee for the respondent.

* Special Appeal, No. 2833 of 1869, from a decree of the Subordinate Judge of Sarun, dated 28th August 1869, affirming a decree of the Moonsiff of that district, dated the 31st March 1869.