making a second marriage; and though the plaintiff was alive, alienated and pledged the property now in suit; that under the Mitakshara law, the defendant, Aghori Ram Jhiram Sing, had no right so to alienate or pledge the property, without the plaintiff's consent there being no legal necessity for the alienation of the ancestral property and the profits and income of the mauza being quite sufficient to cover all the necessary expenses of the family. Hence, he says, the plaintiff having brought this regular suit prays that, by determination of possessory right, justice may be administered to him.

The first Court, without going into the merits, dismissed the suit on two grounds: first, that it is under-valued; and, secondly, that the plaintiff should have sued for a declaration of the plaintiff's future right.

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.

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 a later stage (2), *Sadabart Prasad Sahu* v. *Foolbask Koer* (3).

The case must be remanded to the first Court.

(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.

B. L. R. Vol. V, p. 17.

(Appendix.)

The 26th April 1870.

Before Mr. Justice Bayley and Mr. Justice Mitter.

SHEO GOBIND RAWUT *(Plaintiff)*,

versus

ABHAI NARAYAN SING and others *(Defendants)*.

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* 31*st March* 1869.

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 Mouza 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 under-valued, 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.

Mitter, J.—We see reason to interfere with the judgment of the Lower Appellate Court. It is admitted that the suit was under-valued, and it is also admitted that if the claim were properly valued, the suit could not have been instituted in the Court of the Moonsiff who tried it in the first instance. Under these circumstances, the Lower Appellate Court was right in reversing the decision of the Moonsiff, upon the ground that it was heard without jurisdiction.

It is contended that the objection as to valuation was not taken before the Court of first instance, but whether it was so taken or not, the jurisdiction of the Court by which the suit was heard, is admittedly affected, and the Lower Appellate Court was, therefore, justified in taking up the point even though it was not urged by the defendant before the Court of first instance.

We dismiss the special appeal with costs.

B. L. R. Vol. V, p. 21.

(*Appendix.*)

The 2nd June 1870.

Before Mr. Justice Norman.

In the Goods of SHAMLAL DAS.

Administration, Certificate of—Act XXVII of 1860, s. 6.

THIS was an application for Letters of Administration, or for a fresh Certificate of Administration in supersession of one which had originally been granted by the Judge of the 24 Pergunnas, under Section 6 (1) of Act XXVII of 1860.

Norman, J., ruled that, sitting on the original side of the Court, he could not grant the latter.

(1) *Act XXVII of* 1830, *s.* 6.—"The granting of such certificate may be suspended by an appeal to the Sudder Court, which Court may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it shall think fit. The Court may also, upon petition, after a certificate shall have been granted by the district Court, grant a fresh certificate in supersession of the certificate granted by the district Court."

B. L. R. Vol. V, p. 21.

(*Appendix.*)

The 7th May 1870.

Before Mr. Justice Norman.

SMITH *v.* BOGGS.

Act XXIII of 1861, s. 8—Act VIII of 1859, ss. 273, 280.

Section 8 of Act XXIII applies only to applications made under Section 273 of Act VIII of 1859, not to applications made under Section 280.

THE prisoner was brought up on a writ of *habeas corpus*, and applied for his discharge under Section 280, Act VIII of 1859.

Mr. Hyde for the plaintiff asked for a reasonable time for inquiry, and to enable the plaintiff to be prepared with the proof required by Section 281.

Mr. Ingram for the prisoner contended that, if time was granted, his client should be let out of prison on undertaking to appear at the expiration of the further time granted, as provided by Section 8 of Act XXIII of 1861.

Mr. Hyde contended that Section 8 referred to a different case from the present, *viz.*, to the circumstances described in Sections 273 and 274, for the latter of which it was substituted.

Mr. Ingram contended that Section 8 was extensive enough to include both procedure in applications under Section 273, and under Section 280.

Norman, J., was of opinion that Section 8 of Act XXIII of 1861 applied only to applications made under Section 273 of Act VIII, *viz.*, for discharge from arrest in execution of a decree; and not to applications under Section 280, where the applicant has been actually committed, and is brought up from the jail. A week's time was granted, and the prisoner remanded.

Attorney for the Plaintiff: *Mr. Dover.*

Attorneys for the Prisoner: *Messrs. Carruthers & Co.*
