

*Baboos Annada Prasad Banerjee and Mahini Mohan Roy* for Respondents.

*Norman, J.*—THE plaintiff sued to recover the sum of rupees 3,461, deposited with the defendants, with interest thereon.

A receipt was put in evidence by the plaintiff written on unstamped paper.

The first Court received the document holding that it fell within the exception in Clause 61, Schedule A, of Act X of 1862, as a receipt for money deposited at interest in the hands of a banker, and did not require a stamp.

On appeal, the Judge of Rajshahye reversed the decision of the first Court in favor of the plaintiff, on the ground that the document was in reality a bond, and required a stamp as such, and that the defendants were not bankers, and consequently that the document did not fall within the terms of exemption in Clause 61.

Baboo Anukul Chandra Mookerjee, for the plaintiff who appeals, contended before us, that even if the Judge was right in holding that a document required a stamp, yet under the provisions of the 350th section of Act VIII of 1859, the Lower Appellate Court ought not to have reversed the decision of the first Court on that objection; the error in the decision on a mere question of stamp not being one which affects the merits of the case, or the jurisdiction of the Court. He cited two cases, *Enlji Sing v. Syad Akram Ser* (1), *Mark Ridded Currie v. S. V. Mutu Ramen Chetty* (2), which are expressly in point.

We think that these cases govern that now before us, and therefore we reverse the decision of the Judge with costs, and remand the case to the Judge for trial on the other issues.

(1) 3 B. L. R., A. C., 235.  
(2) 3 B. L. R., A. C., 126.

*B. L. R. Vol. V, p. 14.*

(Appendix.)

The 20th April 1870.

*Before Mr. Justice Norman and Mr. Justice Mitter.*

AGHORI RAMASARG SING, *alias* DAU JHI (*Plaintiff*),

*versus*

J. COCHRANE and another (*Defendants*), (1).

*Special Appeal No. 2158 of 1869, from a decree of the Judge of Shahabad, dated the 17th July 1869, affirming the decree of the Subordinate Judge of that District, dated the 5th January 1869.*

**Mitakshara—Sale of Ancestral Property—Cause of Action.**

According to the Mitakshara, a son has a right during the life-time of his father to set aside alienations of ancestral property made without his consent. His cause of action arises from the date when possession is taken by the purchaser.

*Baboos Annada Prasad Banerjee and Rames Chandra Mitter* for Appellant.

*Baboo Mahes Chandra Chowdhry* for Respondent.

*Norman, J.*—THE plaintiff states that the plaintiff, Aghori Ramasarg Sing, sues for the establishment of his right of possession by determination of his title to 5 annas 4 pie of Mouza Bhutolia lands in Kadia and other properties, by cancelling certain deeds of conditional sale dated the 13th of September 1859, and a mortgage dated the 30th of August 1862, executed by the plaintiff's father, Aghori Ram Jhiram Sing, and for the recovery of future mesne profits; that the suit is brought on the ground that the monzas in question were acquired by the great-grand father and ancestors of the plaintiff; that Aghori Ram Jhiram Sing, who is made a defendant, had no right to alienate the ancestral property, without his (the plaintiff's) consent, and no right to pledge or sell the ancestral property without legal necessity; that the property was acquired by the plaintiff's great-grand father out of his own funds, and out of the income of ancestral property; that the defendant, Aghori Ram Jhiram Sing, squandered his money in unauthorized expenditure, and in

See *Rao Goraun v. Teza Goraun*, 4 B. L. R., App. 99 of 1 Suppl. Vol., p. 534.

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 Persand* (1), and the same case in a later stage (2), *Sadaburt 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 31st 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.