(1916) 01 AHC CK 0027

Allahabad High Court

Case No: None

Ram Lal		APPELLANT
	Vs	
Ram Harakh and Jagannath and Others		RESPONDENT

Date of Decision: Jan. 24, 1916

Citation: (1916) ILR (All) 217

Hon'ble Judges: Walsh, J; Piggott, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Piggott, J.

This is an appeal by one of the defendants in a suit for partition. According to the plaint, the parties owned property in the Sultanpur district and also a house in the city of Allahabad. There was a suit relating to the partition of the Sultanpur property which was settled by a compromise. The present suit was brought after the decree had been passed by the court at Sultanpur. One of the defences taken was that the present suit was barred by the provisions of Order II, Rule 2, of the Code of Civil Procedure, because the plaintiff had noglected to include this house in the property in respect of which he sued in the court at Sultanpur. The court of first instance accepted this pi ea and dismissed the present suit on this ground alone. The learned District Judge on appeal has held that the provisions of Order II, Rule 2, do not bar the present suit, and, having reversed the decision of the first court on this point, has remanded the case under Order XLI, Rule 23, of the CPC for decision on the merits. The appeal before us is against this order of remand. It is, undoubtedly, the general principle that the plaintiff in a suit for partition must include the whole of the joint family property whether in his possession, or in the possession of the defendant, or in the possession of the parties jointly. At the same time it is clear that the courts have felt considerable difficulties about applying strictly the provisions of Order II, Rule 2, of the CPC to different descriptions of suits for partition, I am

content to refer to the case of Mansa Ram Chakravarty v. Ganesh Chakravarty (1912) Ind Case 383, in which numerous authorities on the subject are discussed. I do not overlook the fact that the suit in that case was as between tenants-in-common, and not as between the members of a joint Hindu family, but the suit was one for partition, and many of the authorities discussed are cases in which the parties were members of a joint Hindu family. More particularly it is to be noticed that the case of Ukha v. Daga I.L.R (1882) Bom. 182, which is the principal authority in favour of the defendant appellant, has expressly been dissented from by the learned Judges of the Calcutta High Court. On the facts of the present case I am of opinion that the provisions of Order II, Rule 2 are not applicable. To begin with, it is open to question whether the Sultanpur court could have entertained the present suit. The plaintiff in the present case alleges that, the house in Allahabad is joint family property, still undivided and still in the possession of the parties. He sues strictly for partition, that is to say, in order to have his joint possession of an undivided and unascertained share converted into the separate possession of a specified portion of the house, limited by metes and bounds; he has accordingly stamped the plaint with a court foe of Rs. 10 only, as a suit for partition pure and simple. In the Sultanpur case he alleged his dispossession by the defendants and sued for recovery of possession, stamping his plaint with an ad valorem court fee. In the present case, moreover, the defendants have set up against the plaintiff a deed of gift which the plaintiff is seeking to set aside, and that deed of gift was registered in Allahabad. A suit for a mere declaration as to the invalidity of that deed of gift would certainly not have been maintainable before the court at Sultanpur. In Mayne''s Hindu Law at page 688, in paragraph 493, of the Eighth Edition, it is laid down in general terms that, if different portions of the property of a joint family lie in different jurisdictions, suits may be brought in the different courts to which the property is subject. Various authorities are quoted for this proposition, the oldest being that of Subba Raw v. Rama Rau (1867) Mad. H.C. Rep. 376. The more recent cases there referred to show that the principle was affirmed in cases where one of the two courts concerned would not have had jurisdiction to entertain the whole claim. It seems to me, however, in the present case, having regard to the form in which the two plaints were drafted, the Sultanpur court would not have jurisdiction to entertain the present suit. Apart from this, I am clearly of opinion that the present suit as brought is not based on the same cause of action as was the suit filed in the Sultanpur district. The cause of action for a suit is the sum total of the facts and circumstances which the plaintiff has to prove in order to entitle him to the relief claimed. In the present case his cause of action appears to be distinct from that alleged by him at Sultanpur. He says that he has never been dispossessed in respect of the house now in suit, and that may have been his reason for not including it in the specification of the joint family property appended to the plaint filed at Sultanpur. For these reasons I think the learned Judge was right and I would dismiss this appeal with costs.

Walsh, J.

2. I wish to add a few words. I agree with every thing my learned brother has said, except that I think that the word must with regard to what a plaintiff ought to include in a partition suit should, strictly speaking, be should, that is to say, the defendant can object if he chooses, but the plaintiff''s cause of action is complete in itself if he includes the matter within the jurisdiction of the court. This method, namely, by objection to be raised by the defendant, of getting over the difficulty was recognized by the learned Judges of the Calcutta High Court in their clear Judgment in the case of Mansa Ram Chakravarty v. Ganesh Chakravarty (1912) Ind Case 333, to which my learned brother has already referred, and which in my opinion, read with the decision in Subba Ran v. Rama Rau (1867) Mad. H.C. Rep. 376, is decisive of this question. I want to add only one word about Order II, Rule 2, of the Code of Civil Procedure, which was the really substantial point taken in the first court, accepted by the Munsif, overruled by the District Judge, and argued before us. I agree with the Judgment of the District Judge. I do not think that Order II, Rule 2, applies to a partition case at all. I think that "omits to sue" involves intention. It is ejusdem generis with intentional relinquishment. Clause (2) must be read with Clause (1). Clause (1) enables a plaintiff to relinquish. Clause (2) points out the two ways in which he may relinquish. He may omit, or he may expressly abandon. It is a pity that the expression "intentionally omit" does not appear in the Rule; but I think that is its meaning. I am fortified in this opinion by two things. I should have hesitated to express it if I had not found confirmation of it in the Bombay case, where they treated the omission as intentional. Moreover, a decision of the Privy Council has negatived the argument on behalf of the appellant, namely, that the omission to sue may be an accidental omission or in the language used by the learned vakil for the appellant "an after thought." The Privy Council has expressed the opinion that a right which a litigant possesses without knowing it does not come within the Rule cited because it is not "a portion of his claim" and adopting that view it follows that if a plaintiff has accidentally omitted in a partition suit to include undivided property of which he had no knowledge he is not barred. I agree with my learned brother''s order dismissing the appeal with costs.

3. The appeal is dismissed with costs.