given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed. We have no reason for holding under the circumstances of the present case that the bequest was merely colourable and that the intention of the testator was in reality to confer an absolute interest free from any trust upon his nephews. Some point has been made in the court below upon the dealings with the property by the two nephews. In our opinion such dealings can in no way affect the question which we have to decide, namely, as to whether the nephews took the house as a trust or for their own benefit. The facts of the present case closely resemble the facts in the case of *Benode Behari Maulik* v. *Sita Ram Naik Daji Kalia* (1) and in the case of *Debnarain Bose* v. *Sreemutty Comulmonee Dossee* (2). We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAM HARAKH (DEFENDANT) v. RAM LAL (PLAINTIFF) AND JAGANNATH AND OTHERS (DEFENDANTS).*

1916 *January*, 24.

Civil Procedure Code (1908), *order II, rule 2—Partition—Separate suits for property in different districts—Cause of action.*

The plaintiff as a member of a joint Hindu family brought a suit for partition of certain property in the district of Sultanpur. He admitted that he was not in possession of this property, and paid an *ad valorem* court fee on his plaint. This suit was settled by a compromise.

Subsequently the plaintiff brought a separate suit in Allahabad for partition of some of the joint family property situated in that district; but in this suit he alleged that he was in joint and undivided possession and paid a court fee of Rs. 10 as on an ordinary partition suit.

Held that the omission of the Allahabad property from his suit in Sultanpur was not a bar to the plaintiff's second suit and that the case did not fall within order II, rule 2, of the Code of Civil Procedure. *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (3), *Ukha* v. *Daga* (4) and *Subba Rau* v. *Rama Rau* (5) referred to.

THE facts of this case were as follows :—

The plaintiff, a member of a joint Hindu family, instituted a suit in Sultanpur, for partition and recovery of possession of his share of the joint family property, situate in the Sultanpur district.

* First Appeal No. 154 of 1915 from an order of S. R. Daniels, District Judge of Allahabad, dated the 16th of September, 1915.

(1) (1909) 6 A. L. J., 444. (3) (1912) 16 Indian Cases, 383.

(2) (1873) 20 W. R., C. R., 39. (4) (1882) I. L. R., 7 Bom., 182.

(5) (1867) 3 Mad. H. C., Rep., p. 376.

1916

RAM HARAKH v. RAM LAL.

He alleged that he had been dispossessed by the defendants, and paid an *ad valorem* court fee on his claim. No mention was made in that suit of certain other joint property, consisting of two houses, situate in the Allahabad district. The suit was compromised and a decree for partition was passed. Shortly afterwards, the plaintiff brought a suit in the Allahabad court for partition and separate possession of his share of the houses aforesaid. In this suit the plaintiff alleged that he was in joint possession of the houses, and paid a court fee of Rs. 10. It was stated in the plaint that the first defendant was alleging that the plaintiff's father had made a gift of the houses to him. The plaintiff denied the existence and validity of the alleged gift, but asked for no relief in respect of it. The defence, *inter alia*, was that the present suit was barred by order II, rule 2, of the Code of Civil Procedure, inasmuch as the plaintiff had omitted to include the Allahabad property in his former suit. The court of first instance gave effect to this plea and dismissed the suit. The lower appellate court reversed the decision and remanded the suit for trial on the merits. One of the defendants appealed to the High Court.

Munshi *Nawal Kishore*, for the appellant :—

The present suit is barred by the provisions of order II, rule 2, (2), of the Code of Civil Procedure. In the former suit the plaintiff should have included the whole of his claim in respect of the joint family property, but he omitted to include the property now in suit. The cause of action for both suits was one and the same. When a member of a joint Hindu family seeks to have the joint family property partitioned and his share thereof put in his separate possession, his cause of action is and remains the same whether the whole of the family property is in his joint possession or a part of it is in the exclusive possession of another co-parcener. It is a well-established principle that a suit for partition of joint Hindu family property must embrace all the joint property. There is not a separate cause of action for each item of property, so that a member of a joint Hindu family cannot institute from time to time a hundred different suits in respect of a hundred items of property; *Ukha* v. *Daga* (1), *Sooruj Pershad Tewary* v. *Saheb Lal Tewary* (2).

(1) (1882) I. L. R., 7 Bom., 182. (2) (1865) 3 W. R., C. R., 25.

The rulings relied on by the lower appellate court are distinguishable. In the case in I. L. R., 28 All., 627, the first suit for partition was dismissed for default : in I. L. R., 31 All., 3, all the co-parceners excepting the plaintiff had agreed, in the first suit, to remain joint, and it was held that there was nothing to prevent them from suing subsequently for partition *inter se*. In the present suit the plaintiff in his deposition says that he is not in possession, so the circumstances of both suits were the same.

Munshi *Kanhaiya Lal*, for the respondents :—

The cause of action was not the same for the two suits. From the allegations in the two plaints it is apparent that there was one important ingredient in the cause of action of the former suit which was not present in the latter. In the former suit the plaintiff alleged that he had been dispossessed by the defendants from the property then in suit ; the suit was in substance one for recovery of possession, and the plaint was accordingly stamped with an *ad valorem* court fee. In the present suit there was no complaint of ouster of possession ; it was a suit for conversion of joint into separate possession and was therefore filed with a court fee of Rs. 10. Moreover, the present suit sought to set aside a gift set up by the defendants. The cause of action for partition of joint property is a recurrent one and a second suit for partition of joint property which was not partitioned in the first suit will lie ; *Bisheshar Das* v. *Ram Prasad* (1), *Chandar Shekhar* v. *Kundan Lal* (2), *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (3). The property sought to be partitioned in the present suit was not within the jurisdiction of the Sultanpur court ; for this reason, also, the suit is maintainable ; Mayne's Hindu Law, (eighth Edition), pp. 688, 690 ; and the cases cited in the foot-notes. The omission penalized in order II, rule 2, is a deliberate, and not an inadvertent omission. There is nothing to show that it was the former in the present case.

Munshi *Nawal Kishore*, in reply :—

If the omission had been inadvertent the plaintiff would have said so in the present plaint. The word " omits " in order II, rule 2, is not qualified by " intentionally." There was nothing to

(1) (1906) I. L. R., 28 All., 627. (2) (1908) I. L. R., 31 All., 3.

(3) (1912) 16 Indian Cases, 393.

1916

RAM HARAKH v. RAM LAL.

prevent the plaintiff from including the Allahabad property in the former suit. The Sultanpur court could have dealt with it and could have been given the relief asked for in the present suit. It was the duty of the plaintiff to have asked for it then. No relief is specifically sought for in the present suit in respect of the deed of gift.

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 neglected 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 plea 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 Code of Civil Procedure 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 Code of Civil Procedure to different descriptions of suits for partition. I am content to refer to the case of *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (1), 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.

(1) (1912) 16 Indian Cases, 383.

More particularly it is to be noticed that the case of *Ukha* v. *Daga* (1), 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 fee 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 Rau* v. *Rama Rau* (2). 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

(1) (1882) I. L. R., 7 Bom., 182. (2) (1867) Mad., H. C., Rep., p. 376.

1916

RAM HARAKH v. RAM LAL.

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.—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 judgement in the case of *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (1), to which my learned brother has already referred, and which in my opinion, read with the decision in *Subba Rau* v. *Rama Rau* (2), 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 judgement 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

(1) (1912) 16 Indian Cases, 333. (2) (1867) 3 Mad. H. C. Rep., p. 376.

1915

RAM HARAKH v. RAM LAL.

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.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1916

January, 31.

GANGA SINGH (DEFENDANT) v. RAM SARUP AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 164—*Suit against lambardar for profits—Sir and khudkasht land held by co-sharers to be taken into account.*

Held that in a suit for profits brought by a co-sharer against a lambardar under section 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have taken into account the profits of sir and khudkasht land held by the other co-sharers in the village. *Bishambhar Nath* v. *Bhullo* (1) discussed. *Gulzari Mal* v. *Jai Ram* (2) referred to.

THIS was a suit by certain co-sharers in a village for profits of their shares against the lambardar of the village. The court of first instance decreed the claim in part. The plaintiffs appealed, and the additional District Judge remanded the case for a fresh account to be made up between the parties, including the profits of the *sir* and *khudkasht* lands held by other co-sharers in the village, which had previously not been taken into consideration. In the result the court of first instance (Assistant Collector) passed a decree in favour of the plaintiffs for about half the amount claimed by them. The plaintiffs again appealed and

* Second Appeal No. 1379 of 1914, from a decree of Banke Behari Lal, Additional Judge of Cawnpore, dated the 31st of July, 1914, modifying a decree of Kewal Krishna, Assistant Collector, first class, of Cawnpore, dated the 8th of May, 1913.

(1) (1911) I. L. R., 34 All., 98. (2) (1914) I. L. R., 36 All., 441.