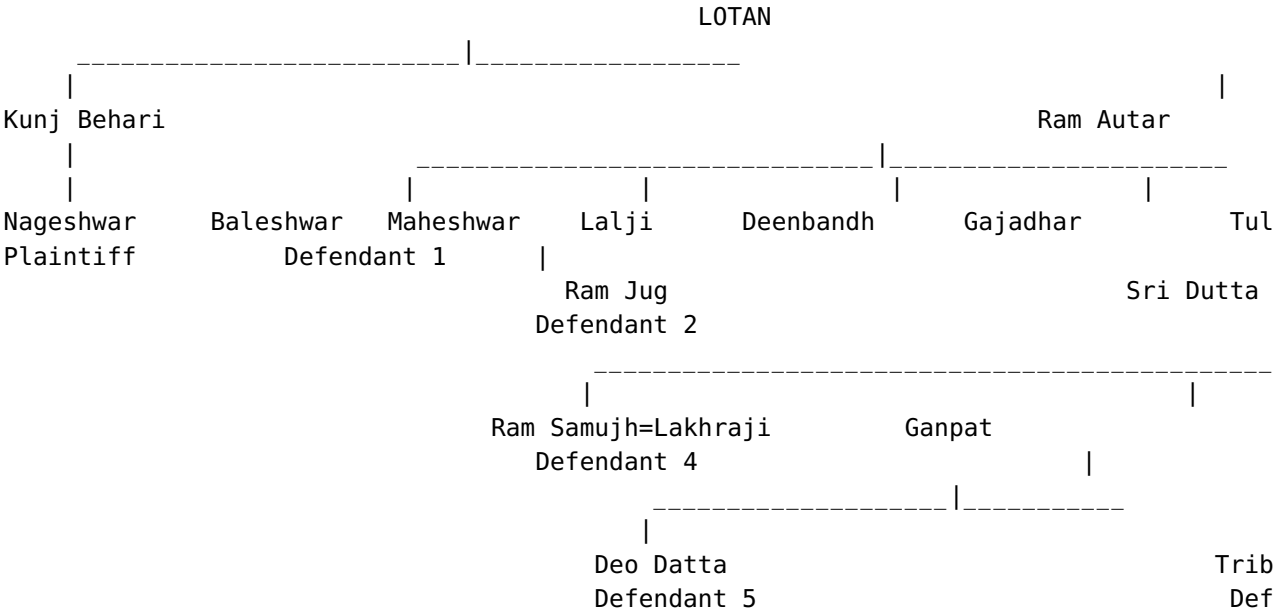
Nageshar Tewari vs Dwarka Prasad And Ors. on 18 December, 1952

Equivalent citations: AIR1953ALL541, AIR 1953 ALLAHABAD 541

JUDGMENT

Malik, C.J.

1. This is a plaintiff's suit (appeal?) against a decision of the lower Court dismissing the plaintiff's suit for partition of four plots in which the plaintiff claimed that he had under-proprietary rights. The plots in dispute are Nos.725, 730, 739 and 856. A small pedigree will help in understanding the facts of the case.



2. The family was joint and in the year 1913 Kunj Behari filed a suit No. 16 of 1913 against the sons & grandsons of Ram Autar, Ram Autar having died, for a partition. The plaintiff alleged that he formed a joint Hindu family with the defendants and the properties in suit were joint family properties. The suit was decreed on 28-4-1913, and the plaintiff was given a decree for partition of a one-half share

in the properties specified in the first list. It may be mentioned that the contesting defendants had denied that the family was joint and had pleaded that Ram Autar had separated and that they were in adverse possession of the properties in the first list.

3. Plot No. 856 was included in the first list and the plaintiff was given a decree for a half share in the said properties. The other items in that list were partitioned but somehow this plot was left out with the result that in the final decree for partition plot No. 856 was not mentioned at all and it was not divided. The plaintiff never got the decree amended nor did he ever get possession of the plot. On the question of possession, learned Munsif held as follows:

> "The plaintiff has utterly failed to prove possession within limitation."

Both the Courts, however, by reason of the fact that the plaintiff was a co-sharer, expressed the opinion that the defendants had to prove ouster and, in the absence of proof of ouster, adverse possession was not established even though they may have remained in possession of the plot for a long time. The plaintiff's claim with respect to this plot was, however, dismissed by reason of the provisions of Section 47, Civil P. C.

4. Learned counsel has urged that the plaintiff had a recurring cause of action for partition and that the mere fact that his client had not taken advantage of the previous partition decree did not debar him from filing a fresh suit for partition.

If the plaintiff's title to the property had been recognised and he had been in actual possession of the plot he might have had a recurring cause of action, but his suit for partition in 1913 was based on title and he got a decree. On the same cause of action and on the basis of the same title he cannot now bring a separate suit. I am not inclined to agree with the lower Courts that in the circumstances of the case set out by them in their judgments the defendants could not be deemed to have prescribed a title as against the plaintiff by lapse of time. Even in the suit of 1913 the defendants had claimed that they were in adverse possession of the property. Their plea no doubt failed and the suit was decreed, but even after the decree they remained in possession and they have been in possession from 1913 right upto the date when the suit was filed in 1945. In my view the plaintiff had no right to bring a second suit and his claim in respect of this plot was rightly dismissed.

5. As regards plot No. 739, the plaintiff claimed that this was joint family property as it had been purchased by Ram Autar on behalf of the joint family under a sale deed Ex. A1, dated 6-1-1883. The lower Courts have recorded a finding that this plot is not included in the sale deed and that the plaintiff had failed to prove that it was joint family property. This is a finding of fact. The plaintiff's claim with respect to this plot must, therefore, also fail.

6. As regards the two plots Nos. 725 and 730, the plaintiff's suit had been dismissed by reason of the provisions of Order 2, Rule 2, Civil P. C. Learned counsel has urged that the plaintiff was entitled to a partial partition and that the mere fact that he had left out some properties in the previous claim his right to a share therein and a right to bring a second suit for partition was not barred. His further contention is that Order 2, Rule 2, Civil P. C., only applies to a case of deliberate omission & not to a

case of an accidental mistake. Reliance is placed on a decision of the Calcutta High Court in -- 'Mansaram Chakravarti v. Ganesh Chakra-varti', 16 Ind Cas 383 (Cal)(A). In that case a suit for partition of properties was filed on behalf of the plaintiff and the suit was decreed. Certain plots were not included in the previous suit for partition and in respect of those plots a second suit was filed. The question formulated by the learned Judges, Sir Ashutosh Mookerjee and Mr. J. Beachcroft, was as follows:

> "The question, therefore, arises, whether one of the two tenants-in-common, who has sued for partition of a part of the properties jointly held by them, is at liberty to bring a suit for partition of the remainder of the properties."

It may be open to tenants-in-common to have each item of property partitioned at their choice. The point has not arisen in this case and I need not therefore express any opinion.

7. Learned counsel has, however, relied on certain observations in the body of the judgment to the effect that when a plaintiff sues for partition of a part of the joint property it is open to the defendant to take exception to the scope of the suit and to insist upon the inclusion of all properties jointly owned by the parties, and that if he -fails to take exception to the scope of the suit, the inference is legitimate that the properties not included are by consent of parties left joint. With great respect to the learned Judges I am not inclined to agree with the view expressed by them. It may as well be assumed that the plaintiff 'having omitted to include a certain item of property in his claim he was not claiming that that property was joint family property and as the defendants were also of the same view that it was not joint family property they did not raise the plea that the suit was a suit for partial partition and must fail.

In case of a tenant-in-common it may not be possible to say that the cause of action for partition of every item of the property arises at the same time but in a suit where a member of a joint Hindu family to break up the joint status wants the joint family property to be divided the cause of action for partition is one and the same and he must, therefore, include every item of the property in his claim. No case has been cited at the Bar but some assistance may be drawn from a decision of this Court in -- 'Darbari Lal v. Gobind Saran', AIR 1924 All 902 (B), where it was held that on the death of a Hindu widow if a reversioner challenges the alienation made by her & claims possession of the property transferred by her the cause of action is the death of the widow and only one suit is maintainable for recovery of the entire property, though the widow might have transferred them under various documents. To the same effect is the decision of the Bombay High Court in -- 'Anant Subrao v. Mahableshwar Bhat Gurunath Bhat', AIR 1931 Bom 114 at P. 116 (C). A claim for partition in this suit arose by reason of Ram Autar's desire to break up the joint status and to get his half share in the property. It cannot be said that in such a suit there was a separate cause of action for each item of joint family property.

8. Coming to the next question whether a suit would be barred under Order 2, Rule 2, Civil P. C., if the plaintiff had made accidental omission. A large number of cases have been cited on the point. It is not necessary to discuss them all. In the case before me the plaintiff had not pleaded that he did not know that the plots that he was now claiming were joint family property. His case was that by

accident these plots were left out in Kunj Behari's suit in the year 1913. The language of Order 2, Rule 2, is as follows :

> "Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of this claim, he shall not afterwards sue in respect.
>
> of the portion so omitted or relinquished."

There is some divergence of opinion on the point whether the sub-rule would apply to a case where a plaintiff had no knowledge of the facts. It has been held in some cases that where the plaintiff did not know the facts and was, therefore, not in a position to put forward the claim it could not be said that he had omitted to sue in respect of any portion of his claim. Learned counsel has cited in support of his contention the case of --'Venkata Chandikamba v. Veswanadhamayya', AIR 1936 Mad 699 (D), and several other cases of other High Courts.

The point is also covered by a Division Bench ruling of this Court in -- 'Batul Kunwar v. Munni Lal', 32 All 625 (E). In that case Stanley, C. J., and Griffin J., held that if the plaintiff was not aware of his rights at the time when he filed the previous suit it could not be said that he had made an omission with regard to a portion of his claim. It is not necessary in this case to express any opinion on the point as this is not a case where the plaintiff has alleged that he was not aware of his legal rights. The allegation in the plaint was that he by accident (sahwan) left out from his previous suit the four plots now claimed by him. That point is covered by a decision of this Court in -- 'Ganga Narain v. Misir Ramesh Chand', 1944 Oudh W. N. 23 (P), and I agree with respect with the opinion expressed in that case. Reliance was placed on a decision of their Lordships of the Judicial Committee in -- 'Moonshee Buzloor Ruheem v. Shumsheroonnissa Begum', 11 Moo Ind App 551 (P. C.) (G), where their Lordships had said:

> "If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been reason for enacting it. The words of the law, are, "If a plaintiff relinquish or omit to sue for any portion of his claims". It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment."

These observations as well as the decision mentioned above fully cover the point raised and the 'plaintiff must, therefore, be deemed to be debarred under Order 2, Rule 2, Civil P. C., as he must be deemed to have knowledge of his rights and had by mistake omitted to claim any relief with regard to these plots.

9. The result, therefore, is that this appeal must fail and is dismissed with costs.