

(1942) 02 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 107 of 1940

Ganesh Ramchandra Thakur

APPELLANT

Vs

Gopal Lakshman Thakur

RESPONDENT

Date of Decision : 27-02-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Limitation Act, 1908 — Article 11

Citation : AIR 1943 Bom 12 : (1942) 44 BOMLR 819

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Macklin, J.—These three appeals arise out of two suits brought by one Ganesh Ramchandra and a third suit brought by the family of Laxman, who was Ramchandra's brother. Each suit was for a declaration of the right of the plaintiff to a half share in certain property alleged to belong to the family of which Ramchandra and Laxman were the two eldest members; and for a proper understanding of them it is necessary to set out the facts at some length.

2. Ramchandra and Laxman went to Bombay from the Ratnagiri district more than fifty years ago and worked at the Mint; and though Laxman appears to have been the more able of the two and to have earned more money and had a better head for business, they both managed to save a certain amount of money, and they kept three joint accounts with three different banks in Bombay. Laxman, as the better business man of the two, was given a power-of-attorney by Ramchandra; and it seems that the practice of the brothers was that when any transactions affecting both of them were entered into (and there were admittedly a number of such transactions,) the person who managed the transaction was Laxman but the transaction was conducted in the name of Ramchandra, because he was the elder of the two. In 1910 Laxman retired and Ramchandra also retired at about the same time. In 1914 a mortgage transaction was entered

upon which is of importance in the present litigation. One Joshi borrowed Rs. 2,500 on the security of his land at Rahadgar. The money was actually paid by the hand of Laxman on behalf of the mortgagee, who is named as Ramchandra; and although in the subsequent litigation Ramchandra at one time claimed the entire mortgage as his, his son now says that he had no more than a share in it. In 1916 disputes arose between the brothers, and the power-of-attorney was cancelled. At some time in the same year a separation in interest admittedly occurred, though for some time longer the joint accounts continued. Towards the end of the year and after the separation had occurred Joshi borrowed Rs. 4,000 on the mortgage of his land at Shirgaon ; and this mortgage is in the name of Laxman alone. Between 1916 and 1918 Laxman advanced various sums to Joshi, and for a settlement of the amounts due between them the matter was referred to arbitration. . Without consulting Ramchandra they included in the matters referred to arbitration the mortgage for Rs. 2,500, and a decree was passed in favour of Laxman against Joshi for an amount of Rs. 9,529 as due upon the mortgage for Rs. 2,500, the mortgage for Rs. 4,000, and the other loans advanced by Laxman. Under this award both the Rahadgar and the Shirgaon properties were charged. In 1920 Ramchandra died. In March, 1922, Laxman filed a suit against Ganesh, son of Ramchandra, for partition of all land in the possession of Ganesh Ramchandra, and in that suit the mortgaged property was not included. Ganesh was not in possession of the mortgaged property, and he asked that all the property, both moveable and immovable, including the property mortgaged for Rs. 2,500 and the award decree, should be dealt with in the suit. To this Laxman replied that the Shirgaon properties covered by the mortgage of Rs. 4,000 were his exclusively. In April, 1924, this suit was withdrawn with liberty to bring a fresh suit, because Laxman said that he was ill and was unable to continue giving evidence. Shortly after this Laxman filed a darkhast to recover a sum of Rs. 12,580 due under the award decree by sale of Joshi's property. The matter went to the Collector as Joshi was an agriculturist, and on hearing of it Ganesh Ramchandra put in an application to the Mamlatdar asking for the sale of the property to be made subject to his father's mortgage of Rs. 2,500. It is to be noted that he did not ask for it to be subject to any share that he might have in the mortgage of Rs. 4,000. This application was dismissed by the Mamlatdar in June, 1925. Two months later Ganesh Ramchandra filed a suit for a declaration of his sole rights in the mortgage of Rs. 2,500. But in 1926, while this suit was pending. Laxman came to an arrangement with Joshi under which the Shirgaon property that had been mortgaged for Rs. 4,000 was sold to Laxman for Rs. 12,000, and the Rahadgar property which was subject to the mortgage of Rs. 2,500 was released. Thereupon Ganesh Ramchandra withdrew his suit with liberty to bring a fresh suit. Acting under the liberty given to him to bring a fresh suit, he brought suit No. 154 of 1934" for a declaration that he was entitled to a half share in the Shirgaon property subject to the mortgage of Rs. 4,000, and for partition or in the alternative joint possession of that property. On the same day he filed another suit (No. 155 of 1934) for a share in a house and some land which had been bought by Laxman on his retirement in 1910. In both

these suits an objection was taken on the ground that all the property available for partition was not included in the suit, and in the case of suit No. 155 a further objection was taken that it was barred by Order II, Rule 2, of the Civil Procedure Code, 1908, by reason of the fact that suit No. 154 might have included the property which was the subject of suit No. 155 but had not included it. Suit No. 154 was dismissed on the ground that partial partition was inadmissible. Suit No. 155 was dismissed for the same reason and for the further reason that it was barred by Order II, Rule 2. The decree in suit No. 154 was taken in appeal to the High Court and suit No. 155, which was a second class suit though tried in fact by the First Class Subordinate Judge, went in appeal to the District Court. The High Court held that although suit No. 154 might not be able to result in a decree for partial partition, nevertheless the claim in the alternative was for joint possession, and it was held that the plaintiff was entitled to joint possession if the property belonged to the family, and in any event the plaintiff was entitled to a declaration of his share in the property, if it belonged to the joint family and it was not possible to give the plaintiff joint possession. It may be mentioned that neither the plaint nor the written statement of this suit referred to any separation of interest between the brothers in 1916, and it does not seem that the fact of the separation in 1916 was brought to the notice of the High Court. Suit No. 154 was then referred back to the trial Court for a decision on the merits.

3. In 1938 the family of Laxman, who was then dead, brought suit No. 172 of 1938 for a declaration of their half share in all the family property and for partition of their share. This suit was heard along with suit No. 154 which had been remanded for a fresh trial on the merits by the High Court. The result of suit No. 154 was that the suit was dismissed, partly on the ground that the plaintiff Ganesh Ramchandra had not proved that he had . any interest in the mortgage for Rs, 4,000, and partly on the ground that by reason of Article 11 of the Indian Limitation Act, 1908, his suit was barred, it not having been filed within one year of the Mamlatdar's order refusing to sell Joshi's property subject to the mortgage of Rs. 2,500. The decision in that suit has given rise to Letters Patent Appeal No. 8 of 1940. The cross-suit No. 172 of 1938 included four groups of properties. As to groups C and D the suit was dismissed. As to groups A and B, which comprised the family property at Mhapan and also other property at Mhapan, some of which was held along with stranger co-sharers, the suit was allowed, and Laxman's family was recognised as having a half share in it in spite of a plea by Ganesh Ramchandra that the claim was barred by his adverse possession. The decision in this suit has given rise to First Appeal No. 107 of 1940. After the remand of suit No. 154 by the High Court, suit No. 155 was heard in appeal by the District Judge. The High Court had already decided in the other suit that the fact of the suit being for only partial partition was no ground for dismissing it, and the same reasoning applied to suit No. 155 also in that respect. The learned Judge therefore did not touch the question of partition but considered the question of Order II, Rule 2. and decided against Ganesh Ramchandra on that ground without going further into the merits of the case. In

consequence of that decision Second Appeal No. 585 of 1939 has been filed.

4. I take first Letters Patent Appeal No. 8 of 1940, arising out of suit No. 154 for possession of the land bought in execution of the award decree. The trial Court has considered the question from two points of view--limitation, and the right of the plaintiff to a share in the mortgage of Rs. 4,000. As to the point of limitation, the learned Judge holds that by Article 11 the suit ought to have been brought within one year of the dismissal of Ganesh Ramchandra's application to the Mamlatdar to have the sale of Joshi's property made subject to the mortgage of Rs. 2,500. He has apparently created that application as the kind of application referred to in Order XXI, Rule 63, the dismissal of which would make it necessary for the applicant to institute a suit within one year from the date of the dismissal if he wished his right to be recognised. But Article 11 prescribes a period of one year from the date of an "order under the CPC on a claim preferred to property attached in execution of a decree," and it is by no means clear that the Mamlatdar's order upon Ganesh Ramchandra's application was an order under the Code of Civil Procedure. The order says:--

The statement deposed to in writing by the petitioner is at exhibit 39. Therein he says that the sum advanced by way of security; is included in the sum of the Darkhast. Hence nothing can be done in respect of this application. The application is rejected and the applicant has been informed likewise.

5. Even assuming this to be an order under the Civil Procedure Code, it does not seem to be a decision upon a claim. It does not say that the applicant is not entitled to the right which he claims in respect to the property. It merely says that his request to have the sale made subject to his mortgage cannot be granted, and the reason for the refusal is certainly not any decision that Ganesh Ramchandra had no concern with the mortgage of Rs. 2,500. Thus there is no bar to the suit under Article 11, and that is the only point of limitation that was raised against Ganesh Ramchandra in the suit.

6. But in this appeal two more points of limitation have been taken. Apart from the custom of this Court in not allowing new points to be taken in appeals under the Letters Patent, there does not seem to be any substance in either of them. The first contention is that although the suit is in form a suit for a share in the land bought in execution of the award decree, the plaintiff is really basing his claim upon the mortgage for Rs. 2,500 and his suit is therefore in effect a claim upon that mortgage and is governed by Article 120 of the Indian Limitation Act. To this a sufficient answer seems to be that in fact Ganesh Ramchandra is not suing on the mortgage but is suing for the land, and it is only the land that he asks for. The other contention is that even before Ganesh Ramchandra put in his written statement to the 1922 suit on September 19, 1922, he must have known that there was an adverse claim against him, since he says in his deposition "I learnt before I filed my written statement that he had fraudulently omitted the mortgage amount from that suit of 1922 and that the amount of the mortgage for Rs. 2,500 was represented by him, to be his separate estate." As the present

suit was filed only a fortnight before twelve years had elapsed from the date of Ganesh. Ramchandra's written statement in the suit of 1922, it is argued that his previous knowledge of an adverse claim must have arisen more than twelve years before the present suit and that his claim for the land is therefore barred. But there is no definite evidence to show that he knew of any adverse claim outside the period of twelve years from the present suit. Laxman was in the position of a co-mortgagee, and there is nothing to show that he did anything against. Ganesh Ramchandra, the other co-mortgagee, until he bought the property in execution of the award decree in 1926. In any case this is a question of fact as well as a new point, and we should not allow it to be considered in a Letters Patent Appeal. Thus the plea of limitation fails.

7. On the merits the trial Court has dismissed Ganesh Ramchandra's claim to a share in the property not only because he has failed to show that he had any interest in the mortgage for Rs. 4,000 but also because, in the view of the learned Judge, he has failed to show that he had any interest in the mortgage for Rs. 2,500. The learned Judge is unquestionably right in finding that Ganesh Ramchandra has not proved that he had any interest in the mortgage of Rs. 4,000. The mortgage was executed in the name of Laxman alone after the separation in interest had taken place, and there is really nothing to connect it with Ramchandra except Ganesh Ramchandra's own word. It is also to be noted that in his application to the; Mamlatdar to have the sale of Joshi's property made subject to the mortgage of Rs. 2,500, he did not ask that it should be made subject to his share in the mortgage of Rs. 4,000 also; and, as the learned Judge says, that is an indirect admission that the mortgage for Rs. 4,000 was one in which Ram chandra had no share. But as to the mortgage of Rs. 2,500, we are not prepared to agree with the learned Judge's finding that Ganesh Ramchandra has not proved his share in that. The fact that it is in the name of Ram chandra alone does not prove much, since admittedly a number of transactions in which both brothers were concerned took place before the separation in interest and were in the name of the elder brother alone. But at the time when this mortgage was executed, the brothers were still joint and they had joint accounts in various banks, and it may be presumed that the source for the money advanced was these joint accounts. Not only that, but there is on the record of this case a post card written in September, 1915, by Laxman to Ramchandra mentioning various matters of interest and stating in the middle that Joshi had not yet paid his interest. Prima facie this suggests that Ramchandra was concerned in the failure of Joshi to pay interest. The date of this post card is September 9, and Laxman's accounts of that time show that Rs. 150 by way of interest on Rs. 2,500 had fallen due on February 4, 1916, though actually it seems that interest was not really payable until June or July. On the credit side of the account there are three sums amounting to Rs. 150 paid between August 20, 1915, and January 20, 1916. The interest which Joshi had not paid and which Laxman mentioned on September 9, 1915, as not having been paid can only be the interest referred to in these accounts. We therefore

think it proved that Ganesh Ramchandra has an interest in the mortgage for Rs. 2,500, and his share in it must of course be taken to amount to half. The position then is this. The mortgage for Rs. 4,000 must be taken to have been Laxman's sole concern, and the further sums included in the award decree other than the mortgage for Rs. 2,500 also must be taken to be Laxman's sole concern. But instead of the money due to him Laxman took the land. The land was therefore in substitution of the mortgage dues, and in one of the mortgages Ganesh Ramchandra had a share. That being so, he must get a share in the land proportionate to the share which the amount due under the mortgage for Rs. 2,500 had in the total debt found payable by the award decree. The award decree was for Rs. 9,529, and the amount due under the mortgage for Rs. 2,500 at that time amounted to Rs. 2,565 ; and in that Ganesh Ramchandra had a half share. His share in the amount of the award decree thus comes to 1 divided by 7.43, say two annas in the rupee, and he must be given a share in the land to that extent. His appeal accordingly succeeds in part.

8. The order of the trial Court dismissing his suit must be set aside and he must be given joint possession of a one-eighth share in the suit property. The plaintiff will receive one-fourth of his costs throughout from the defendants, and the defendants will bear their own costs throughout.

9. I come now to First Appeal 107 of 1940. This appeal is concerned with the Mhapan properties. Ganesh Ramchandra, the appellant, claimed them as his own by adverse possession. There are two kinds of properties at Mhapan mentioned in the plaint. Group A consists of a number of parcels of land in which no strangers are concerned, and group B consists of a number in which strangers are concerned and have shares. The family originally owned property at Mhapan which before 1880 was assessed at Rs. 24. The Mhapan property in this suit is very much more than that, and it is evident that there have been considerable purchases of property at Mhapan by Ramchandra, who was in possession of the family property there. Ganesh Ramchandra in Laxman's suit of 1922 admitted Laxman's right to partition of the family property at Mhapan. But the admission did not go beyond the family property assessed at Rs. 24, and Laxman's right to any share in the rest of the property was denied. The present suit was not brought by Laxman's family until about sixteen years after Laxman's right was denied. But the difficulty in the way of Ganesh Ramchandra in establishing his adverse possession of property other than the original joint family property is that the acquired property has been so mixed with the original property that it cannot now be said which property is which. An attempt has been made to show that the ancestral property cannot possibly be included among the B properties and that the B properties therefore need not be regarded as having been mixed with the ancestral property. But on behalf of Ganesh Ramchandra Mr. Madbhavi has had to admit in this appeal that he cannot definitely say that none of the ancestral property assessed at Rs. 24 has been included in the B properties. If this were a coparcenery, it is evident that the plea of adverse possession in respect of the property other than the ancestral property would have to be

disallowed. It is true that the parties are tenants in common, but we have not been referred to any authority showing that as between tenants in common the results of an inextricable blending of two sets of properties would not be the same as it would be in the case of a coparcenery. Another difficulty in the way of the appellant is that since we do not know which of the several parcels of land referred to as Mhapan property in A and B is ancestral, it cannot be said that the denial of Laxman's right to any property other than the original ancestral property can be applied to any particular parcel of land. In the result the plea of adverse possession must fail, and the whole property must be treated as if it were part of the ancestral property in which Ganesh Ramchandra admits that Laxman's family has a share. This appeal therefore fails and is dismissed with costs.

10. In the last of the appeals (second appeal No. 585 of 1939) we are concerned only with the effect of Order II, Rule 2. Suit No. 155 of 1934 out of which it arises was filed on the same day as suit No. 154. The claim in suit No. 154 might have included the properties in suit No. 155, but did not. The contention therefore is that the plaintiff comes within the mischief of Sub- Rule (2) of Order II, Rule 2, and that suit No. 155 must be dismissed as being a suit brought after the plaintiff had omitted to sue in respect of a portion of a claim admissible to him in a former suit. Sub-rule (2) of Rule 2 of Order II says "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." It has been found by the lower appellate Court that the cause of action for the two suits is the same, and on behalf of the appellant-plaintiff it is argued before us that it is not the same. Reference has been made to *Ittappan v. Manavikrama* (1897) ILR 21 Mad. 153, *Kuppusami Aiyar Vs. Kuppusami Aiyar and Others*, , and *Syed Habibur v. Ashita Mohan* (1908) 12 C.W.N. 640 with the object of showing that in suits between co-owners as distinct from coparceners the plaintiff is not bound to include in his suit the entire claim that he might have against his co-owner and that if he fails to sue in respect of the entire property of which he is the co-owner he can nevertheless sue at a later date in respect of the remainder. But however that may be, there can be no doubt that in this case the cause of action for the two suits is the same. The cause of action dates from the denial of Ramchandra's rights to the suit properties in a counter written statement which Laxman made in the suit of 1922 after Ganesh Ramchandra had asserted in his written statement that the house in Ratnagiri and the award decree were joint property; and in each case the principal fact which the plaintiff would have to prove is the source of the money, and proof of the source as being joint funds would dispose of either case. The cases cited as to co-owners as distinct from coparceners do not seem to touch the case of a denial of a co-owner's right to partition or joint possession of any of the property held by the co-owners. On the merits the issues in the two suits are substantially the same, and each of the suits Nos. 154 and 155, in so far as it does not include the entire claim which the plaintiff might have made upon the cause of action, seems to offend against Sub-rule (2) of Rule 2 of Order

II. But even though this is so, it does not follow that the penalty for a breach of Sub-rule (2) should be the dismissal of suit No. 155 or indeed of either of the suits. It is true that there are authorities to show that even in the case of suits filed upon the same day one or other should be dismissed unless an appropriate amendment has been made (see *Murti v. Bhola Ram* (1893) ILR 16 All. 165 F.B. and *Rayalu Ayyar v. Ramudu Ayyar* (1926) ILR 49 Mad. 869. But we have the authority of our own High Court to show that it is possible to deal with this situation in a different way. In *Heirs of Bapu Kamble v. Narayan Dabhulkar* (1868) 5 B.H.C.R. 30. three suits were brought by a co-owner against his co-proprietor and the three alienees in respect of three distinct parcels of land alienated. In the appeal to the High Court it was objected that the provision in the Code corresponding to Order II, Rule 2, had been infringed. The High Court agreed that the procedure was irregular and that as the plaintiff had only one cause of action against the co-proprietor, he ought to have brought only one suit against him and either included all the alienees in this suit or brought separate actions against the alienees for the several pieces of land in their possession and had the proceedings in those suits stayed until the suit against the co-proprietor was determined. But they refused to interfere under the provisions of the Code corresponding to what is now Section 99 (prohibiting an appellate Court from reversing or substantially varying a decree because of an error or irregularity which does not materially affect the merits of the case or the jurisdiction of the Court) because the separate actions against the co-proprietor had been instituted simultaneously and therefore the error in splitting up the claim against him did not affect the merits. Under Sub-rule (1) the plaintiff is required to include the whole of the claim upon the cause of action, and any suit which fails to do so is to that extent defective. Sub-rule (2) provides the penalty, namely that the plaintiff shall not afterwards sue in respect of that claim which has been omitted. Applying the principle underlying the decision in *Heirs of Bapu Kamble v. Narayan Dabhulkar*, it seems that although two suits have been filed each of which does offend against Sub-rule (1), still no question of applying the penalty provided in Sub-rule (2) ought to arise here. Without going so far as to say that in the case of suits filed simultaneously as these have been the penalty provided by Sub-rule (2) should never be applied and one or the other of the suits should never be dismissed merely on that ground, we nevertheless think that in this case the suit ought not to have been dismissed. It would have been possible to consolidate the two suits, as any Court has the power to do in its inherent jurisdiction (see *Qazi Muhammad Afzar v. Mankumar Mahton* (1922) ILR 1 Pat. 669 and in fact they were tried together, and the material issues in the two suits were the same. For practical purposes they were treated as only one suit; and I say this in spite of the fact that one of them was triable as a second class suit, and the appeal went to the District Court instead of to the High Court. We think therefore that the appeal must be allowed and this suit be remanded for trial on the merits, setting aside the decree dismissing the suit. The costs will be costs in the cause.

Broomfield, J.—I agree with my learned brother and have only to add a few observations on the points of law arising in these appeals.

2. First of all there is the point of limitation in the Letters Patent Appeal No. 8 of 1940 arising from Suit No. 154 of 1934. The only point of limitation argued in the Court below was whether it was necessary that the suit should have been brought within a year of the Mamlatdar's order of June 25, 1925, rejecting Ganesh's application in the execution proceedings before the Collector that the property should be sold subject to the mortgage of 1914. The learned trial Judge held that it was necessary to sue within a year of this order. But in that he seems to have been clearly wrong. This was not a claim proceeding of the kind contemplated by Rule 58 and the following rules of Order XXI of the Code. Those rules apply where there has been an investigation of a claim by a Court. The Collector to whom a decree has been transferred for execution is not a Court: *Shankar Atmaram Wani Vs. Keshav Govind Tambulkar*, . Therefore Rule 63 of Order XXI does not apply to make the order final That point was conceded by Mr. Parulekar. It is true that Article 11 of the Indian Limitation Act applies to any orders made under the Code. It is not limited necessarily to the orders of Courts. In view of Section 68 and the following sections of the Code and also sch. III, the Collector may be said to act under the Code when exercising the powers conferred on him by the Code. But it has been held that the Collector has no power to consider objections to an attachment: *Onkar Singh v. Mohan Kuar* (1898) ILR 20 All. 428 and *Sattappa v. Mahomedsaheb* (1935) 38 Bom. L.R. 221. It is doubtful, to say the least of it, whether he has power to consider and deal with a claim such as the one made by Ganesh in this case. In that connection reference may be made to *Shankar v. Keshav*. In any case it is clear that the Mamlatdar did not consider and dispose of the claim and it cannot be said that his order is an order against Ganesh within the meaning of Article 11.

3. Mr. Parulekar did not contend that the suit was barred by Article 11. He sought to argue the question of limitation from a new point of view altogether. He urged that the claim of Ramchandra and his son under the first mortgage was a claim for money only and that as their right was denied by Laxman in the suit of 1922 a suit in respect of it was barred under Article 120. It is not the practice of this Court to allow new points to be argued in Letters Patent appeals: *Sattappa v. Mahomedsaheb*. Anyhow there is no substance in the new argument. The co-mortgagee's right was to recover the money out of the property mortgaged or out of property substituted for the property mortgaged. It was not till March, 1926, when Laxman by compromise with the mortgagor allowed the first mortgage security to be released and acquired the Shirgaon property in lieu of the whole debt due, that he did anything openly and necessarily inconsistent with the rights of his co-mortgagee. The latter would have a period of twelve years, to enforce his right to a proportionate share of the Shirgaon land and the present suit was brought within twelve years.

4. Then there is the question of the construction of Order II, Rule 2, which arises

in Second Appeal No. 585. We are concerned only with the first two clauses of the rule. Clause (1) says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and Clause (2) provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. I feel no doubt whatever that the cause of action in the two suits filed on October 5, 1934, was the same. The essential and material part of the cause of action was the denial by Laxman in the pleadings of the suit of 1922 of Ramchandra's right to the Shirgaon property, the subject of suit No. 154, and the property in Ratnagiri town, the subject of suit No. 155. These properties were not included in that suit of 1922 brought by Laxman for partition but he sought partition of all the other properties. Ganesh in his written statement alleged that these properties also were joint and should be included. Laxman then put in a counter statement in which he maintained that they belonged to him exclusively. The only essential facts to be proved in both suits were that there was a common fund belonging to the two joint brothers out of which both these properties were acquired. The cases cited by Mr. Walawalkar, Syed Habibur Rasul v. Ashita Mohan Ghosh 12 C. W. N. 640 and Kuppusami Aiyar Vs. Kuppusami Aiyar and Others, , are not really of any assistance. It is true that a tenant in common, unlike a coparcener, may sue for partial partition and there may be several such suits in spite of Order II, Rule 2. But, if, as in the present case, there has been a denial of his co-ownership in respect of all the properties, the tenant in common has a cause of action in respect of them all and the rule must apply. *Ittappan v. Manavikrama* (1897) ILR 21 Mad. 153 was also cited, but that has no application. What was held there was that a suit for partial partition does not bar a suit for general partition or for a partition of the rest of the properties. That is so, as the Court pointed out, because the cause of action is clearly not the same.

5. The important question is whether the second part of Rule 2 applies. Is it a case of a plaintiff afterwards suing in respect of a portion of a claim omitted from a former suit? The plaints in the two suits were presented on the same day and bear consecutive numbers. It is reasonable to suppose that they were presented simultaneously. It has been held by the Allahabad High Court in *Murti v. Bhol Ram* (1893) ILR 16 All. 165 and by the Rangoon High Court in *The Standard Electric and Motor Works v. Picture Palace* (1923) ILR 1 Ran. 682 that in such circumstances the suit bearing the later number is to be presumed to have been filed afterwards. The basis of these decisions is that if Order II, Rule 2, (or Section 43 of the old Code), were not to be applied in the case of suits filed on the same day, it would open the door to deliberate and continual evasion of the law. For instance, if A buys on the same occasion seven different articles from B in B's shop, B, might file on the same day seven suits against A in respect of the price of the seven articles sold which, it is said, would be absurd. I am by no means satisfied, however, that this argument ab inconvenienti really makes it necessary to strain the language of the rule and to assume contrary to the fact

that one of two complaints presented simultaneously has been presented afterwards. The Madras High Court has declined to make this assumption: *Rayulu Ayyar v. Ramudu Ayyar* (1926) ILR 49 Mad. 869 but apparently it thought it necessary nevertheless to assume that one or the other of the suits was instituted afterwards and so the expedient was adopted of giving the plaintiff the option of electing which of the suits should be regarded as the earlier.

6. It is obvious that either of these purely arbitrary methods of procedure may cause great injustice. That would no doubt be irrelevant if there were no other way of preventing evasion of the rule that a suit must include all claims arising out of the same cause of action. But I think that is not so. In the hypothetical case put by Sir John Edge in *Murti v. Bhola Ram* the man who brought seven suits on the same day based on the same cause of action would not and could not in fact evade the provisions of the first part of Order II, Rule 2, and the Court would obviously not be bound to hear all the suits separately. The Court might consolidate them or call upon the plaintiff to include all the claims in one suit and withdraw the rest.

7. The only ruling of our own High Court on the point, so far as we are aware, is *Heirs of Bapu Kamble v. Narayan Dabhulkar* (1868) 5 B.H.C.R. 30. That seems to be an authority, binding on this Court, for the view that if suits are filed simultaneously there is no contravention of the part of the rule which prohibits a plaintiff from afterwards suing for a relief omitted in a former suit. In that particular case both suits had been tried and as the High Court was dealing with the matter in appeal, it applied the section corresponding to the present Section 99. Here the lower Courts have dismissed one of the suits and there is no question of applying Section 99. But as we take the view that this procedure, on the face of it unjust to the plaintiff, was not necessary on the true construction of the rule, we consider ourselves justified in treating the two suits as having been consolidated, as they ought to have been. To all intents and purposes it may be said that they were in fact consolidated since they were tried together on the same evidence.