

(1987) 08 MAD CK 0062
In the Madras High Court

Vathapa Gounder and Others

APPELLANT

Vs

Thambayi Ammal and Others

RESPONDENT

Date of Decision : 31-08-1987

Acts Referred:

Citation : (1989) 2 MLJ 67

Hon'ble Judges : S.A. Kader, J

Bench : Division Bench

Judgement

S.A. Kader, J.—The appeal is against the judgment and decree of the Court of the Subordinate Judge of Dindigul in O.S. No. 100 of 1976. The defendants 1 and 6 to 8 are the appellants.

2. This is a suit for declaration of the plaintiff's title to the suit property after cancelling the deed of partition dated 22.8.65 and for possession with mesne profits, past and future from defendants 1 to 8. The plaint averments are briefly as follows: The plaintiff, who is the wife of the 9th defendant and the mother of the 10th defendant purchased the suit property of an extent of 9.04 acres in S. No. 323/2 of Chathrapatti village Palani Taluk from defendants 6 to 8, who are father and sons for a sum of Rs. 6,000 by and under a registered deed of sale dated 17.7.53. In, pursuance of the said deed of sale the plaintiff was duly put in possession of the suit property. The suit land is situate in Charthrapatti village, which formed part of a zamin estate, which was taken over by the Government under the provisions of the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act. In the survey and settlement effected thereafter the title of the plaintiff to the suit property has been recognised and patta has been issued to her. The plaintiff was doing personal cultivation through her husband till about 1963 as evidenced by the adangal accounts, and she has been paying the kist ever since the purchase. The first defendant is well known to the plaintiffs husband. He is the brother of defendants 4 and 5 The second defendant is the wife of the first defendant and the third defendant is the mother of the second defendant. There is a tiled chalai house in the suit property. The plaintiffs

husband, with the consent of the plaintiff, allowed the defendants 1 to 5 to reside in the aforesaid chalai house and keep watch over the suit property. Their possession of chalai house is purely permissive. In falsi 1374 the plaintiff's husband as the power of attorney agent of the plaintiff, leased out the scheduled land to one Thiruppathi Naicker raised cotton and groundnut crops. The defendants 1 to 5 who are living in the chalai house, were not only negligent in watching the crops but allowed their cattle stray and it has caused severe loss to the tenant, Thirupatti Naicker. In the circumstances, the said Thiruppathi Naicker did not want to continue the lease after one year and nobody also was prepared to take the land on lease in view of the attitude of the defendants 1 to 5. The plaintiff, therefore called upon the defendants 1 to 5 to vacate the house, but they refused to do so. To the notice issued by the plaintiff the first defendant sent a false reply setting up title to the suit land in defendants 6 to 8, who have sold the land to the plaintiff. There upon the plaintiff filed a suit against the defendants 1 to 8 in OS. No. 413 of 1966 on the file of the District Munsifs Court, Palani for declaration of the title to the suit property and for consequential injunction or in the alternative for recovery of possession. She also prayed for past mesne profits for falsi 1375 during which the land was lying fallow. Taking advantage of the alternative relief of possession asked for by the plaintiff, the defendants 1 to 8 trespassed into the suit property and began to cultivate the land unlawfully. They contended in their written statement filed in the said suit that the sale by defendants 6 to 8 in favour of the plaintiff dated 17.7.53 was sham and nominal, that it was not acted upon, that the debts due to the Government and other liabilities were discharged by the 6th defendant, and receipts were obtained in the name of the plaintiff that the 6th defendant alone paid kist in the name of the plaintiff, that Thiruppathi Naicker never enjoyed the suit land and that the 6th defendant was in possession and had prescribed title by adverse possession. It was also contended that the plaintiff had no subsisting title to the suit property in view of the deed of partition dated 22.8.65 in family of the plaintiff's husband under which the suit property was allotted to her son the 10th defendant herein. The contentions raised by defendants 1 to 8 are all false and fraudulent. The deed of sale in favour of the plaintiff is true and fully supported by consideration. The debts mentioned therein were discharged by the plaintiff. There was also an undisclosed mortgage decree in O.S. No. 73 of 1953, on the file of the District Munsif of Palani which was also subsequently discharged by the plaintiff. The plaintiff was not a party to the partition deed entered into between her husband, the 9th defendant herein and her son, the tenth defendant and who was not, therefore, bound by the allotment to the suit property to the 10th defendant in the said partition. The plaintiff filed an application in the said suit in I.A. No. 433 of 1967 for appointment of a receiver and a receiver was appointed by the court. However, the defendants 1 to 8 were allowed to harvest the crops on deposit of Rs. 2,000. The suit was subsequently transferred to the file of the District Munsif and numbered as O.S. No. 1499 of 1968. After trial it was ultimately decreed in favour of the plaintiff. The defendants 1 to 8 preferred an appeal in A.S. No. 79 of 1969 on the file of the sub-court, Dindigul and the

appeal was dismissed. The matter was taken up by the defendants 1 to 8 in S.A. No. 439 of 1972 on the file of the Court. During the pendency of the second appeal this court passed an order directing the defendants 1 to 8 to deposit a sum of Rs. 3000/- and continue to deposit Rs. 750 every year. The defendants 1 to 8 deposited Rs. 3000 and continue to deposit Rs. 750 in October, 1973 and another sum of Rs. 750 in October, 1974 and the entire amount of Rs. 6500 was allowed to be withdrawn by the plaintiff. No deposit was made by the defendants subsequently. The second appeal was however allowed by this Court on dated 21.11.75, on the ground that in the face of the partition deed the plaintiff should have filed the suit along with her son the 10th defendant as plaintiff or should have filed the suit against him and others and she had not, therefore, established her title. It was also observed by this court that it was open to the plaintiff to file a separate suit impleading all the parties. The plaintiff is, therefore, obliged to file the present suit impleading her husband as the 9th defendant and her son the 10th defendant in order to obtain adjudication in their presence. Though the said partition is not binding on the plaintiff and the plaintiff is entitled to ignore the same, by way of abundant caution she also prayed for the cancellation of the said deed of partition so far as it related to the plaint scheduled property. She has also claimed mesne profits at the rate of Rs. 1,500 per annum from 1966 upto the date of plaint and after giving credit to the sum of Rs. 6,500 realised by the plaintiff she has claimed in the suit the balance of Rs. 7,500 as past mesne profits at the same rate till delivery of possession.

3. The defendants 4 and 5 remained ex parte.

4. The 6th defendant has filed a detailed written statement, which has been adopted by defendants 1 to 3, 7 and 8 raising the following contentions: The plaintiff has no title to the suit property or possession. The deed of sale in her favour dated 17.7.53, is a sham and nominal one. It was never acted upon nor was it intended to convey any title on the plaintiff. The 6th defendant was heavily indebted at the time of the said deed of sale and the suit property was attached and brought to sale in O.S. No. 418 of 1952, on the file of the District Munsif's Court, Palani; There were other debts as well. In order to save the property from the clutches of the creditors, the 6th defendant on his behalf and on behalf of his minor sons defendants 7 and 8 executed this deed of sale in favour of the plaintiff as suggested by her husband. No cash was received for the said deed of sale and the Government loans and other debts were discharged by the 6th defendant and receipts were obtained in the name of the plaintiff. The expenses for the purchase of stamps and registration were also met by the 6th defendant. The kists were paid only by the 6th defendant but receipts were obtained in the name of the plaintiff. The plaintiff was never put in possession and the property continue to be in the possession and enjoyment of the 6th defendant as before. The suit land was never leased out to Thiruppathi Naicker and he was never in possession. The defendants 1 to 5 were in possession of the chalai under the permission of the 6th defendant. The plaintiff's husband has stealthily changed the patta in the name of the plaintiff taking advantage of the kist receipts,

documents and receipts for discharge of debts handed over by the 6th defendant to the plaintiff's husband for the survey and settlement operations. He has also manipulated the village records with the help of the Village Munsif. The suit filed by the plaintiff in O.S. No. 1499 of 1968, on the file of the District Munsifs Court, Dindigul was decreed and the appeal in A.S. No. 79 of 1969, was dismissed. But in SA. No. 439 of 1972, this court set aside all the findings of the court below and held that the plaintiff had no title and allowed the appeal. This suit being for the same reliefs of declaration and possession is barred by resjudicata. The reference to proceedings for appointment of receiver are not relevant. The 6th defendant has filed an application before the District Munsifs Court, Dindigul for restitution of the amount withdrawn by the plaintiff in O.S. No. 1499 of 1968. The 6th defendant and his sons have been in enjoyment of the suit property openly and continuously for over 23 years and perfected title by adverse possession. The plaintiff is fully aware of the deed of partition entered of the into between her husband and her son and the inclusion of the suit property therein but has stood by the transaction all those years. She is bound by the said deed of partition and it is too late in the day for the plaintiff to make averments against the tenor of the deed of partition. The suit is bad for misjoinder of parties and causes of action. The court fee paid is not correct.

5. In his additional written statement the 6th defendant contended that there was no valid reason for cancellation of the deed of partition and the plaintiff's claim in that respect was barred by time. It was also barred under Order 2, Rule 2, C.P.C.

6. The defendants 9 and 10 in their separate written statements accepted the title of the plaintiff and contended that the suit property was included in the partition under the bonafide belief that they would get the property after the life time of the plaintiff. They have no objection to a decree to be passed in favour of the plaintiff.

7. The plaintiff has filed a reply statement refuting the contentions of the defendants 1 to 3,7 and 8.

8. On the above pleadings, the following issues have been framed for trial:

1. Whether the plaintiff has got title to the suit property?
2. Whether the partition deed dated 22.8.1965 is true and valid?
3. Whether the suit is barred by res judicata?
4. Whether the plaintiff's claim is barred by estoppel?
5. Whether the sale deed dated 17.7.53 is sham and nominal as contended by the 6th defendant?
6. Whether the 6th defendant has perfected title by adverse possession?
7. Whether the plaintiff is entitled to past and future mesne profits, if so at what

rate?

8. To what relief? if any, is the plaintiff entitled?

Additional issues:

1. Whether the suit is maintainable without setting aside the partition deed dated 22.8.65?

2. Whether the partition deed dated 22.8.65 is to be set aside for any of the reasons stated in the plaint?

3. Whether relief on cancellation prayed for is in time?

4. Whether, the plaintiff is estopped from questioning the validity of the partition deed?

5. Whether the suit is barred under Order 2, Rule 2, C.P.C.?

6. Whether the court-fees paid is correct? Additional issue No. 1 was not pressed.

9. The learned Subordinate Judge found all the other issues in favour of the plaintiff. He held that the deed of sale executed by defendants 6 to 8 in favour of the plaintiff dated 17.7.53 was true and genuine, that the plaintiff has got title over the suit property and the defendants 6 to 8 had not perfected title by adverse possession. He also held that the present suit was not barred by res judicata in view of the decision in S.A. No. 439 of 1972 on the file of this court. The court below further found that the plaintiff was not a party to the deed of partition dated 22.8.65, that it was not valid so far as the suit property was concerned and was liable to be set aside. The relief for cancellation was not barred by time or under Order 2, Rule 2, C.P.C. The plaintiff was also held entitled to recover Rs. 7,500 from the defendants 1 to 8 towards past mesne profits. The quantum of future mesne profits was relegated to separate proceedings under Order 20, Rule 12, C.P.C. In the result, the suit was decreed as prayed for with costs. Aggrieved thereby the defendants 1 and 6 to 8 have preferred this appeal.

10. The points that are canvassed before me and which arise for consideration are:

1. Whether the deed of sale dt. 17.7.53 executed by defendants 6 to 8 in favour of the plaintiff is sham and nominal?

2. Whether the plaintiff has title to the suit property?

3. Whether the defendants 6 to 8 have preferred title by adverse possession?

4. Whether the suit is barred res judicata in view of the decision of this court in S.A. No. 439 of 1972?

5. Whether the relief for cancellation of the deed of partition is barred by time?

6. Whether the relief for cancellation of the deed of partition is barred under Order 2, Rule 2, C.P.C.?

7 .Whether the plaintiff is entitled to the mesne profits claimed?

11. Points 1 and 2:- ExA.2 is the registration copy of the deed of sale executed by the defendants 6 to 8 in favour of the plaintiff for a sum of Rs. 6,000 over the schedule property. The contention of the defendants 6 to 8 is that this deed of sale is a sham and nominal one, that it was not acted upon and was not intended to be acted upon, that it was executed at the instance of the plaintiff's husband in order to save the property from the clutches of the creditors, that no consideration passed from the plaintiff for the said deed of sale, that the debts mentioned, therein were discharged only by the 6th defendant, and that possession was not delivered to the plaintiff and continued to be in that with the 6th defendant. The burden is heavily on the defendants 6 to 8 to establish that the apparent is not the real. The 6th defendant examined himself as D.W.2. It is his contention in the written statement that Ex A.2 deed of sale was executed in favour of the plaintiff at the instance of her husband to ward off the creditors. But, in his evidence he would say that he did not at all see the plaintiff's husband, P.W.1, in connection with the deed of sale in favour of the plaintiff and that he approached the plaintiff directly and completed the transaction, and this would falsify his averment in the written statement. The 6th defendant, who has been examined as D.W.3 in the earlier suit in O.S. No. 1449 of 1968, on the file of the District Munsif of Dindigul, has clearly and categorically admitted that he executed the deed of sale only with a view to discharge the decree debt(vide ExA.35) This admission itself is sufficient to show that Ex.A.2 deed of sale is true and genuine.

12. Apart therefrom, the evidence on the side of the plaintiff is overwhelming to establish the truth of ExA.1. The consideration mentioned in Ex A.2 is Rs. 6,000, out of which a sum of Rs. 2,021-13-2 has been reserved with the vendee for the discharge of the decree in favour of one Samiyappa Rounder against the defendants 6 to 8 in O.S. No. 418 of 1952, on the file of the District Munsif of Palani in execution of which the suit property was attached and brought to sale in E.P. No. 198 of 1953. This amount has been paid by the plaintiff to the advocate for the plaintiff in that suit under Ex A.32 receipt Ex.A5 is the certified copy of the full satisfaction memo filed by the decree holder in the said suit. A further sum of Rs. 100 was reserved by the plaintiff is discharge of a Government loan and this loan is also said to have been discharged by the plaintiff. A sum of Rs. 100-2-10 has been paid to the vendors piece meal and the balance of Rs. 3778 has been paid at the time of the execution of the deed of sale. The defendants 6 to 8 have mortgaged this property in favour of Samiyappa Koundar and the defendants 6 to 8 have completely suppressed this encumbrance from the knowledge of the plaintiff. After the purchase by the plaintiff, the mortgagee has filed a suit on the mortgage bond in O.S. No. 73 of 1953 on the file of the court below against the defendants 6 to 8 as mortgagors and against the plaintiff

herein as the purchaser. A preliminary decree was passed on 14.9.55 and a final decree on dated 24.2.56 as evident from Ex.A.6 certified copy of the suit register. The defendants 6 to 8 did not discharge this decree debt and the property was brought to sale in Ex.P. No. 125 of 1956. The plaintiff has paid the entire decree amount and has obtained a registration receipt under ExA.7, dated 16.4.67. It is thus evidence that the plaintiff has not only paid the consideration mentioned in ExA.2 deed of sale but more.

13. The 6th defendant had previously leased out this property to the first defendant by a registered deed dated 5.6.53 under Ex.A.8 on an annual rent of Rs. 300 for a period of two years. Two days before the execution of ExA.2 deed of sale in favour of the plaintiff, the 6th defendant has obtained surrender of possession from the first defendant by means of an endorsement under ExA.9 on the back of Ex.A.8 and handed over the deed of lease to the plaintiff. This surrender of possession by the lessee is evidently a prelude to the handing over of actual possession to the plaintiff under Ex.A.2 deed of sale. If as contended by the defendants 6 to 8, ExA.2 deed of sale was a sham and nominal one, there was absolutely no necessity for the 6th defendant to obtain surrender of possession from the lessee the first defendant. This surrender probablises the case of the plaintiff, that delivery of possession was effected in her favour and she took possession of the property on the date of Ex.A.2 and that Ex.A.2 is a true and genuine one. In pursuance of the deed of sale patta has been transferred in the name of the plaintiff, and in the survey and settlement effected after the taking over the land which formed part of a zamin estate, patta has been issued to the plaintiff under Ex.A.14. Right from the date of the sale the plaintiff has been paying kist as is evident from Exs.A.16 to A.30. The contention of the 6th defendant that he discharged the debts, he paid the taxes but obtained all the receipts in the name of the plaintiff and that he handed over these documents to the plaintiff at the time of survey and settlement is too puerile to merit any consideration. Mr.M.R.Narayanaswami, learned senior counsel for the appellant referred to only one aspect of the matter viz., that the plaintiff has not produced the original deed of sale. As the original was not available with the plaintiff, the registration copy has been tendered in evidence and marked as an exhibit without any objection whatsoever. If the 6th defendant had produced the original it may be open to him to contend that the sale is a nominal one, but, that is not the case here. The fact that the owner has lost the original and produced the registration copy does not in the least affect her right. The facts discussed above conclusively establish the truth and genuineness of ExA.2 sale and the contention of the defendants 6 to 8 that it is a sham and nominal one is a mere flight of fancy.

14. It is contended in the written statement that as this property has been included in the deed of partition under the original of Ex.B.1 entered into between the plaintiffs husband the 9th defendant and her son, the 10th defendant and allotted to the share of the 10th defendant, the plaintiff has lost their title. This contention has to be mentioned only to be rejected, Ex.B.I deed

of partition has been entered into by the 9th defendant on his behalf and on behalf of his minor son Varadarajan as his father and guardian and the 10th defendant, who is the eldest son. In the body of Ex.B.I it is recited that the properties dealt with under Ex.B.I belonged to the parties there to ancestrally and to the 9th defendant by virtue of the power of attorney executed by his wife, the plaintiff. ExA.31 is the said deed of power of attorney. It has been executed by the plaintiff in favour of her husband, the 9th defendant for the purpose of managing her properties and for court proceedings etc., and by no figment of imagination can it be said that the property is transferred to the 9th defendant for the purpose of managing her properties and for court proceedings etc., and by no figment of imagination can it be said that the property is transferred to the 9th defendant by virtue of this power of attorney. In fact the acceptance of the power by the 9th defendant is a clear admission of the title of the plaintiff. The plaintiff is not a party to the said deed of partition. It is a well-settled principle, of law that a person, who is not a party, to a document and who does not claim under any of the parties to that document, is not in the least bound by the document or the recitals therein. So far as he is concerned, the said deed is non est in the eye of law. The plaintiff can, therefore, treat this document as non-existent or as a mere scrap of paper. Her title is not in the least touched or affected by Ex.B.I deed of partition. Advisedly, therefore, Mr.M.R.Narayanaswami, learned senior counsel for the appellant did not put forward any contention based on Ex.B.I.

15. For the foregoing reasons I find both the points against the appellants and hold that ExA.2 deed of sale in favour of the plaintiff is not sham and nominal and the plaintiff has title to the suit properly.

16. Point 3:- It is the case of the defendants 6 to 8 that possession of the suit property was not delivered to the plaintiff under Ex.A.2 deed of sale dated 17.7.53 and defendants 6 to 8 continued in possession and cultivation of the suit land for nearly 23 years upto the date of this suit and have perfected title by adverse possession. As already pointed out, the 6th defendant has leased out this property to the first defendant under Ex.A.8 registered deed of lease dt. 5.6.53 and two days before the execution of Ex.A.2 deed of sale in favour of the plaintiff he has obtained surrender of possession from the first defendant under ExA.9 endorsement on the back of Ex.A.8 and handed over the deed to the plaintiff. Obviously this surrender of the lease hold interest by the first defendant is only to deliver actual possession to the plaintiff and the case of the plaintiff that she was put in possession on the date of the same is probablised. Right from the date of the sale the plaintiff has been paying the kist as evidenced by ExsA.16 to A.30. The defendants 6 to 8 rely upon Exs.B.6 to B.8 adangal extracts to show that he was in possession during faslis 1365,1367 and 1370. But these adangal extracts include other lands as well. Under Ex A.2 the plaintiff has purchased paimash Nos. 44/10,44/7,44/6,44/8 and 44/13, while Exs.B.6 to B.8 include also paimash Nos. 42/2,42/7,44/3 and 44/11. Patta was not also transferred to the plaintiff at that time and probably all these lands, i.e., the

lands sold and not sold have been shown in the adangal in the name of the 6th defendant. But, subsequent by after issue of ryotwari patta to the plaintiff under Ex.A.14, the adangal extracts for the suit land bearing new S. No. 323/3 are in the name of the plaintiff, her husband cultivated these lands till falsi 1373. In falsi 1374 and was eased out to one Tiruppathi Naicker and Ex.A.12 adangal extract clearly mentions his name for falsi 1374. He cultivated the land only for one year because of the trouble given by the defendants 1 to 5 in allowing their cattle to graze the crops. In falsi 1375 the land was lying fallow as nobody was prepared to take the land on lease because of the attitude of defendants 1 to 8 who are occupying the chalai in the suit land. This is proved by Ex.A.13 adangal extract for falsi 1375 which shows that the land was lying fallow. It is therefore clear that the defendant 1 to 8 must have tress passed and cultivated the land only from falsi 1376 corresponding to 1966-67 as contended by the plaintiff. The present suit having been instituted within twenty years therefrom in 1976 is well in time. The defendants 6 to 8 cannot, therefore, be said to have perfected their title by adverse possession. In fact, the learned Counsel for the appellants did not advance any serious argument on this aspect of the matter. This point is also found against the appellants.

17. Point 4:- This is the main question that is canvassed before me. The thrust of the argument of Mr.M.R.Narayanaswamy, learned senior counsel for the appellants is that in view of the judgment of this Court in S.A. No. 439 of 1972(Ex.A.I) dismissing the earlier suit filed by the plaintiff in O.S. No. 1499 of 1968 on the file of the District Munsif of Dindigul, the present suit is barred by res judicata. It is true that both these suits are for the same relief of declaration of the plaintiffs title and possession in respect of the same property. The plaintiff and the defendants 1 to 8 are the same in both the suits. As in the present so also in the earlier suit, the defendants 1 to 8 attacked the title of the plaintiff on two grounds viz., that the deed of sale dated 17.5.53, executed by the defendants 6 to 8 in favour of the plaintiff is sham and nominal and in any event the plaintiff has no subsisting title in view of the allotment of the suit property in the family partition between her husband and her son, who are defendants 9 to 10 herein to the 10th defendant under the original of Ex.B.I deed of partition dated 22.8.65 which was marked as Ex.B.9 in the earlier suit. The learned District Munsif of Dindigul repelled the aforesaid two contentions of the defendants 1 to 8 and decreed the suit in O.S. No. 1449 of 1968 on his file. This judgment and decree were affirmed on appeal by the learned Subordinate Judge, Dindigul in A.S. No. 79 of 1969. Both the courts concurrently held that the deed of sale dated 17.7.53, executed by the defendants 6 to 8 in favour of the plaintiff was not sham and nominal and the plaintiffs title was not affected by Ex.B.I deed of partition entered into between the plaintiffs husband and her son as she was not a party thereto, In S.A. No. 439 of 1972, before the Court both these contentions were urged before V.Sethuraman, J. The learned Judge did not at all deal with the questions of the sham and nominal nature of the deed of sale dated 17.7.53, and took up for consideration the deed of partition only and he

observed as follows:

So long as Ex.B.9 (now Ex.B.1) which is a registered document is there, she (plaintiff) cannot say that she is solely entitled to the suit property. Either she should have filed the suit along with her son Ramachandran (10th defendant) as plaintiff or she should have filed the suit against him and others saying that the inclusion of this property in the partition under Ex.B.9 was not proper. In these circumstances, as indicated earlier, I am satisfied that the plaintiff has not established her title to the suit property especially having regard to Ex.B.9.1 would therefore set aside the findings of the Court below with reference to all the issues and hold that the plaintiff has not established her title to the suit property in view of Ex.B.9. It will be open to the plaintiff to file a separate suit, if she is so advised, impleading all the parties who may be interested in the property. The appeal is allowed. There will be no order as to costs

With due reference to the learned Judge, I am unable to persuade myself to see how the inclusion of the plaintiffs property in the deed of partition entered into between her husband and her son will affect the plaintiffs title when she is not a party to the said deed. It is an undisputed and indisputable principle of law that no person is bound or affected by a deed to which he is not a party. To hold other wise would spell ruin on every individual Mr.M.R.Narayanaswamy, learned senior counsel for the appellants, candidly conceded his agreement with this settled principle. But it is contended by him that even an erroneous decision will operate as *res judicata* and reliance is sought to be placed on the decisions, of the Supreme Court in *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*, and *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, . It is also contented by him that the gratuitous advice given by the learned Judge in disposing of the second appeal referring the plaintiff to a separate suit, has not the effect of preventing the application of the doctrine of *res judicata* if otherwise applicable *Vide Fatesh Singh and Ors. v. Jagannath Bakshi Singh*, 48 M.L.J. 64 . There can be no quarrel with any of these propositions of law. But, what we have to find out is the real import of the judgment of the learned Judge is S.A. No. 438 of 1972 in order to see whether the principal of *res judicata* applies.

18. A reading of the judgment of V. Sethuraman, J., in SA. No. 439 of 1972, would show that the learned Judge has been of the opinion that the plaintiff cannot maintain the suit without impleading her son, who is the defendant herein and to whom the suit property has been allotted in Ex.B.I deed of partition, either as a plaintiff or as a defendant. This is clear from the following observations of the learned Judge.

Either she (plaintiff) should have filed the suit along with her son Ramachandran (10th defendant) as plaintiff or she should have filed the suit against him and others saying that the inclusion of this property in the partition under Ex.B.9 was not proper. It will be open to the plaintiff to file a separate suit if she is so advised impleading all the parties (emphasis mine) who may be interested in the property". The pith and substance of the judgment of the learned Judge is that

the suit is bad for nonjoinder of necessary party viz: her son, the 10th defendant herein.

19. In order to conclude a plaintiff by a plea of res judicata it is necessary that the former decision must have been on merits of the question in issue. Where the prior suit has been dismissed on some technical ground without going into the merits of the questions raised, there can be no decision on such questions and therefore no res judicata. In *Abdulla Ashgar Ali Khan v. Ganesh Dass* A.I.R.1917 P.C 201, A executed a bond in favour of B for the amount found due by A to B on the dissolution of their partnership by a deed of dissolution. A sued B for cancellation of the bond on the ground of fraud. B pleaded that the suit for cancellation would not lie, the bond being based on the deed of dissolution. The suit was dismissed in second appeal without going into the merits, on the ground that the suit was not properly framed. B then sued A on the bond, who pleaded fraud. It was held by the Judicial Committee that the issue as to fraud was not finally decided in the prior litigation, the second appellate court having decided the case on other grounds and hence it was not barred by the rule of res judicata. The law on this matter has thus been stated the Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, :

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of nonjoinder of parties or misjoinder of parties or multeteriousness or on the ground that the suit was badly framed or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or Letters of Administration or Succession Certificates when the same is required by law entitling the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court-fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit

I therefore hold that since the suit has been dismissed on the technical ground or nonjoinder, the decision in the former suit cannot operate as res judicata.

20. It is then urged by Mr.M.R.Narayanaswamy, learned Senior counsel for the appellants that the learned Judge in dismissing the suit has set aside the findings of the court below with reference to the other issues and hence he must be deemed to have heard and finally decided all the other issues and he cannot, therefore, be held to have decided the other issues on merits, "Res judicata", observed Lord Remilly in *Jenkins v. Robertson*, (1867) L.R.1 H.L.117, "by its very words means a matter upon which the Court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion, res judicata signifies that the Court has, after argument and consideration come to a decision on a contested matter". There is

no such decision in the instant case. If the learned Judge has intended to decide the other matters on merits where was the necessity for him to refer the plaintiff to file a separate suit impleading all the parties who may be interested in the property as has been done by him? we can, therefore, safely hold that the learned Judge, who decided the second appeal, did not intend to decide other matters on merits and must be deemed to have intended to leave them open.

21. Even assuming that the learned Judge of this Court has decided the other matters on merits, the said decision cannot operate as *res judicata*, for, it was totally unnecessary to decide those issues when the suit was dismissed on the technical ground of nonjoinder. In order to attract the application of the principle of *res judicata*, the decision must be on an issue which is necessary and relevant for the purpose of the disposal of the suit. As pointed out by the Supreme Court in *Thiruvallanchuli Vaidyalingam Pillai Charities v. Vijayavalli Achi* (1966) 2 An.W.R. 48 S.C., a decision would operate as *res judicata* if it was necessary for the purpose of the case in which it was given. Where a Court, while dismissing a suit basing its decision expressly on a particular point, gives a finding against the plaintiff on another point in order to prevent a remand, in case the Appellate Court should take a different view on the other point, or while dismissing the suit as not being maintainable gives a finding against the plaintiff on another issue, the decision of the case cannot be said to be based upon the finding so given and the finding cannot, therefore, operate as *res judicata* (vide *Sinnasami Chettiar v. Aligi Koundar* AIR 1924 Mad. 893 and *Sri Sri Gopal Jew Thakur through Narendra Nath Mondal Vs. Radha Binode Mondal and Others*, .

22. I therefore find that the present suit is not barred by *res judicata* and answer the point against the appellants.

23. Point 5 - The plaintiff has in this suit sought a declaration of her title after cancelling the deed of partition dated 22.8.65, entered into between her husband, the 9th defendant and her son the 10th defendant. It is urged by Mr.M.R. Narayanaswamy, learned senior counsel for the appellants that the relief of cancellation of a document falls under Article 59 of the Limitation Act of 1963 corresponding to Article 91 of the Limitation Act of 1908 and the period of limitation is three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him and as the plaintiff admittedly had knowledge about this deed of partition when the defendants 1 to 8 filed their written statement in the earlier suit in O.S. No. 1499 of 1968, the relief for cancellation is barred by time. The word "cancellation" implies that the person suing should be a party to the document sought to be cancelled. Strangers are not bound by the document and are not obliged to sue for cancellation. In fact, he cannot get it set aside or cancelled. Thus, where B executes an instrument in favour of C, A, who is not a party to it or who does not claim through either B or C, cannot get it set aside or cancelled for the simple reason that as between B and C it may be valid and binding instrument. In *Unni v. Kunchi Amma* ILR Mad. 26 a Bench of this Court quoted with approval, the

following observations of Turner C.J., and Kernan, J., in a previous unreported case in *Raman v. Valli Animal*, S.A. No. 270 of 1880:

If a person not having authority to execute a deed or having such authority under under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for, it cannot be used against them. They may treat it as a non-existent and sue for their right as if it did not exist]

But A may sue, if the instrument is likely to cast a cloud upon his titles, to get a declaration u/s 34 of the Specific Relief Act, 1963 that the instrument is not binding upon him and cannot affect his interests. He is, however, not bound to sue for such a declaration and his failure to do so will not affect the enforcement of his rights. Even if in a suit to enforce such rights he prays for setting aside or cancelling such an instrument, the prayer will be regarded as merely incidental to the reliefs which he claims.

24. Even if the plaintiff is a party to the document but impugnes it either as sham and nominal or void ab initio it has been held that he need not set aside the document and if he includes any such prayer, it will only be ancillary to the main relief and Article 91 of the Limitation Act of 1908 Corresponding to Article 59 of the Limitation Act of 1963 will not apply. In *Pethar Perumal Chetty v. Muniyandi Servai*, 351 A. 98, the plaintiff sued for possession of certain property in respect of which he had executed what purported to be a deed of sale in favour of the defendant and alleged in his plaint that the transaction was merely a nominal instrument not intended to be operative. It was contended that the Article applicable to such a suit was this Article. Their Lordships of the Judicial Committee of the Privy Council observed:

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance being an inoperative instrument, as in effect, it has been found to be, does not bar the plaintiffs right to recover possession of his land and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th and not 91st Article in the second Schedule to the Act, is, therefore, that which applies to the case and the suit has consequently been instituted in time

In *Mt. Aisha Begam Vs. Mt. Kundan Jan and Others*, , it was held that when possession is claimed of certain property which had been transferred by the plaintiff by a document which is void, then, even though a relief may be added for the setting aside of the document, that relief is merely ancillary to the main relief for possession and it is not necessary to have the document set aside before the plaintiff is entitled to claim possession and in those circumstances Article 91 of the Limitation Act of 1908 would have no application in the case. The plaintiff is entitled to bring the suit within 12 years. The case of the plaintiff before me is stronger still, for, she is not even a party to the deed of partition which is sought to be set aside. She can ignore the said deed, treat it as non est

and sue for possession. The relief for cancellation of the deed asked for by her is not merely ancillary but unnecessary, redundant and a surplusage. Article 59 of the Limitation Act of 1963 can have no application to this case. The proper Article applicable is Article 65 of the Limitation Act of 1963 corresponding to Article 144 of the Act of 1968 and the suit filed in 1976 is well in time. The point is held against the appellants.

25. Point 6: The next contention advanced on behalf of the appellant is that the relief for cancellation of Ex.B.I deed of partition is barred under Order 2, Rule 2, C.P.C., which reads thus:

Suit to include the Whole Claim

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Relinquishment of part of Claim.

(2) 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. Omission to sue for one of several reliefs.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any or such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted.

EXPLANATION:- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Relying under Order 2, Rule 2(3) it is urged that as the plaintiff had omitted to seek the relief of cancellation in the earlier suit without the leave of the Court is not entitled to sue for the said relief in the present suit. In dealing with point No. 5, I have pointed out that the relief of cancellation of Ex.B.I deed of partition is merely ancillary to the main relief for possession, it is unnecessary, otiose and redundant and to such a case Order 2, Rule 2, C.P.C. can have no application. Further, in order to invoke Order 2, Rule 2, C.P.C., all the reliefs must be in respect of the same cause of action. The cause of action for the relief of declaration of title and possession sought for by the plaintiff in the earlier suit is the denial of the plaintiffs title by the first defendant in his reply notice under Ex.B.10, dated 20.8.65 in which there is no reference to Ex.B.I deed of partition and the trespass committed by defendants 1 to 8, whereas the cause of action for the relief of cancellation of Ex.B.I is the execution of the deed under Ex.B.I by defendants 9 and 10 and the acquiring of the knowledge of the same by the plaintiff during the pendency of the earlier suit by means of the written statement filed therein by defendants 1 to 8. They do not arise out of the same cause of action. There is, therefore, no scope for the application of Order 2, Rule

2. Again if the right to relief in respect of which further suit is brought did not exist at the date of the former suit, then this rule does not apply as pointed out by a Bench of the Punjab and Haryana High Court in *The Haryana Co-operative Sugar Mills Ltd., Rohtak Vs. Joint Hindu Family Firm Styled as Gupta Drum Supply Company*, . It is the definite case of the plaintiff that she became aware of Ex.B.I. deed of partition entered into between her husband and her son only through the written statement filed by the defendants 1 to 8, in the earlier suit and hence her right to sue for cancellation of the deed of partition has arisen only subsequent to the institution of the earlier suit. On this ground also Order 2, Rule 2, C.P.C., cannot be invoked. This point is found accordingly.

26. Point 7:- The plaintiff has claimed mesne profits from fasli 1375 when the suit land was lying fallow because of the hostile attitude of defendants 1 to 5. Normally the period of limitation for claiming mesne profits is only three years. But, the plaintiff herein claims the benefit of Section 14(1) of the Limitation Act in view of the pendency of the earlier suit. Section 14(1) reads thus:

In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision against the defendant shall be excluded where the proceedings relate to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

As already held by me, the earlier suit in which the plaintiff succeeded in the trial Court and in the first appellate Court, has been dismissed in the second appeal on the ground of nonjoinder. This is a cause of like nature with defect of jurisdiction and the plaintiff is, therefore entitled to the benefit of Section 14(1) of the Limitation Act of 1963. When the period of pendency of the earlier suit and the appeals there against is included, the claim of the plaintiff is in time. The point is found in favour of the plaintiff-first respondent.

27. In the result, the appeal fails and is dismissed with costs.