

JUDGMENT

Hari Nath Tilhari, J.

1. This is the defendant's Second Appeal under Section 100 of the Code of Civil Procedure, for short 'C.P.C.', challenging the Judgment and Decree dated June 23, 1984 delivered by 2nd Additional Civil Judge, Belgaum, in Regular Appeal No. 63/1983, dismissing the appeal and confirming the Judgment and Decree of the Trial Court dated April 20th, 1982, delivered and given by the Principal Munsiff, Belgaum, decreeing the plaintiff-respondent's claim for possession and mesne profits in regular suit (O.S.No. 291/1971 - Roasene Jerome D'Souza v. Bhagwandas).

2. The facts of the case in brief are that the plaintiff-respondent filed the above mentioned suit on 7.9.1971, against the defendant -appellant for decree of possession over the suit property as described in para-1 of the plaint and for a decree of mesne profits at the rate of Rs. 35/- per mensem from the date of suit till the delivery of actual possession.

The plaintiff's case as per averments made in the plaint has been that the Plaintiff-respondent purchased house property measuring 1392 square feet for a sum of Rs. 7000/- on 27.7.1970, from Chandrakumar Balaji Kamble and Venkubai Balaji Kamble. The property in the plaint has been described in paragraph-2A, as House No. 5 bounded as below:

East - Cantonment Public Road,

West - Wall of the House No. 5 and beyond that (Cantonment) House No. 4,

North - Cantonment Road and South - Cantonment Public Road

3. The Plaintiff-Respondent claimed title to the property as mentioned just above on the basis of the registered Sale Deed 27.7.1970 and claimed to have purchased the same for a sum of Rs. 7000/- from the above mentioned vendors, that is, Chandrakumar Balaji and Venkubai Balaji Kamble. According to the case of the vendors, the house belonged to them. It is mentioned in the plaint that originally the house in dispute belonged to Jainuma, widow of Sultansaheb and one Mohamad Mirza Saheb mortgaged the property with possession for a period of 5 years for a sum of Rs. 2200/- under a possessory Mortgage Deed dated 30.11.1944, in favour of Venkoji Balaji Kamble and that they sold the same for Rs. 4000/- to possessory mortgagee under a duly registered Sale Deed dated 30.4.1959. The said Venkoji Balaji Kamble had mortgaged the whole house for a sum of Rs. 1000/- in favour of the Pioneer Co-operative Urban Bank Ltd., Belgaum under a Simple Mortgage Deed dated 15.4.1963, which came to an end in the month of February 1965. Thereafter, the plaintiff made purchase of the abovementioned House No. 5, situated at Mutton Butcher Street, Camp Belgaum on 27.7.1970.

According to the plaintiff's case, the vendors of the plaintiff transferred their rights, title and interest in House No. 5, including the suit property by registered Sale Deed without making any alteration in the boundaries. The defendant-appellant had no concern at all with the suit property nor had he got any concern with House No. 5 or any portion thereafter. No doubt, in a part of the property, that is, House No. 5, defendant is in occupation and that part had been indicated by letters ABCDEF with approximate measurements in the sketch. The defendant was a tenant of plaintiff's vendor Venkoji Balaji Kamble paying Rs. 9/- per mensem and that his tenancy was terminated by a notice dated 15.1.1965, issued by Counsel on behalf of Sri Venkoji Balaji Kamble, the father of Chandra Kumar Venkoji Kamble, the plaintiff's vendor. That after the purchase of the suit house, plaintiff also gave a notice to the defendant to quit the suit premises, but, in reply, the defendant set up an agreement alleged to have

been entered into and executed by deceased Venkoji Balaji Kamble. The defendant is denying the title of the plaintiff as well as his vendors, as he has alleged that he has taken a written agreement for sale from plaintiff's vendor, in the circumstances mentioned above, denying the defendant's possession as a tenant arid on the basis that he is a trespasser, the plaintiff claiming herself to be the owner, based her suit on a cause of action to the effect that the defendant is in possession of the suit property as a trespasser.

4. The defendant filed the written statement and denied the plaintiff's case. The defendant asserted that it is wrong to say that Chandrakumar Venkoji Balaji Kamble and Venkobai, sold the property to the plaintiff. Even if the plaintiff proves any sale of the property in dispute, the vendors of the plaintiff, namely, Chandrakumar and Venkobai did not have any right or locus standi to the exclusion of the defendant to execute the Sale Deed in respect of the suit property. The defendant's further case has been that the House in suit has been the joint family property of the deceased Venkoji Balaji and the present defendant, who is his cousin brother, and that the property was purchased by and out of the joint family funds and property of Balaji Kamble and Chandrakumar Balaji had no exclusive right over the suit property to execute the sale deed in respect thereof as the present defendant has also got right, title and interest therein. It is pleaded that the Sale Deed dated 27.7.1970, has not been executed by Sri Chandra Kumar, but, even if it is proved to have been executed by him it is ineffective so far answering that defendant's share and interest is concerned as Shri Chandra Kumar Balaji, who could not sell the property in dispute as it is joint family property. The defendant has not been in use and occupation of the part house in Suit. That he has been in use and occupation of the part house which is in his use and occupation in his own right as a co-owner and coparcener. The defendant denied the plaint allegations to the effect that the defendant was a trespasser or was an unauthorised occupant of the portion of the House in suit. In the alternative, it has been pleaded that even assuming that defendant is not the co-owner of the property in suit, the defendant, having been in possession of the suit property for more than 30 years in his own right, has perfected his title as owner by adverse possession. That the suit House was purchased out of the joint nucleus provided by the family business in the name of Venkoji Balaji, the eldest son of Chote Balaji Rao and therefore, defendant claims that he is a joint owner of the house in suit. The defendant denied the plea that he is the tenant. Even without admitting, if it be taken that the House in suit belonged exclusively to Venkoji Balaji, it was alleged that Venkoji Balaji Kamble died 6 years after coming into force of Hindu Succession Act and he left behind himself, two sons and 3 daughters. It has specifically been stated that Venkoji Balaji had died sometime after coming into force of the Hindu Succession Act, 1956. It is admitted in the written statement that Chandrakumar Balaji was the only major son, but, it was asserted that Chandrakumar has not been the guardian of the property of the minor children of deceased Venkoji Balaji, as such, Chandrakumar could not transfer the entire house including rights, title and interest of the minor children of the deceased Venkoji Balaji. So, the sale of the house in suit in plaintiff's favour was illegal and void to the extent of the shares of the minor children, therefore the plaintiff is not and cannot be the absolute owner of the house in suit. The plaintiff has wrongly filed the suit for recovery of possession of the entire House referred to above. The defendant has also taken the plea that in the Sale Deed, which has been executed in favour of the plaintiff, the property sold has been described by the area as 928 square feet and not 1392 square feet.

5. On the basis of the pleadings of the parties, the Trial Court, that is, the Principal Munsiff, Belgaum, framed the following issues including the additional issues framed later on:

ISSUES

1. Does plaintiff prove that her vendors were the only owners of the suit house?

2. Whether plaintiff proves that defendant was tenant of her vendors at monthly rent of Rs. 9/-?

3. To what relief is the plaintiff entitled to?

The additional issues framed by Court below read as under:

ADDITIONAL ISSUES

4. Does the defendant prove that the suit house is a joint family property and as such he has a share in the suit house?

5. Does the defendant prove that the sale in favour of the plaintiff by Chandrakumar is valid only to the extent of his share and does not bind the share of other co-sharers, and as such plaintiff is not the owner of the entire house?

6. Whether the defendant proves that the suit is not maintainable for want of notice under Section 14A of the T.P. Act as contended?

7. Does the plaintiff prove that she purchased the house bearing No. 5 measuring 1392 sq. ft. under the registered sale deed dated 27.7.1970 as alleged?

8. Does the defendant prove that he has perfected his title to the suit property adverse possession as contended?

9. Whether the plaintiff proves that she has purchased the entire house No. 5 in the camp area including the suit property and that the measurement of the area is wrongly mentioned?

6. After a perusal of the evidence on record, the Trial Court recorded the following findings.-

1) That the vendors of the plaintiff were the only owners of the house being the legal heirs of Venkoji Balaji.

2) The defendant had failed to prove that Chandrakumar Balaji had sold interest to the extent of his share and not that of others.

3) The Trial Court took the view that the plaintiff's vendor being the Manager or Kartha of the Joint Hindu family would alienate the property so as to bind the interest of the minor coparceners and these powers are not adversely affected by the provisions of Hindu Minority Guardianship Act. The Trial Court further held that plaintiff has failed to prove that the defendant was tenant on behalf of previous owner or the plaintiffs of suit of property or of any portion thereof on monthly rental of Rs. 9/-.

4) He further held that the defendant is a trespasser and the suit which has been filed against him, has been filed treating him as a stranger, therefore, there is no question of application of Section 114A of the T.P. Act.

5) Plaintiff has also proved that he has purchased the entire house and that the measurement as mentioned in sale deed, i.e., Ex.P2, is wrong.

7. As mentioned earlier, dealing with Issue No. 5, the Trial Court has held that defendant is a trespasser, but, defendant has failed to prove that he has perfected his title to the suit property by adverse possession.

Feeling aggrieved of the Judgment and decree of the Trial Court, the defendant-appellant preferred a Regular Appeal No. 63/1982. The Additional Civil

Judge, Belgaum, delivered Judgment and decree dated June 23, 1984, dismissing the defendant's appeal and thereby he confirmed the Trial Court's decree as passed in O.S.No. 291/1971. The Lower Appellate Court held that plaintiff has proved that she has become the owner of the house purchased by her vide registered Sale Deed dated 27.7.1970 of the entire house No. 5 measuring 1392 square feet and the measurement given in the Sale Deed is wrong. He further held that defendants have failed to prove that the Sale Deed does not bind the co-sharers, and, that Section 114A of the T.P. Act did not apply to the facts of this case and therefore, the suit has been maintainable even without notice under Section 114-A of Transfer of Property Act. The Lower Appellate Court confirmed the finding of the Trial Court to the effect that defendant had failed to prove that he has acquired any title to the property in suit by adverse possession. He held that the defendant failed to show that Venkoji Balaji and defendant himself had constituted the joint family and Venkoji Balaji was the eldest member of the family. It appears that Chandra Kumar Balaji had sold his house, as he has no other source of income to maintain the family which consisted of five members, that is, two brothers and three sisters and further there was need of money for payment and disbursement of expenses of his education. Therefore, the sale deed was a valid sale deed. The Court also took the view that as the identification and description of the property in the Sale Deed, by the boundaries has been specific and exact, therefore, the boundaries have to prevail. It has also been found that the defendant-appellant has not been a tenant, so there is no question of application of Section 114-A of the Transfer of Property Act. The Court took the view that the suit has been based on title. With these findings after having held that the defendant failed to prove that he has acquired title over property in suit or in respect of any part house in suit by adverse possession, the Lower Appellate Court confirmed the Trial Court decree.

Feeling aggrieved by the Judgment and decree of the Lower Trial Court, and the Lower Appellate Court confirming the Trial Court decree, the defendant has come up in this Second Appeal under Section 100 of the Civil Procedure Code.

8. During the pendency of the Appeal, the appellant has moved an application for permission to urge the following grounds as well, apart from the grounds taken in the memo of appeal through I.A.IV:

1. When it is undisputed that plaintiff's vendor under Ex.P2, was one of the five heirs of deceased Venkoji Balaji, whether only one heir (one co-owner) could maintain a suit for eviction based on title?

2. When defendant was a tenant, whether suit was maintainable in the Civil Court?

9. Sri. K.I. Bhatta, learned Counsel for the appellant very fairly submitted that as regards the findings recorded on the questions whether the defendant-appellant and Sri Venkoji Balaji constituted Joint Hindu family and whether the property in -dispute was the joint family property or not being the findings of fact cannot be challenged at this stage, simply on the ground of appreciation and misappreciation of the evidence and he is not challenging the said findings. That finding recorded on the question whether the defendant-appellant has acquired any title by adverse possession is also a finding on fact, Shri Bhatta submitted that he is not going to challenge the same as it does not come within the frame-work of law declared by Supreme Court under Section 100. That the defendant is not a tenant, but, he is a trespasser and therefore the question that the suit is barred by Section 114-A of the Transfer of Property Act also does not arise. I must appreciate the fairness with which Shri Bhatta has argued his client's case. His main submissions have been that the plaintiff did not acquire title to the entire property in suit in view of the fact that the Sale Deed mentions an area of 928 sq. feet and not 1392 sq.ft. as the area or description of property. So the finding to the contrary recorded by Courts (Trial and Appellate) below is erroneous in law. He further submitted that

taking the findings as they are, Venkoji Balaji was the exclusive owner of the property in suit and on Venkoji Balaji's death, all his heirs and legal representatives, namely, two sons and three minor daughters inherited the property. Therefore, Chandrakumar Balaji could transfer his own interest or share only and the Courts below incorrectly held that the plaintiff's vendor could legally transfer the entire property in dispute. He further developed his arguments that in view of this admitted position, plaintiff did not become the full owner of the property on the basis of Sale Deed dated 27.7.1970 and the plaintiff's suit for possession against defendant was not maintainable and in any case without impleadment of other co-owners of property in suit by plaintiff's vendors, Chandrakumar Balaji, namely, the second son and the three daughters of the deceased Venkoji Balaji, as have been indicated in the additional written statement and as such, the plaintiff's suit is liable to be dismissed. The second contention of Sri Bhatta, learned Counsel for the Appellant is to this effect that defendant has been a tenant of predecessor-in-title of the plaintiff, as such, the plaintiff's suit was not entertainable by the Civil Court and therefore, the decree as passed by the Trial Court and as affirmed by the Appellate Court is without jurisdiction. He submitted that in view of the provisions of Section 11 of the Hindu Minority and Guardianship Act a person acting as guardian defacto is not entitled to make transfer of the interest of the minors. Therefore, Chandrakumar Balaji could not validly transfer the shares of the minors concerned. In this view of the matter, Sri K.I. Bhatta submitted that as other heirs of Venkoji Balaji had not been impleaded in the suit as parties one way or the other, the suit was bad and not maintainable and decree passed by Courts were illegal and null and was liable to be set aside. In support of his contentions Shri Bhatta made reference to Decision of this Court in the case of RAJABIBI AND ORS. v. AMEERALI AND ANR., 1974(1) KLJ 320 and to the Decision in KANAKARATNAMMAL v. LOKANATH MUDALIAR, as well as to Decision of Kerala High Court in B. VALSALA v. SUNDARAM NADAR BHASKAR., AIR 1994 Kerala 154

10. On behalf of the respondent Sri U. Lakshminarayana Rao, Senior Advocate assisted by Sri M. Shashidar and Sri Vignesh, submitted that defendant-appellant, being a trespasser and having been so found as well by the Courts below, is not entitled to raise such a plea, particularly when the plaintiff-respondent is proved beyond doubt to be the owner of the property in dispute. Sri Rao submitted that the plea of the defendant that the suit is bad for non-joinder of certain parties should not be permitted to be raised by the defendant-appellant at the stage of second appeal, particularly, when no issue has been pressed nor any argument in respect thereof has been advanced either in the Trial Court or in the first Appellate Court. It is well settled principle of law that in such a case it should be deemed that the plea had been waived off. When, the Courts below, after the appreciation of the evidence on record oral and documentary, have come to the conclusion that Sri Chandrakumar had transferred this property and plaintiff had purchased the property from Chandrakumar Balaji and the property has been sold in favour of the plaintiff for legal necessity and for the maintenance of the family members as well as their education particularly where, the family consisted of all the heirs of Venkoji Balaji, the Sale Deed cannot said to be illegal and therefore the plaintiff-respondent acquired title under that Deed. He further submitted that in such a case it is not the right of the trespasser to challenge the sale transaction. It may be said to be open to the other co-owners if any as alleged by the defendant-appellant, that is, Venkoji Balaji's other heirs, they so desire to challenge that transaction and its validity but it is not open to the stranger i.e. trespasser to challenge the validity of Deed on this ground. He further submitted that the transaction cannot be said to be void ab initio. That the appellant's Counsel may be correct in making the submission that in case, where one of the admitted co-sharers files a suit and claims property to be belonging to him exclusively and to the exclusion of others denying the claim of other co-owners, who are either admittedly the co-owners or who are proved to be co-owners, then those co-owners should be impleaded either as plaintiff or as co-defendants. But, where, there is a claim of decree for possession by

ejection against the trespasser only and there appears no claim to have been made against co-owners, the suit cannot be thrown away on the plea that co-owners have not been made parties. That expression owner means and includes a co-owner and a co-owner is owner along any other persons and in a matter between a co-owner and a trespasser, a co-owner is owner every inch of the land or property, and is very much entitled to dispossess the trespasser, as such he is entitled to file a suit for possession against trespasser and so, the suit cannot be thrown on this ground. Sri Rao, with reference to the argument of the learned Counsel for the appellant regarding Section 11 of the Hindu Minority and Guardianship Act submitted that firstly if his first proposition is accepted regarding right of a co-owner's right to file the suit against a trespasser, it may not be very necessary to go into that question at this stage. Sri Rao further submitted that no doubt, Section 11 of the Hindu Minority and Guardianship Act, per se provides that a person, simply on the ground of being a defacto guardian cannot deal with the property of the minor. Every expression used in this Section 11 has got some meaning and some purpose with which that has been used. He put forth the cases, where, a de facto guardian in special circumstances of the case is compelled to make transfer of the property of the minor for the education of the minor or the like, that may not be a case of alienation simply or merely on the ground of being defacto guardian. Shri U.L. Narayana Rao invited my attention to Section 12 of the Hindu Minority and Guardianship Act, and submitted that if there is a joint family and joint family property, the minor has got an undivided interest, the Kartha of the family may be father or the elder brother, he can dispose of the property and he is entitled to dispose off the whole property including the undivided interest of the minor. In support of his contention, he made a reference to the Decision of this Court in the case of KAMALAMMA v. RAMABHADRA GUPTA, . Sri Rao, further made a reference to the Division Bench Decision of KASTURI LAXMIYAMMA v. S. VENKOBA RAO, AIR 1990 AP 440.

11. Shri Rao further submitted that in view of the provisions of Section 99 of the Code read with Order 1 Rule 9, the law is that no suit is to be dismissed merely by reason of non-joinder of parties. He submitted that in the present case even for a moment if it is taken that there has been a non-joinder of the heirs, the present defendants could at the most be said to be proper parties, and not necessary parties, as such, this ground should not be entertained and decree need not be interfered with or reversed or modified. That in reply to the submission of the appellant's Counsel that entire House including the disputed property has not been sold in favour of the plaintiff-respondent by the vendors and the Court below have wrongly held that property measuring 1392 sq. ft. instead of area of 928 sq.ft., learned Counsel for the respondent Sri Rao submitted that there was no error committed by Courts below and the Courts below have followed the correct principle of law while deciding the question of identity and extent of property sold by applying the doctrine to the effect that in case of description of the property in suit by area and the boundaries if there is a conflict between the two, the description by boundaries is to prevail over that area. In this connection, reliance had been placed on behalf of the respondent on Privy Council's Decision in PALESTINE PUPAT CO-OPERATIVE SOCIETY v. GOVERNMENT OF PALESTINE, AIR 1948 PC 207 as well as on a Decision in SHIV DHANASINGH v. SACHINDRA KUMAR, AIR 1963 SC 18. Shri Rao has submitted that in this view of the matter the Second Appeal deserves to be dismissed.

12. I have applied my mind to the above arguments of Counsel for both the parties. That as regard the finding of the Courts below to the effect that property that has been sold is the same as claimed by plaintiff in plaint and description by area is wrong and that the Courts below have rightly held that in case of conflict of description of property by area and by boundaries, the description by boundaries is to prevail, Shri Bhatta submitted that in view of the law laid down by Privy Council in the case of Palestine Pupat Co-operative Society v. Govt. of Palestine and in the case of Shiv Dhansingh v. Sachinder Kumar by Supreme Court on subsequent thought he found that finding cannot be challenged with force. In my opinion, he has rightly and fairly acted in

submitting that no serious challenge can be made to the finding of Court on the question of identity of property sold as it is well settled that in case of description of property by area and boundaries and there being conflict in the two, the description of property by the boundaries is to prevail, if boundaries are specific and well defined. Thus considered the finding of Courts below is upheld.

13. That as regards the plea of non-joinder of alleged co-owners, the law has clearly been laid down in Section 99 of the Code, with reference to the exercise of jurisdiction at the Appellate stage and the law in that context has been laid down under Order 1 Rule 9 of the Code as well. Before I proceed further, it will be just and proper to refer to Section 99 of the Code. Section 99 of the Code reads as under:

"99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Provided that nothing in this section shall apply to non-joinder of a necessary party."

14. Order 1 of the Code deals with the parties to the suit. Order 1 Rule 9 reads:

"No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Provided nothing in this rule shall apply to non-joinder of a necessary party."

14A. A bare reading of Section 99 as well as Order 1 Rule 9 reveals the law to the effect that technical objections relating to misjoinder or non-joinder of parties or cause of action are not to be allowed to have their play to non-suit a person or to deny a claim in the suit and that the right inter se the parties to the litigation have to be decided. That the matter in controversy with regard to the rights of the parties, actually before the Court, has got to be decided. Similar is the principle with the Appellate stage that no decree which has been granted shall be reversed or be modified or varied substantially in a case nor the case shall be remanded for trial afresh, afresh simply on the ground of non-joinder or misjoinder of parties which does not affect the merits or jurisdiction of the Court.

15. A reading of Section 99 C.P.C. per se reveals certain exceptions, such as the case where the non-joinder is of a nature which is likely to affect the merits of the case and the jurisdiction of the Court to entertain the suit or the cases covered by the Proviso, where, the ordinary principle of Section 99 will not apply, namely, the case of a non-joinder of a necessary party. Keeping the basic principles of law under Section 99 of the Code in view it has to be considered whether the principles of law enshrined under Section 99 applies and debars interference with the decree of the Courts below in this case. I may make it clear that there has been no issue regarding non-joinder of necessary party and there has been no discussion of the issue by the Trial Court nor has this plea been raised or pressed before lower appellate Court. I might have rejected this contention, but, having heard the learned Counsel of the parties on the merits of this plea, I think it proper to proceed to deal with this plea. Otherwise, there is the law to the effect as laid down in MUDDANNA VEERIAH v. MUDDANNA ADANNA, AIR 1930 PC 18, by Their Lordships of Privy Council to the effect as under:-

"It is true that Limitation was mentioned in Adanna's Written Statement and in his grounds of appeal, but, before the trial Judge, no issue was directed to

bear upon the question, nor does the point appear to have been taken at the bar during trial."

17. As I have mentioned earlier, the detailed arguments have been advanced on both the sides. The plaintiff allegations do not disclose that she is the exclusive owner or that there are any other persons entitled to that property. The plea of the defendant that he has been the co-owner with Venkoji Balaji has been rejected holding that defendant was not the co-owner,

18. The defendant further stated in his written statement that after Venkoji Balaji died, he left behind him two sons Chandrakumar Balaji, aged about 23 years and Venkatrao aged about 8 years along with three daughters Venkubai Balaji, and Pramila, aged 17 years, Dhanalaxmi aged about 16 years and Padma aged about 11 years and amongst them only Chandrakumar was major and he could not transfer the entire house including the right, title and interest of minor children of deceased Venkoji Balaji Rao. Therefore as per written statement the sale made in favour of plaintiff is not valid and plaintiff cannot be the absolute owner of the entire House in Suit bearing No. 5 as mentioned above and she cannot file suit for recovery of possession of entire suit House.

19. In the Trial Court, the issue that was passed was to the effect as under:

Does the defendant prove that the sale in favour of the plaintiff by Chandrakumar is valid only to the extent of his share and does not bind the share of other co-sharers, and as such plaintiff is not the owner of the entire house?

20. The Lower Appellate Court has observed that as per Hindu Law, the Manager or the eldest member of the family is entitled to alienate the family property and it is binding on other co-sharers. In this case, the transfer is made under Sale Deed Ex.P.2. In clear terms, P.W.5 Mohanlal Balaji has stated that Chandrakumar has sold his house for family necessity and education, as he had no other source of income for the maintenance and there were five members in his family. P.W.5 is the brother of Chandrakumar Balaji and Venkobai, therefore, P.W.5's evidence is fully reliable. Thus, the Lower Appellate Court recorded the finding to the effect that the property in dispute was transferred by Chandrakumar – the eldest son of Venkoji Balaji Rao for the family necessity of five members altogether.

21. Whether this finding will be binding on this aspect of the matter? It is well settled that findings are ordinarily binding on the parties to the litigation and not on others. Therefore, plaintiff became the owner of the property. Whether he became the sole owner or co-owner, it is well settled that decree would not be reversed simply on the ground of non-joinder of a proper party. The test of necessary party is that in whose absence no effective decree could be granted at all. In a suit for possession, the plaintiff has to prove his title, particularly, against the trespasser. If the plaintiff fails to prove his interest in the property his suit has to fail and he will not be entitled for a decree. Unless there is a partition or division of the property, every co-owner is a owner of every inch and every particle of that property and is entitled to enjoy that property free from any encumbrance or stranger or trespasser. When I do so observe regarding co-owner, I find support for this view of mine from the Decision of Their Lordships of Supreme Court in the case of VISHWANATHA PILLAI v. SPECIAL TAHSILDAR FOR LAND ACQUISITION, AIR 1991 SC 1986 @ 1968 where, Their Lordships of the Supreme Court have been pleased to observe as under:

"It is well settled that one of the co- owners can file a suit and recover the property against a stranger and decree would enure to all the co-owners. It is equally well settled law that no co-owner has a definite right title or interest in any particular item or a portion. On the other hand he has right title and interest in every part and parcel of joint property or co-parcenary

property under Hindu Law by all coparceners. In KANTA GOEL v. B.P. PATHA this Court upheld an application by one of the

co-owners for the eviction of a tenant for personal occupation of the co-owners being maintainable. The same view was reiterated in Shri Ram Parischa v. Jagannath [1977(1) SCR 395 : 1976 SC 23351 and Pal Singh v. Sundar Singh (dead) by LRs. [1939(1) SCR 67 : 1989 SC 758]. A co-owner is as much owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property is not his own. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. That position will undergo a change only when partition takes place and division was effected by metes and bounds."

22. This being the position of law, as regards trespassers, I am of the opinion that even one co-owner can file a suit for decree of possession. He cannot be said to be a part owner or fractional, until division of the property has taken place and that person denies the title of others expressly. Against a trespasser, the co-owner cannot be said to be a necessary party, because one co-owner as owner of the property may be deemed to have instituted the suit for the benefit of other co-owners against a trespasser. Prima facie it appears to me, that the transfer has been made for the benefit of all the heirs of Venkoji Balaji Kamble in the present case, by Chandrakumar and the plaintiff acquired title to the property in suit as a sole owner thereof vide Sale Deed dated 27.7.90 as held by two Courts below but this finding is confirmed in its scope with reference to the purpose of the suit. Even if the plaintiff be deemed to be co-owner as submitted by the appellant there is no doubt that even a co-owner is entitled to file the suit for possession against a trespasser. Therefore, the present plaintiff-respondent has got the right to file the suit against the trespasser and to obtain the decree for possession against him i.e. appellant.

23. The learned Counsel for the appellant placed reliance on a Decision in Rajabibi v. S. Ameer Ali and Anr., where Justice Malimath was pleased to observe after making a reference to another Single Judge's Decision of this Court in A.I.R. 1967 MYSORE 143, Shivanna Gowda v. Gangawwa, as under:

"It, therefore, follows that if one of the co-sharers instituted a suit for ejecting against a trespasser, repudiating the claim of the other co-sharers and claiming exclusive title in himself, such a suit would not be maintainable in the absence of the other co-sharers."

24. But, in that case a person claiming himself to be the exclusive owner had repudiated the title of his co-owners, then in that case, impleadment of the co-owner as a proforma defendant had been held to be necessary or proper. As I have mentioned earlier that if a person says that he is a owner of the property, even if he is co-owner, he is justified, in view of the law laid and observations made by the Supreme Court to the effect that a co-owner is as much owner of each particle of that property as others. If in a situation like the one where, the plaintiff does not know that there are other co-owners, it cannot be said that he is denying the title of other co-owners. In this view of the matter, the authority of Rajabibi's case is distinguishable from the facts of present case, where, really plaintiff claimed for a declaration that he is the owner of the suit property and in this case, the ownership of property in dispute has not been claimed expressly by plaintiffs-respondents to the exclusion of the co-owners if any. The plaintiff-respondent claiming his rights and title on the basis of Sale Deed dated 27.7.1970 simplicitor and has sought decree for possession as an owner against a trespasser as such the Decision in Rajabibi will not apply to non-suit the plaintiff-respondent.

25. In the case of Shivanna Gowda v. Garigawwa, it has been held that one co-owner can bring a suit for ejecting the transpasser from the property claimed by him as owner. The material observations in paragraph-5 may be quoted as under:

"5. There is a catena of decisions which have taken the view that one of the co-owners can bring a suit for ejecting a trespasser from the property owned by him and others either jointly or as co-owners, the basis being that he has a right to hold every inch of the joint property until a division takes place."

26. That another case relied on by the learned Counsel for the appellant, namely, Kanakarathnammal's case, is also distinguishable. A perusal of the facts of that case would show that His Lordship Justice Hegde observed that a claim in the suit had been made with respect of the properties by the plaintiff to the effect that the plaintiff was sole or exclusive owner of the same and that his brothers had no right in that property and that such a contention could not be upheld in the absence of other co-sharers.

27. Here, in the present case, that is not the case, because plaintiff claimed title on the basis of the purchase of property under the Sale Deed and filed the suit in the absence of knowledge of any co-owner. It cannot as such be said that she has made any claim adverse to any co-owner if any in the suit; instead in this case, the Court below has found that Sale Deed had validly been executed. So, the finding of the Courts below, I may observe herewith, are to be taken in the context of the parties to the case and not with respect to the other heirs as mentioned in the written statement. In this view of the matter, I am of the opinion that the suit cannot be thrown out on the ground that the co-owners have not been impleaded. It is not open to the defendant to resist in the name of others, the claim of title holder i.e. plaintiff respondent. I may refer to the Decision of the Supreme Court in the case of LAKSHMI SHANKAR HARISHANKAR BHATT V. YASHRAM VASTA (DEAD) BY LRS., , Their Lordships expressed as under:

"13. A careful reading of above clearly discloses that there is no clear averment as to who are the co-owners and what exactly is the nature of right claimed by them. A vague statement of this character, in our considered opinion, could hardly be sufficient to non-suit the appellant on the ground of non-joinder of parties. We are unable to comprehend as to how the trial Court had come to the conclusion that the executants of the sale deed dated 12.2.1968 could not pass a full title when itself points out that the shares of the other co-owners were not known. May be the appellant took the stand that it was not necessary to implead others but that does not mean the appellant is liable to be nonsuited. The stand of the appellant is consistent with his case that he has come to acquire the entire ownership of the suit property. Therefore, the Courts should have insisted on some material on record as to the existence of other co-owners and their rights pertaining to suit properties. In juxtaposition to revenue record, there must be some worthwhile evidence for the Court to conclude that there are other co-owners. Genealogical tree filed along with the written statement cannot point to the existence of co-owners without specific evidence in this regard. Such an evidence is totally lacking in this case. Therefore, we find it equally impossible to accept the finding of the High Court when it endorsed the view of the trial Court in this regard. Accordingly, we conclude that in the absence of a specific finding as to whether there are other co-owners and how they are necessary parties, the suit could not have been dismissed for non-joinder of necessary parties. On this conclusion, we think it is unnecessary to go into the legal aspect as to whether in the absence of other co-owners, one co-owner could maintain a suit."

28. In the Decision of Lakshmishankar H. Bhatt, just referred above, where the suit was for recovery of possession on the ground that the plaintiff had purchased the suit property under Sale Deed dated 12.2.1968 and in that connection, Their Lordships observed that the stand of appellant was consistent that he came to acquire the entire ownership of the house in suit.

29. If we apply this principle to the present case, it can be said that the plaintiff has claimed right of ownership of the property on the basis of the Sale Deed. So, there is nothing wrong on the part of the plaintiff-respondent in claiming to be the owner of the property. Thus considered in my opinion at this

stage plaintiff cannot be non-suited on the above ground nor decision of Courts below calls for any interference in this matter.

30. I must at the end, appreciate the fairness with which the learned Counsel for both the parties have presented their case.

Thus considered the Appeal, that is, the Regular Second Appeal deserves to be dismissed as having got no merits and is hereby dismissed. The decree of the Courts below are hereby confirmed. But, it is clarified that the finding regarding the transfer shall be confirmed and be read in the context of the parties to the litigation and not otherwise.

31. The learned Counsel for the appellant at this stage requested that he may be allowed time to hand over the vacant possession to find out some alternative accommodation.

32. The learned Counsel for the respondent submitted that if appellant is permitted to file a written undertaking to the effect that without any further objection, he will hand over the vacant possession of suit property to the plaintiff-respondent or his representative within a period of three months. Three months time is allowed to the appellant as a matter of human consideration to vacate the illegal possession. The written undertaking in the form of an affidavit shall be filed in this Court by the appellant by or before 18th of October, 1994 and for this period also appellant will pay the damages for use and occupation on the rate which may be awarded by the Courts below, so also the mesne profits which would be determined by the Court below within three months from the date of this Judgment

ORDER DATED 19.12.1994

If the written undertaking would have been filed the same would have been accepted. As it has not been filed so far, unless the same is filed at the later stage along with application for condonation of delay the order dismissing the Second Appeal shall remain operative. There is no need for further orders.