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possession. It was held that the decision in favour of the tenant plaintiff against the other tenant did not operate as *res judicata* in a subsequent suit brought by the landlord against the first tenant. The tests by which a nominal and a necessary party may be distinguished are laid down in *Ahmad Ali v. Najabat Khan* ⁽¹⁾, in which the Allahabad Judges followed the decision in *Ramchandra v. Narayan* noted above. There must be a conflict of interests among the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*. Where the question about the family being joint or divided had not been determined in the previous suit as between the defendants *inter se*, but simply as against the plaintiff who was a stranger, the decision did not operate as *res judicata* when one of the defendants sued the other on the ground that the family was joint—*Bhagwant Singh v. Tej Kuar* ⁽²⁾. This was also the view taken by the Madras High Court in *Ramanuja v. Narayana* ⁽³⁾.

On the strength of these rulings it seems clear that the District Judge very properly held that the decision in Gundabhat's suit No. 581 of 1896 did not preclude the respondent-plaintiff Narayanbhat from bringing his present suit against Balambhat and Gundabhat. We, therefore, confirm the order of the lower Court and dismiss the appeal with costs.

Order confirmed.

(1) (1895) 18 All., 65.

(2) (1885) 8 All., 91.

(3) (1893 & 1895) 18 Mad., 374.

APPELLATE CIVIL.

Before Mr. Justice Candy, Acting Chief Justice, and Mr. Justice Ranade.

VITHAI (ORIGINAL PLAINTIFF), APPELLANT, v. HARI (ORIGINAL DEFENDANT),
RESPONDENT.*

*Limitation Act (XV of 1877), Art. 91—Suit to cancel a document—
Cause of action.*

Where a plaintiff sought for the cancellation of a mortgage-bond and for possession of the mortgaged property, alleging that the mortgage was a sham transaction and that she, the plaintiff, had subsequently remained in possession and had only been dispossessed within three years before suit,

* Second Appeal, No. 800 of 1899.

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Held, that if the plaintiff's allegations as to remaining in possession were true, the period of limitation for the suit could not be computed from the date of the mortgage-bond as provided in article 91 of the Limitation Act (XV of 1877).

Janki Kunwar v. Ajit Singh(¹) distinguished.

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, Joint First Class Subordinate Judge, A. P., of Sátára.

Plaintiff had been the mistress of defendant. She alleged that on 21st December, 1889, she had executed to defendant a registered mortgage-bond purporting to mortgage her property for Rs. 1,000; that the mortgage was a sham transaction; that she had remained in possession of the property till 1895, when she was dispossessed by the defendant of two fields forming part of the property comprised in the mortgage.

This suit was filed in 1897 to recover possession of the fields and for a declaration that the mortgage-bond was void.

It appeared that in 1892 the defendant had brought a possessary suit in the Mámlatdár's Court against the plaintiff and certain tenants of the land, and had obtained a decree in July of that year. Defendant contended (*inter alia*) that the suit was barred by limitation.

The Court of first instance disallowed this contention and awarded plaintiff's claim.

On appeal, the Subordinate Judge, A. P., held that the suit was barred under article 91 of the Limitation Act (XV of 1877), which provides that a suit to cancel or set aside an instrument must be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. He, therefore, reversed the decision of the Court of first instance and dismissed the suit.

Against this decision plaintiff preferred a second appeal to the High Court.

M. B. Chaubal, for appellant.

N. G. Chandavarkar, for respondent.

CANDY, C. J. (ACTING):—The only question before us relates to limitation. Plaintiff, who had been the mistress of defendant,

(1) (1887) 15 Cal., 58.

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alleged that on 21st December, 1889, she had executed to him a registered mortgage-bond purporting to mortgage her property for Rs. 1,000; but the same was a sham transaction, no consideration or possession having passed. She remained in possession till 1895, when defendant wrongfully took possession of the two fields which were part of the property included in the mortgage-bond. Hence this suit to recover possession of the two fields and for a declaration that the mortgage-bond was void. The defence was that the mortgage was a real transaction accompanied with consideration and change of possession.

The Subordinate Judge in the Court of first instance found on the question of limitation, following the decision in the case of *Ikram Singh v. Intizam Ali*⁽¹⁾, that the limitation of twelve years was applicable; and on the merits he decided in favour of the plaintiff.

On appeal to the District Court the Subordinate Judge, A. P., summarily disposed of the case on the point of limitation, holding that the question before him was concluded by the Privy Council ruling in *Janki Kunwar v. Ajit Singh*⁽²⁾. He, therefore, held that the suit was barred under article 91 of the Limitation Act: also that it was barred as not being brought within three years from the date of the Mámlatdár's decree. A copy of this decree of the Mámlatdár was produced for the first time in the lower Appellate Court; and there has been no examination of the parties regarding the circumstances relating to that decree. It is dated July, 1892, and purports to be given in a possessory suit filed by the present defendant against the present plaintiff and certain tenants. A copy of the present plaintiff's deposition in that suit was also filed in the Court of first instance; but it is impossible from the record, as it now is, to say whether that was a *bond fide* suit for possession, or whether the then plaintiff as the registered mortgagee was merely the then first defendant's nominee in order to eject the tenants.

With regard to article 91 of the Limitation Act, it is clear that the Subordinate Judge, A. P., was mistaken in simply relying on the Privy Council case quoted by him. That was a case

(1) (1884) 6 All., 260.

(2) (1887) 15 Calc., 58; S. C. L. R., 14 I. A., 148.

in which the executant of the deed in question, which had been acted on from the date of execution, sued to obtain a cancellation of the same and to recover possession of the properties.

That is different from the present case, in which it is alleged that the mortgage-deed was not acted on, but that the plaintiff remained in possession of the property till 1895. There is no finding on this allegation of possession, and so it is impossible for us to come to a definite conclusion on the question of limitation. It is obvious that if plaintiff's allegations are correct, then a period of limitation of three years cannot run from the date of the execution of the document. Otherwise it would always be open to a sham mortgagee or vendee to wait for three years from the date of the execution of the document, and then with impunity he could seize the property, and the real owner of the property would be helpless (*Cf.* the remarks of Muttusami Ayyar, J., in *Sundaram v. Sithammal* ⁽¹⁾). Admitting that the plaintiff seeking to recover possession against an instrument executed by herself must first obtain the cancellation of the instrument, and that the three years' limitation enacted by article 91 applies, the period cannot be calculated from the date of the bond. But we are not in possession of the facts; and the Judge in the lower Appellate Court made no attempt to ascertain the facts. We must, therefore, reverse his decision and remand the appeal for a fresh decision. If necessary, the lower Appellate Court will call for further evidence. Costs to abide the result.

Case remanded.

(1) (1892) 16 Mad., 311 at p. 315.