

acting upon the belief that such representation was true, they gave the second defendant in adoption; and that the plaintiff then brought up the second defendant as her adopted son, and, as such, married him to the girl of her choice, and as her adopted son he, for years, performed funeral ceremony of her husband. Having so acted, she cannot now be heard to deny that the adoption was valid. We have been referred to the decisions in *Chitko v. Janki*(1) and *Ravji Vinayakrav Jaggannath Shankarsett v. Lakshmbai*(2), in both of which it was held that the conduct of the person who actively participated in the adoption estopped him from disputing the validity of the adoption. It seems to us that this is just such a case as section 115 of the Evidence Act was framed to meet, and we are unable to assent to the argument of the appellant's pleader that estoppel only refers to cases of contract.

KANNAMMAL
v.
VIRASAMI.

This second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

SUBBAN (DEFENDANT No. 1), APPELLANT,

v.

ARUNACHALAM (PLAINTIFF), RESPONDENT.*

1892.
April 13.

*Transfer of Property Act—Act IV of 1882, s. 85—Parties to a mortgage suit—
Objection in written statement as to non-joinder.*

In a suit by a mortgagee against two of his three mortgagors, the defendants objected in their written statement that the suit was bad for non-joinder of the third mortgagor, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagor, as a witness, renounced interest in the greater part of the mortgage premises. On second appeal:

Held, that the suit should be remanded to the Court of First Instance for disposal after joinder of the third mortgagor and the subsequent encumbrancers.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in appeal suit No. 661 of 1890,

(1) 11 Bom. H.C.R., 199.

(2) I.L.R., 11. Bom., 381.

* Second Appeal No. 1477 of 1891.

SUBBAN
v.
ARUNACHA-
LAM.

confirming the decree of K. Rangamannar Ayyangar, District Munsif of Dindigul, in original suit No. 336 of 1890.

Suit to recover principal and interest due upon a mortgage, dated 17th October 1885 and executed to the plaintiff by the defendants, Nos. 1 and 2, and their brother, Lakshumanan Chetti. The plaintiff alleged that Lakshumanan Chetti had paid a sum of money on account of his share for the secured debt and prayed for a personal decree against both defendants, Nos. 1 and 2, and, in default, for the sale of the property comprised in the mortgage.

The defendants, among other pleas, objected that the suit was bad for the non-joinder of Lakshumanan Chetti, and alleged that they had created further charges on the property with the assent of the plaintiff subsequent in date to the mortgage sued on.

The District Munsif passed a personal decree against the defendants and provided for its realization by the sale of their interest in the mortgage premises. His decree was affirmed on appeal by the Subordinate Judge, who said, with reference to the plea of non-joinder,—

“Under section 85, Transfer of Property Act, plaintiff should have made Lakshumanan Chetti a defendant, since he had an interest in the mortgaged property. This Act is to be read as part of the Contract Act, and, therefore, he should have been made a defendant strictly speaking. I find, however, from the record, that he was examined as defendants’ third witness, and, he says, that he has no interest in the items of property mortgaged, save item 4. Plaintiff might have been refused the right to sell this property, but I see no warrant for absolutely dismissing the suit in the circumstances disclosed. At best, the decree for sale of item 4 may not bind Lakshumanan Chetti.

“It is said in appeal that the subsequent encumbrancers should have been made parties to the suit. It appears from the evidence of plaintiff and other witnesses that some properties were sold or mortgaged with plaintiff’s consent to others and the sums realized were received by plaintiff. He would and could not, therefore, proceed against such portions of the property as were mortgaged or sold with his concurrence.”

Defendant No. 1 preferred this second appeal.

Bhashyam Ayyangar and *Thiruwenkatachariar* for appellants.

Krishnamachariar for respondent.

SUBBAN
v.
ARUNACHA-
LAM.

JUDGMENT.—We think that, under section 85 of the Transfer of Property Act, it is necessary to make Lakshumanan Chetti a party, as he has an interest in the property comprised in the mortgage, even though the plaintiff may not ask for a personal decree against him. He is, at any rate, interested in item 4.

The subsequent encumbrancers must also be made parties unless the items of property sold or mortgaged to them have been excluded from the properties against which plaintiff seeks a decree. It may be that sales or mortgages made with plaintiff's concurrence have excluded such items from liability, but, if so, they must be excluded from the suit. It is not clear that such is the case. The decrees of the Courts below must be reversed and the suit remanded to the Court of First Instance for disposal.

We will give the appellant the costs of this appeal and the other costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAMBAYYA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

GOPALAKRISHNAMMA (PLAINTIFF), RESPONDENT.*

1892.
March 23.

Practice—Variance between pleadings and proof—Relief not asked for.

The plaintiff, alleging that a certain lane was his property and that he had been obstructed by the defendants from building a door upon it, sued for an injunction and for damages. The Court held that the plaintiff's title to the land was not established, but passed a decree declaring that both the plaintiff and the defendants were entitled to use the lane by right of easement :

Held, that this declaration, which had not been asked for, should not have been made, and that the suit should have been dismissed for want of proof of the title alleged by the plaintiff.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 468 of 1890, reversing the decree of Y. Janakiramyya, District Munsif, Ellore, in original suit No. 17 of 1890.

* Second Appeal, No. 1026 of 1891.