

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **18.03.2016**

CORAM

THE HONOURABLE Dr. JUSTICE. **S.VIMALA**

**CRP(NPD)No.745 of 1991**

V.G.Naidu @ Govindasamy Naidu ... Petitioner / Tenant

Vs.

Pahlajraj Gangaram @  
Pahlaj Rai

... Respondent /  
Subsequent Owner

Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 09.02.1990 made in E.P.No.162/89 in HRC 136/75 on the file of the X Small Causes Court, Madras.

For Petitioner : Mr.K.Srinivasan,  
Senior Counsel  
for Mr.Antony Jesus  
For Respondent : Mr.M.V.Venkatesesha

**ORDER**

A defaulting tenant, who was ordered to pay a sum of Rs.837/- towards arrears of rent on or before 14.10.1977, having committed a default again, and having suffered an order of eviction on 25.01.1978, whether can be allowed to prolong the case without vacating the premises (including the legal representatives also) till 2016, i.e. nearly for 40 years?. Is it not the right time to revamp the judicial system, to reform the procedure and redraft the related laws, is the critical issue that would arise

in the mind of the Court as well as the litigants.

1.1. When getting delivery of possession from the tenant is more onerous, than the delivery of a child from a mother and when the execution of the decree for the possession is achieved by the landlord; When such delivery recorded is branded as a paper delivery and not an actual delivery; when the tenant is guilty of recurring infringement of the order of the Court; when the decree holder do not claim any right independent of the right of his vendor/earlier decree holder; and when the subsequent purchaser has acquired the right to continue the execution proceedings, what is the right of the subsequent landlord whether to file a suit for possession or to continue the execution proceedings of the erstwhile landlord?-is the issue arising for consideration in this case.

2. This is a case where the tenant has raised very curious contentions and offered strange suggestion to the landlord / subsequent purchaser, with a view to reap the benefit of procrastination of the proceedings.

3. The contention of the tenant is that when delivery has already been ordered on 02.03.1981 in E.P.No.1077 of 1980, the second execution petition filed by the subsequent purchaser in E.P.No.162 of 1989 is not maintainable.

3.1. Yet another contention of the tenant is that the Court after ordering delivery becomes functus officio and therefore, the Executing Court has no jurisdiction to entertain the second execution petition.

4. This contention has been raised forgetting that if this contention is accepted, after ordering delivery in E.P.No.162 of 1989 by 26.02.1990, how the Court is not functus officio so far as M.P.No.203 of 1990 (which is filed by the tenant) is concerned, remain unanswered by the tenant.

5. The tenant has offered clear cut suggestion to the landlord/subsequent purchaser as to what the subsequent purchaser should do and what he should not do, through objections filed by the tenant. It is the desire of the tenant that the landlord/subsequent purchaser should not file the Execution Petition and that he should file only a suit for possession. What are the intentions behind this contention? Why the tenant, who is placed in a less privileged premises than the landlord, wants not the termination of the proceedings, but, continuation of the proceedings, by asking the landlord to file a fresh suit instead of filing an Execution Petition? What are the intentions behind this suggestion? Is the litigation so profitable to the tenant than the landlord? In other words, whether this desire of the tenant is legally tenable or not, is the issue.

6. The facts leading to the tenant filing CRP:

One C.S.Masilamani, (hereinafter he is referred to as erstwhile landlord/owner) as the owner/landlord of the suit property, filed R.C.O.P.No.136 of 1975 seeking eviction of the tenant (Revision Petitioner) from the suit premises. Eviction was ordered on 25.01.1978. On the basis of the eviction order, the erstwhile landlord filed the petition for execution in E.P.No.1077 of 1980 and got an order of delivery.

6.1. On the ground that there was a trespass subsequent to delivery, a criminal prosecution was launched in C.C.No.2273 of 1981 by the erstwhile landlord. The complaint was under Sections 448 and 451 of Indian Penal Code. That complaint was dismissed on 08.02.1983.

6.2. Later, a Writ of Mandamus was filed by Masilamani in W.P.No.2849 of 1981, against the Judgment Debtor, seeking direction to the the Commissioner of Police to secure possession to him. That was also dismissed. Subsequently, on 01.10.1986, Masilamani sold the property in favour of Pahlajraj Gangaram @ Pahlaj Rai, respondent herein (in the revision petition).

6.3. After the purchase, the subsequent owner, namely, the

respondent herein filed E.P.No.162 of 1989 for possession. The tenant opposed the application on the ground that delivery was already given and the second execution petition for the same relief is not maintainable and that the Executing Court has become functus officio after ordering delivery in E.P.No.1077 of 1980. According to the tenant, the remedy open to the purchaser is to file a fresh suit for possession. The Executing Court by order dated 07.02.1990 held that E.P.No.162 of 1989 was maintainable and ordered delivery by 26.02.1990. This order is under challenge in this revision petition.

6.4. The Judgment Debtor/tenant filed a petition under Section 47 C.P.C. in M.P.No.203 of 1990, contending that decree in R.C.O.P.No.136 of 1975 is not executable and that E.P.No.162 of 1989 (filed by the subsequent owner) is liable to be dismissed. In the said M.P.No.203 of 1990, the subsequent purchaser filed M.P.No.258 of 1990, contending that the petition under Section 47 C.P.C. is not maintainable.

6.5. The subsequent purchaser/owner of the property contended that application under Section 47 C.P.C. was not maintainable, but, that objection was overruled by the Executing Court and dismissed M.P.No.258 of 1990 and allowed M.P.No.203 of 1990. Challenging the same, Civil

Revision Petition was filed by the subsequent purchaser in C.R.P.No.1913 of 1990, by which, this Court gave a finding that ***application filed under Section 47 C.P.C. by the tenant is not maintainable***. It was specifically held that, as the tenant raised the very same issue in E.P.No.162 of 1989 itself, and when he has not challenged the order passed in E.P.No.162 of 1989, he is estopped from raising the identical question for the second time between the same parties on the principle of constructive res judicata. But, at the same time, it was held that it is open to the tenant to challenge the said order in E.P.No.162 of 1989.

7. The dates and events, as filed by the learned counsel for the revision petitioner, providing for the summary of facts and circumstances is extracted, having regard to the necessity of saving the time:

| <b><i>Date</i></b> | <b><i>Events</i></b>                                                                                                                                                                 |
|--------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| August 1968        | Petitioner became tenant under C.S.Masilamani, predecessor of Respondent.                                                                                                            |
| 1975               | Masilamani filed a petition for eviction in H.R.C.No.136 of 1975.                                                                                                                    |
| 25.01.1978         | In H.R.C.No.136 of 1975, eviction was ordered.                                                                                                                                       |
| 1980               | Masilamani, Respondent's predecessor filed E.P.No.1077 of 1980 and the same was ordered.                                                                                             |
| 02.03.1981         | Order of eviction was executed by the Bailiff and vacant possession was delivered to the landlord. E.P. was terminated.                                                              |
| 08.02.1983         | C.C.No.2273 of 1981 before 18 <sup>th</sup> Metropolitan Magistrate's Court, Saidapet, filed by Masilamani under Sections 448 & 451 IPC against the petitioner alleging trespass was |

| <b>Date</b> | <b>Events</b>                                                                                                                                                                     |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|             | dismissed.                                                                                                                                                                        |
| 21.08.1985  | Masilamani filed unnumbered E.P. and the same was dismissed.                                                                                                                      |
| 01.10.1986  | Masilamani sold the petition property to the respondent by virtue of Sale Deed.                                                                                                   |
| 1989        | E.P.No.162 of 1989 was filed by the respondent.                                                                                                                                   |
| 07.02.1990  | E.P.No.162 of 1989 was ordered.                                                                                                                                                   |
| ---         | Petitioner filed M.P.No.203 of 1990 under Section 47 C.P.C. Challenging executability of order.                                                                                   |
| ---         | The respondent filed M.P.No.258 of 1990 to decide the maintainability of application in M.P.No.203 of 1990.                                                                       |
| 28.03.1990  | 10 <sup>th</sup> Small Causes Court held M.P.No.203 of 1990 under Section 47 was maintainable. Respondent filed CRP.No.1913 of 1990.                                              |
| 06.03.1991  | Order was passed in CRP.No.1913 of 1990 setting aside the order of the Small Causes Court and upholding the right of the petitioner to challenge the order in E.P.No.162 of 1980. |

8. The issue to be decided is, whether the order “possession, delivered, E.P. terminated (02.03.1981) as passed in E.P.No.1077 of 1980”, filed by the erstwhile landlord, would operate as constructive res judicata, in E.P.No.162 of 1989 filed by the subsequent landlord (both E.Ps. in R.C.O.P.No.136 of 1975).

9. The contention of the tenant/revision petitioner is that ***(a) the Court having recorded delivery and termination of Execution Petition, has no jurisdiction to entertain the second execution petition in respect of the very same property and therefore, the***

***subsequent E.P. by the subsequent purchaser is unsustainable in law; (b) the purchaser from the original decree holder under Sale Deed dated 01.10.1986 cannot maintain the application for execution having regard to the nature and scope of proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act; (c) the order passed in W.P.No.2849 of 1981 is binding upon the respondent as a purchaser; (d) the purchaser, having exhausted all remedies under the Rent Control Act, IPC, Constitution of India, is not entitled to file the Execution Petition for delivery and the petition so filed is a clear case of gross abuse of process of law and the remedy open to the purchaser is to file a suit for possession; and e) the Court which terminated the Execution Petition becomes functus officio to entertain any other application and the second Execution Petition is a gross abuse of the process of the Court, which cannot be tolerated and entertaining of this petition itself is nothing but encouraging injustice that too an unscrupulous person like the purchaser herein.***

10. Through out the discussions, the revision petitioner is referred to as tenant and the respondent is referred to as landlord (subsequent purchaser).

11. It is not in dispute that the respondent herein is the landlord (subsequent purchaser) having purchased the property by virtue of sale deed dated 01.10.1986. In the **sale deed itself**, it has been mentioned that the sale is being completed by the purchaser/landlord without insisting upon delivery of vacant possession and the purchaser has agreed to take possession by continuing the pending legal proceedings against the tenant.

12. In the petition filed for eviction by the subsequent andlord, the erstwhile landlord has filed an affidavit, describing how the circumstances forced him to sell the property and that the purchaser/landlord is entitled to continue the execution proceedings.

13. It is the case of the erstwhile landlord that on 17.09.1977 the learned VI Assistant Judge of the Court of Small Causes (Rent Controller) directed the tenant to pay the arrears of Rs.837/- on or before 14.10.1977, failing which, an order of eviction will follow. Though the arrears was very huge amount, the Rent Controller was very lenient in directing the respondent only to pay Rs.837/- and the tenant who has no respect for law, did not care to deposit the amount into Court. Consequently, on 25.1.78 an order of eviction was passed.

14. Later on, the **tenant filed M.P.No.507 of 1978 to set aside the**

***order of eviction on the ground that the order of eviction was passed exparte and therefore it should be set aside. On 26.6.1978 the learned Rent Controller dismissed M.P.No.507 of 1978 holding that the order of eviction was not passed exparte and therefore, the application was not maintainable. Against the order in M.P.No.507 of 1978, the respondent filed H.R.A.No.412 of 1978 before the II Judge of the Small Causes Court, who is the appellate authority. The Appellate Authority dismissed H.R.A.No.412 of 1978 on 27.11.1979. The order in H.R.A.No.412 of 1978 became final and consequently the order of eviction has also become final.***

15. In the supporting affidavit of Masilamani, the erstwhile landlord, he has described how the ***delivery proceedings were onerous and difficult than that of the delivery of a child to a mother, to get back possession from the tenant*** and the affidavit reads as under:

*"Therefore, I filed E.P.1077 of 1980 for delivery of possession of property. The Respondent set up one Lakshmana Gupta to **obstruct** the Execution Proceedings and the objections was removed by the Execution Court. Eventually on 22.10.80 when I went to take possession of the building with the bailiff of the Court, the Respondent **did not allow the bailiff** to put me in possession of the building. Therefore, I had to file an application for **police aid**. On 27.2.81 the execution Court directed the bailiff of the Court to execute the warrant and put*

me in possession of the building. On 20.2.81 as Police was not available, the possession could not be taken in the presence of police and the following is the endorsement made by me in the Execution Petition.

"On 2.3.81 at 5.30 P.M. I took the bailiff and P.C.5492, 5028 of E-3 Police station to the warrant address **the respondent was standing in front of the premises. The premises was found locked. The bailiff informed the respondent's son to open the lock. He refused.** As per order of the Court, the bailiff **broke open the lock** and we went inside. **Two daughters of the respondent went in the premises. They refused to vacate.** Then the bailiff removed all the articles with the help of **coolis engaged** by me and put me in vacant possession of the premises. I got the same locked.

Sd/Masilamani"

On 3.3.81 the bailiff filed his report to the Executing Court as below:

"On 2.3.81 at about 5.30 p.m. the petitioner took me and P.C.5492 and P.C.5028 of E-3 Police station to the warrant address the respondent's son was standing in front of the premises which was found locked. I informed the respondent's son to vacate and open the lock who refused to open the lock and vacate. As per the order of Court, I broke open the lock and entered the premises. Two daughters of the respondent were in the premises. They refused to vacate then. I removed all the articles with the help of coolies engaged by the petitioner and put him in vacant possession in the premises who got the same locked.

Thus, the order of the Court came to be executed and delivery has been recorded.

16. ***It has been specifically stated that the erstwhile landlord has assigned the order of delivery dated 25.01.1978 in H.R.C.No.136 of 1975 in favour of the subsequent purchaser and therefore, the erstwhile landlord has no right thereafter in the order of delivery.***

17. It is his further case that the tenant committed trespass on 04.03.1981, ***disrespecting the orders of the Court.*** The Police was reluctant to register the case and only after filing of W.P.No.2894 of 1981 seeking direction, the police registered the case. The XVIII ***Metropolitan Magistrate acquitted the accused*** on the technical ground that the delivery is only a paper delivery and not an actual delivery.

18. The complaint has been dismissed (as per the discussion in CRP.No.1913 of 1990 of this Court), on the ground that there was no delivery known to law and consequently, the question of criminal trespass will not arise.

19. This dismissal of the complaint might have been the reason for the erstwhile landlord to sell his property in favour of the subsequent

purchaser. The process of delivery which is seen to be more laborious and burden-some for the erstwhile landlord has been completely overlooked by the Criminal Court. If the delivery of possession through Court, recorded in the Execution Proceedings, is not recognised as possession, then, what could be termed as possession under law, is not known. The Criminal Court, not acknowledging the lawful process of the Civil Court, has led to this unjust dismissal of the complaint and this has given unjust encouragement to the tenant to file series of litigations.

20. Only thereafter, ***E.P.SR.No.18610 of 1984*** has been filed seeking direction for ***effective delivery*** and that the petition was also dismissed stating that the description of property as described in Col.No.3 did not match with the description of the property in the schedule. The journey undertaken as detailed above would only indicate that, vexed over the circumstances, the erstwhile landlord should have sold the property in favour of the respondent herein.

21. The contention of the learned counsel for the tenant is that this execution petition is the gross misuse of process of law as a) the remedy open to the subsequent purchaser is to file a suit for possession and not to seek the remedy of delivery of possession through the Executing Court; b) the earlier order passed in E.P.No.1077 of 1980 would operate as

constructive res judicata for the maintainability of the subsequent Execution Petition; c) when the erstwhile owner has admitted that he has taken physical possession of the property through Court of law, the present EP by the purchaser is not maintainable; d) the Court which terminated the Execution Petition by ordering eviction become functus officio and it cannot entertain the second execution petition; e) entertaining of this application would amount to encouraging injustice; f) termination and acquittal of tenant in C.C.No.2273 of 1981, against which, no appeal was filed, is final; moreover, the Writ Petition No.2849 of 1981 was also dismissed and therefore, resorting to civil remedy for execution is not maintainable.

22. Under this background facts, the maintainability of the second Execution Petition subsequent to the purchase, dated 01.10.1986, by the purchaser of property (by the respondent herein) and in the light of the subsequent trespass, as alleged by the erstwhile landlord, have to be considered.

23. The learned counsel for the subsequent subsequent landlord has relied upon the following decision in support of the proposition that the second execution petition is maintainable.

(i) 2005 (2) CTC 272 (R.Radha vs. B.Saraswathy)

“9. As has been pointed out by the learned counsel for the respondent, it is relevant to mention that the above decision was rendered in relation to a decree for declaration and permanent injunction and the ***subsequent disobedience perpetrated by the judgment debtor by committing trespass*** upon the suit property and putting up of a shed in the suit property. On the contrary, in this case, the decree itself is for specific performance of the contract and delivery of the suit property in pursuance thereof and therefore, the learned counsel for the respondent, in my opinion, is right in urging this Court ***to reject the argument put forth by the learned counsel for the revision petitioner that the second execution petition is not maintainable.***”

This decision is applicable to the facts of this case.

23.1. The contention of the learned counsel for the tenant is that the Executing Court has become functus officio and therefore, the second order for delivery cannot be passed.

23.2. In order to understand this proposition, it is necessary to understand the basic meaning of the term “functus officio”.

Functus Officio is a Latin term meaning “having performed his or her office.” With regard to an officer or official body, it means without further authority or legal competence because the duties and functions of the

original commission have been fully accomplished.

Functus means "having performed" and officio means "office." Thus, the phrase functus officio means "having performed his or her office," which in turn means that the public officer is without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. [ Logan v. WMC Mortg. Corp. (In re Gray), 410 B.R. 270, 275 (Bankr. S.D. Ohio 2009)].

In other words, the authority which had life and power has lost everything on account of completion of the purpose/activity/act.

23.3. The principle of finality is attached to the doctrine of functus officio, but, there are exceptions to the principle of finality. However, the Court's inherent power to set aside a judgment will only be invoked in exceptional circumstances to avoid a miscarriage of justice. Fraud is a genuine, albeit limited, exception to the important principle of finality of litigation.

23.4. The general proposition of functus officio is subject to certain qualifications. The Court may have, as already said, the inherent power or implied power to correct some kinds of errors which include the jurisdiction to take note of the subsequent event and to mould the relief. This statute may confer the additional powers on the Court to proceed further. As far as

order 21 of C.P.C. is concerned, there can be any number of execution applications within a period of limitation. Even in case of sale, there can be a petition for setting aside of sale on the ground of irregularity or illegality. In case of wrongful dispossession, there is a provision for restitution. Therefore, the applicability of the doctrine of functus officio depends upon the nature and extent of power conferred on the authority functioning.

23.5. Having regard to the facts and circumstances discussed above, the contention that the Executing Court has become functus officio, cannot be accepted.

24. The learned counsel for the revision petitioner/tenant relied upon the following decisions in order to support the main contention that the execution petition (E.P.No.162 of 1989) is not maintainable and in support of the grounds raised in the revision petition.

(i) AIR 1917 Madras 202 (Chokkalinga Mudali and another vs. Gopalathathacharirar and others)

“... The present application of 1913 being such a second application and not an application for review of any order passed on the former application of 1911 is therefore not maintainable.”

This is a case where after restitution having been ordered, the second application have been filed without disclosing reason as to why the second application has been filed. So far as this case is concerned, the second execution petition has been filed only on account of the alleged trespass committed by the revision petitioner, even though delivery was recorded long back in the year 1981. Therefore, this decision will not apply to the facts of this case.

(ii) AIR 1923 Mad 25 (Ibrahim Sahib vs. Konammal and another)

“It was clear that delivery of possession to the decree-holder involves that no person other than the decree-holder remains in possession.”

(iii) 1946 (59) L.W. 219 (Palaniammal vs. Arumugam Chetti)

“It has been held that when the husband did not take the plea of resumption of co-habitation is a bar for executability of the maintenance decree during the first execution petition is estopped from taking the plea during the second execution petition as the same would be barred by constructive res judicata.”

(iv) 1948 (2) MLJ 421 (P.Sundaresan and others vs. P.Venkatesiah and others)

“The earlier order passed in the same Execution

proceedings would operate as constructive res judicata with regard to the same matter raised at subsequent stages of the execution application."

(v) AIR 1961 SC 137 (Shew Bux Mohata & others vs. Bengal Breweries Ltd. & others)

"It is not in dispute that if the decree was once executed against defendant No. 4 in full, then it cannot be executed over again regarding premises No. 27. In other words, if possession had been fully delivered to the decree-holders in execution of the decree on October 1, 1948, the decree must have been wholly satisfied and nothing remains of it for enforcement by further execution. The decree was for khas possession and under Or. 21, R. 35, of this Code in execution of it possession of the property concerned had to be delivered to the decree-holders, if necessary, by removing any person bound by the decree who refused to vacate the property.

This decision will not apply to the fact of this case as there is change in circumstances on account of the conduct of two persons, i.e. the conduct on the part of the tenant having committed subsequent trespass after delivery and another conduct on the part of the erstwhile landlord in having sold the property to the subsequent purchaser along with the right to proceed in execution.

(vi) AIR 1970 Madras 474 (V.57 C 137) (Sri R.Pandhubhai c/o. State

Labour Union, Madras vs. Management, Bombay Cycle Importing Co. Madras and another)

“5. In *Burn and Co., Ltd. v. Their Employees*, 1957-1 Lab LJ 226 = **(AIR 1957 SC 32) the Supreme Court has held that the rule of res judicata enacted in Section 11, Civil P. C. is in terms inapplicable, but the principle underlying it is founded on sound public policy and is of universal application and that there are good reasons why the principle should be applicable to decisions of Industrial Tribunals also.** In *Iypunny v. Madhusudan Mills*, it has been held that the principles analogous to res judicata have been applied to proceedings -under the Industrial Disputes Act on grounds of public policy in the general interest of finality of decision. It has been held that the remedy under Section 33-C(2) of the Act is in addition to the remedy provided for under the relevant provisions of the Bombay Industrial Relations Act, 1946 but if an application is made under either of the Acts and fails on merits, a similar second application would be barred.

(vii) 1972 (2) SCC 192 (*Kani Ram and another vs. Smt.Kazani and other*)

“5. It is true that s. 13 (1) of the Rent Control Act prohibited the court from passing the decree or order for recovery of possession of any premises in favour of a landlord against the tenant unless the court was satisfied that one or more of the grounds given in that provision existed; (See

Bahadur Singh & Another v. Muni Subrat Dass & Another). In the judgment of the Senior Subordinate Judge dated October 30, 1961 given in the first set of execution proceedings the various circumstances were considered by which the learned judge came to the conclusion that the court which passed the decree for eviction was, satisfied that one or more of the grounds mentioned in s. 13 of the Rent Control Act had been made out. The decision given in the first set of execution proceedings was thus not one of law only but of a mixed question of law and fact. Such a decision undoubtedly would operate as res judicata. ***In execution proceedings s. 11 of the Code of Civil Procedure does not apply in terms but the rule of constructive res judicata has always been applied.*** Even according to the judgment (1) [1969] 2 S.C.R. 432 of this Court in Mathyra Prasad Baojoo Jaiswal & Ors. v. Dossibai N. B. Jeej'eebboy on which the learned judge of the High Court relied in the judgment under appeal laid down that a mixed question of law and fact determined in the earlier proceedings between the same parties could not be questioned in a subsequent proceeding between them. We have no manner of doubt for these reasons that the High Court was wrong in not sustaining the judgment of the Senior Sub-Judge, Delhi, dated November 14, 1969 by which the order of the Executing Court dated August 23, 1969 had been upheld. In this view of the matter the second point calls for no decision."

(viii) 1998 (2) L.W. 502 (M.Karpagavinayagam vs. Abhimanna Gounder (died) and 10 others)

"The general doctrine of res judicata is founded on considerations of high public policy to achieve two objectives, (1) there must be a finality to litigation and (2) the individual should not be harassed twice over with the same kind of litigation. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings. Before a plea of res judicata can be given effect, the following conditions must be proved : (1) the litigating parties must be same; (2) the subject matter of the suit also must be identical; (3) the matter must be finally decided between the parties; and (4) the suit must be decided by a competent court. If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. Once the questions at issue in the two suits are found to be the same, the fact that the material which led to the decision in the earlier suit was not again placed before the Court in the second suit cannot make the slightest difference. In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. ***A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot operate as res***

***judicata.*** In considering the question of res judicata, the court is not concerned with the correctness or otherwise of the judgment rendered. A finding rendered on a fact in issue by a competent court in earlier proceedings should be regarded as having been finally decided in a subsequent litigation raising the same issue between the same parties.”

The claim in this case is not based on the same cause of action, but, on a different cause of action. The Criminal Court has given a finding that the delivery effected is only a paper delivery and not an actual delivery and hence, question of criminal trespass does not arise. That made the landlord to file a petition before the Executing Court seeking actual delivery of property. Therefore, the doctrine of constructive res judicata will not be applicable to the facts of this case.

(ix) 2000 (11) CTC 136 (Kaliammal and another vs. D.C.Arunachalam and 6 others)

“21. Even if it is accepted that Rule 32(5) applies only for a decree of mandatory nature, that does not follow that the principles therein cannot be followed in cases where there had been utter violation of a decree for declaration and injunction when interest of justice so requires. As I said earlier, what plaintiffs want is only to make use of the pathway as it existed before obstruction and they want that obstruction to be cleared by taking out commission at their expense. Eventhough defendants are not asked to remove the obstruction by mandatory decree, there is no prohibition in plaintiffs getting

the same removed when the decree declares their right to make use of the cart track without any obstruction. The execution petition is filed only to see that while clearing the obstruction, the defendants do not cause any further obstruction.

22. The argument by learned counsel for petitioners that if there is any obstruction, only a separate suit will lie, cannot be accepted. Every Court will see that the litigation comes to an end and not multiply it by asking parties to file separate suit. After having caused obstruction, defendants are also not entitled to be heard saying that plaintiff must go for separate suit."

This decision is in favour of the landlord and not in favour of the tenant/revision petitioner.

(x) **2002 (II) CTC 240 (Kanakamma vs. Kamalan)**

***"Plaintiff is entitled to file execution application for every recurring infringement as long as application was filed within time – Plaintiff cannot be driven for second suit."***

This decision also is in favour of the landlord. The tenant is guilty of recurring infringement, to the extent of driving the erstwhile owner to sell the property in favour of the subsequent purchaser and now this struggle is faced by the subsequent purchaser. The subsequent purchaser cannot be driven for filing a second suit.

(xi) AIR 2000 Supreme Court 2757 (Lakshmi Narayanan vs. S.S.Pandian)

"The consequence of not having it so recorded is contained in Rule 3 of Order 21 of the C.P.C. Rule 3 prohibits every Court executing the decree from recognising a payment or adjustment which has not been certified or recorded by Court."

This decision is not applicable to the fact of this case neither on factual aspect nor on legal aspect.

xii) 2002 (1) L.W. 28 (M/s.International Woollen Mills v. M/s.Standard Wool (U.K.) Ltd.)

".... An ex parte decision may or may not be on the merits. The mere fact of its being ex parte will not in itself justify a finding that the decision was not on the merits. That is not the real test. The real test is not whether the decision was or was not ex parte, but whether ***it was merely formally passed as a matter of course or by way of penalty or it was based on the consideration of the truth or otherwise of the plaintiff's claim.***"

xiii) 2005 (2) CTC 272 (R.Radha vs. B.Saraswathy)

"... *The learned counsel for the revision petitioner would*

*urge that the second execution petition was wholly unsustainable in law and that therefore the impugned order passed by the executing court is liable to be set aside.*

*8. In view of the above circumstances, the learned counsel for the respondent has argued that **in the altered circumstances, subsequent execution petition is maintainable in law** and he has drawn the attention of this Court to the decision in KANAKAMMA v. KAMALAN (2000 (II) C.T.C. 240) in support of such contention. In a similar set of facts and circumstances, this Court held in the above decision that the decree holder is entitled to file execution application for every recurring infringement as long as the application was filed within time and therefore it was urged that the decree holder cannot be driven for a second suit. The learned Judge, K. SAMPATH, J. (as he then was) after discussing the ratio laid down in a catena of decisions of both the Apex Court and this Court ultimately reiterated the principles of law on the subject as follows:-*

*"However, in view of the Bench decision of this Court in venkatachalam Chetty, etc. (I.L.R. 29 MAD. 314) and the decision in Ondipudur Weavers Co-operative Production etc. case (1977 (II) M.L.J. 19), I am clearly of the view that the lower Court was wrong in driving the revision petitioner to a separate suit. For every recurring infringement as long as the application was filed within time the executing Court is duty bound to give relief to the decree holder."*

This decision is also in favour of the landlord and in fact, this decision is

relied upon by the learned counsel for the landlord also.

xiv) CDJ 2008 Kar HC 305 (B.Raghuram Shetty vs. Arun Bhandary & others)

*"12. It is not as though the petitioner is claiming any right independent of his vendor. **If the eviction order had already been implemented nothing remains for the executing court to examine further and the execution petition said to have been filed by the petitioner before the executing court which was ill advised and a petition which is not tenable in law had been rightly rejected by the executing court and the same has been affirmed by the Revisional Court.** Absolutely no scope or need for interference in a matter of this nature under Article 227 of the Constitution of India."*

Even though the eviction order had been implemented once, the necessity for filing second application arose only on account of the subsequent trespass by the tenant. The claim by the subsequent landlord is not independent of the claim made by the erstwhile landlord. Therefore, this decision is not applicable to the facts of the present case.

xiv) 2008 2 L.W. 687 (Barkat Ali & another vs. Badri Narain (D) by Lrs.)

*"8. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the*

same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage."

(xv) 2012 3 L.W. 946 (S.Uttamchand vs. R.Anjugam and another)

"37. The judgment reported in AIR 1958 SC 394 (Saila Bala Dassi v. Nirmala Sundari Dassi and another) was also referred in support of the case of revision petitioner. In the earlier judgment of the Hon'ble Apex Court reported in AIR 1979 SC 1066 (Zila Singh and others v. Hazari and others), this case was referred to and was followed. When we apply the principles laid down by the Hon'ble Apex Court, I could see that ***even without any reference as to the grant of any right of continuing the proceedings, the revision petitioner was entitled to continue the execution proceedings on behalf of the original decree holder*** namely the 1st respondent. ***We have already seen that the 1st respondent had given a right in the sale deed dated 22.02.1984 that the revision petitioner can continue the proceedings including execution proceedings in O.S.No.918/75*** under the color of the right given in the said sale deed. When the 1st respondent has given such right and also conveyed the entire right to the suit property to the revision petitioner, how she can come forward with the applications to dismiss the E.P., and also to set aside the exparte order passed against her. The said applications could be termed as abuse of process of law as referred to in the judgment of the Hon'ble Apex Court reported in (2009) 6 SCC 609(Sardar Estates v. Atma Ram Properties Private Limited).

The relevant portion of the judgment would be as follows:-

"9. It is evident that ***after the first round of litigation was over the tenant started a second round of litigation on frivolous grounds which was a flagrant abuse of the process of the court. This is a practice which has become widespread, and which the Court cannot approve of, otherwise no judgment will ever attain finality. Hence, we dismiss this appeal and impose a cost of Rs.10,000/-(Rupees ten thousand only) on the appellant which shall be paid to the respondent within two months from today.*** The appellant shall also hand over the premises in question, which is in his possession, to the landlord within three months from today failing which he will be evicted by police force."

(xvi) 2012 (8) MLJ 15 (Palayammal vs. I.Dhanamma and others)

***"Once execution proceeding is terminated, recording execution of decree, thereafter, it is doubtful whether decree holder can file a second execution petition for same relief – Plaintiff entitled to relief of recovery of possession based on title and based on proof of trespass – Appeal dismissed."***

On facts, it is found that the second execution petition is maintainable.

(xvii) 2014 (7) MLJ 309 (K.Sakthivel vs. Angala Thavy @ Mumthaj

Begum Thavy)

“8. Though the Rent Control Appeals came to be dismissed on 05.02.2010, the respondent herein chose to file an Execution Petition in 2011 in E.P.No.258 of 2011 as if the tenant had not vacated and the order of eviction remained unexecuted. The said stand taken by the respondent herein/landlord was quite contradictory to the stand taken by the landlord in her memo filed before the learned Rent Control Appellate Authority. Without considering such a contradictory stand taken by the landlord and without properly appreciating the fact that the disposal of the R.C.As. as infructuous would no longer keep the eviction order executable, the Executing Court simply passed an order directing delivery of possession.

9. As rightly pointed out by the learned counsel for the revision petitioner, the said order is not only erroneous, but it can also be stated to be an order passed in exercise of jurisdiction not conferred on the Executing Court. In any event, even assuming that such a jurisdiction is available to the Executing Court, the exercise of such jurisdiction can be termed illegal and it is tainted with material irregularities warranting interference by this Court. Accordingly, this Court comes to the conclusion that the revision deserves to be allowed.”

This case is distinguishable on facts and will not apply to the facts of the revision petition.

25. The tenant has relied upon various decisions ranging from 1917 to

2014 nearly 100 years short of 3 years. This effort under normal circumstances, is appreciable, but not so, when it is found that several decisions relied upon are distinguishable on facts, and certain decisions are unnecessary. For example, the decision on applicability of constructive res judicata for execution proceeding is not necessary after the 1976 amendment to section 11 C.P.C., incorporating explanation VII to Section 11 C.P.C. The said explanation VII reads as under:

*"Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree. (Ins. by Act No. 104 of 1976, sec. 6 (w.e.f. 1-2-1977)."*

26. Therefore, this Court could not refrain from suggesting effective case law management system as followed in United State of America. Every 10 or 15 years, they appoint a body of learned and wise lawyers, who go into the cases reported in all the decisions across the United States, then, they come up with what is called restatement of the law on every possible topic. After the restatement, no case can be cited of a period prior to the restatement and a large body of useless case law gets vanished. The Court is over burdened with excessive case law, some time, with unnecessary case law and in our quest for speedy justice, we need to have

case law management system in India also.

27. The Court has got power rather the Court is expected to take cautious cognizance of events and developments subsequent to institution of proceedings, provided fairness to both sides are followed.

28. Normally, the right to relief must be judged as on date of the suit. But, if a fact arising after the lis, is brought to the notice of this Court and it has a strong fundamental impact on the right to relief which render the original relief inadequate or inappropriate, then equity justifies bending the rules of procedure where no specific provision or fair play is violated with a view to promote substantial justice.

29. It is appropriate to quote the decision reported in **AIR 1975 SC 1409 (Pasupuleti Venkateswaralu vs. the Motor & General Traders)**, where under, in order to make the right of the party meaningful or the remedy claimed by the party to be a reality, the Court is expected to take note of the subsequent events also and the relevant observation reads as under:

*"4. Two submissions were advanced by Sri K. S. Ramamurthy to salvage his client's case. He argued that it was*

*illegal for the High Court to have taken cognisance of subsequent events, disastrous as they proved to be. Secondly, he urged that once the High Court held as it did that the appellate tribunal acted illegally in remitting the whole case to the Rent Controller, it could not go further to dismiss his whole eviction proceedings, a misfortune heavier than would have been, had he not moved the High Court at all. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis a vis circumstances which come into being Subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the*

*party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view."*

30. The subsequent landlord is entitled to continue the eviction proceeding by virtue of the purchase of the property itself as well as the assignment of the decree for eviction. In view of the recurring infringement of the order of the Court by the revision petitioner, the subsequent purchaser was compelled to file the second execution petition.

30.1. Moreover, the Criminal Court gave a long rope to the Judgment Debtor by making an observation that the delivery effected is a paper delivery and not an actual delivery. Under such circumstances, the necessity to continue the execution proceedings become inevitable.

30.2. The anxiety of the revision petitioner to contest a second suit is obviously understandable as the revision petitioner has acquired expertise in dragging on the proceedings. The subsequent purchaser is legally entitled to continue the eviction proceedings as the default in payment of

rent is continuing. Therefore, the order of eviction passed is perfectly legally and does not call for any interference.

**31. *The judicial system should eradicate the ability of one party to cause harassment to the other party by using the procedure as a tool. The judicial system cannot be permitted to be used as a feeding ground to get profit out of the litigation, by adopting delaying tactics. If greater public trust and confidence is to be built, compensation to the party, who suffered, is essential. Therefore, this Civil Revision Petition has to be dismissed with compensatory cost.***

**32. *Considering the fact that the family of the revision petitioner is in possession of the property for the past 40 years by making one party to part with the property itself and making the other party to part with the enjoyment of the property, it is just that he has to pay the compensatory cost of at least Rs.50,000/- to the subsequent landlord.***

33. In the result, the revision petition is dismissed with punitive and compensatory cost of Rs.50,000/- to be payable by the revision petitioner to the respondent. Time for payment is 15 days from the date of receipt of a copy of this order, failing which, the respondent is entitled to execute this

order. The revision petitioner/tenant shall vacate and hand over the possession within 15 days from the date of receipt of a copy of this order.

18.03.2016

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Index : Yes / No.

Internet : Yes/No.

**S.VIMALA, J.**

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To

X Small Causes Court,  
Madras.

**CRP(NPD)No.745 of 1991**

**18.03.2016**

**CRP (NPD) No.745 of 1991****S.VIMALA, J.**

This matter has been listed today under the caption "For Being Mentioned" at the instance of the learned counsel for the respondent/landlord.

2. The learned counsel for the respondent/landlord submitted that after the death of the petitioner V.G.Naidu @ Govindasamy Naidu, the legal representatives of the petitioner were brought on record and mistakenly, the name of the legal representatives were omitted to be mentioned in the reconstituted grounds of revision, but, by mistake, the name of the deceased alone was printed and therefore, this mistake has to be rectified. The learned counsel has also filed a memo to that effect.

3. This memo ought to have been filed by the learned counsel for the revision petitioner. However, on notice, the learned counsel for the revision petitioner has made an endorsement of 'no objection' for recording the names of the legal representatives in the Judgment.

4. Accordingly, this memo is recorded and the Registry is directed to carry out necessary amendments in the Court bundle and Judgment and issue corrected copy of the Judgment to the concerned.

21.04.2016

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**S.VIMALA, J.**

**CRP(NPD)No.745 of 1991**

**21.04.2016**