

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.11.2019

PRONOUNCED ON : 05.02.2020

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM
S.A.No.264 of 1999

Ramalingam

... Appellant/Plaintiff

Vs.

1. Srinivasan
2. Anbarasi
3. Thirunavukkarasu

(minors rep.by father &
guardian 4th respondent)

4. Thisainathan (died)
5. Arumaithambi
6. Harikrishnan
7. Arumbu

(RR1 to 3 recorded as LR and R7
brought on record as LR of the
deceased R4 and RR1 to 3
declared as major vide Order of
court dated CMP.Nos567,566,
568 of 2012 respectively) ... Respondents/Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and the decree dated 30.10.1998 in
A.S.No.83 of 1996 before the Sub-Court, Panruti preferred
against the judgment and decree dated 20.04.1995 in O.S.No.174
of 1990 before the District Munsif's Court, Panruti.

For Appellant

: Mrs.Hema Sampath,
Senior Counsel assisted by
Mrs.R.Meenal

For Respondents

: Mr.R.Sunil Kumar,
for R1 to R3, R5 and R7

: R6 Set Exparte

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the Sub-Judge, Panruti in A.S.No.83 of 1996 dated 30.10.1998 confirming the judgment and decree passed by the District Munsif, Panruti in O.S.No.174 of 1990.

2. The appellant herein had filed a suit in O.S.No.174 of 1990 on the file of the District Munsif, Panruti, to declare his title over the suit properties and for permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit properties, alternatively for recovery of possession of the suit properties. The learned District Munsif, Panruti, by the judgment dated 20.04.1995 had dismissed the said suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.83 of 1996 on the file of the Sub-Judge, Panruti. He also filed two applications in I.A.Nos.27 of 1997 and 47 of 1998 seeking permission of the first appellate court for adducing additional evidence. The learned Sub-Judge, Panruti by the judgment dated 30.10.1998 had dismissed the said appeal and also I.A.Nos.27 of 1997 and 47 of 1998 with costs and thereby confirmed the judgment and decree passed by the trial court. Feeling further aggrieved, the plaintiff has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court

4. The averments made in the plaint are in brief as follows:

a) The suit properties originally belonged to one C.Arumugam Padayachi who is the younger brother of plaintiff's father. They partitioned the joint family properties 25 years ago. Thereafter the said Arumugam Padayachi had purchased the suit properties from one Saravana Padayachi under a registered sale deed dated 02.03.1964 and from the date of purchase, he was in possession and enjoyment of the said properties till he migrated from the said village to Lalpura in Chidambaram Taluk in 1970. The said Arumugam had executed a promissory note for Rs.2000/- in favour of plaintiff's father Muthu Padayachi on 24.07.1970. The said Muthu Padayachi had filed a suit in O.S. No.735 of 1973 on the file of the District Munsif, Cuddalore, for recovery of the amount due thereon. The said suit was decreed on 14.07.1973. The said Muthu Padayachi had filed an execution petition in EP.No.48 of 1975 for attachment and sale of the suit properties in execution of the

decree in O.S.No.735 of 1973. The suit properties were attached on 10.01.1975. The execution petition was dismissed in view of the Ordinance 1/1975 on 03.02.1975, but the attachment was made to continue. Thereafter Muthu Padyachi died and his legal heirs including the plaintiff had filed E.P.No.134 of 1983 for the sale of the suit properties. The suit properties were sold in the court auction sale held on 20.02.1984. The sale was duly confirmed on 24.03.1984 in favour of one G.Krishnamurthy, the court auction purchaser. The court auction purchaser took delivery of the suit properties through court on 21.10.1984.

b) The said court auction purchaser sold the suit property to the plaintiff under a registered sale deed dated 09.08.1985 and delivered possession to the plaintiff and from that date onwards, the plaintiff has been in possession and enjoyment of the suit properties. While so, the said Arumugha Padayachi had sold the suit properties, after the attachment has been made, to one Arunayampathi Padayachi (fifth defendant) under a registered sale deed dated 12.03.1975 giving wrong survey number. Thereafter, the sixth defendant who is the son of the fifth defendant claiming to be entitled to the suit properties under a partition arrangement alleged to have been effected on 03.10.1986 conveyed the suit properties in favour of his mother Chinnammal under a registered sale deed dated 11.08.1998. The said Chinnammal executed a registered sale deed dated 31.01.1990 in favour of the defendants 1 to 3. The plaintiff is cultivating the suit properties by raising cashew and other crops. Now the defendants colluding among themselves are trying to disturb the possession of the plaintiff. The defendants are not having any right or title or interest over the suit properties and therefore, the plaintiff had filed a suit for declaration of his title and also for permanent injunction restraining the defendants from interfering with his possession. Subsequently, he amended the plaint stating that if for any reason the court finds that the plaintiff has not been in possession of the suit properties on the date of the suit, to grant the relief for recovery of possession and the mesne profits as alternative relief.

5. The averments made in the written statement filed by the fourth defendant as guardian on behalf of the minor defendants 1 to 3 are in brief as follows:

Originally, the suit properties belonged to one Arumugam Padayachi. From him, the fifth defendant had purchased the same for a good and valid consideration under a registered sale deed dated 12.03.1975. The plaintiff herein was having eye over the suit properties. So, he filed a suit in O.S.No.467 of

1975 on the file of the District Munsif, Cuddalore, for a declaration of title and injunction. After contest, the said suit was dismissed. As against the same, the plaintiff had filed an appeal and the same was also dismissed. Hence it has been held as the absolute property of the fifth defendant. The fifth defendant had sold the said properties to one Chinammal. The said Chinammal, in turn, sold the said properties to the defendants 1 to 3 appointing the fourth defendant's wife as guardian. So, the suit filed without impleading the proper guardian is bad for non-joinder of necessary party. The allegation that there was a promissory note debt due by Muthu Padayachi to the plaintiff's father is false. Even if there was any such promissory note, since the Execution Petition which was filed by him was dismissed, the attachment automatically raised. There is no order for continuing the attachment. Even if there is any order to continue the attachment, the said order is invalid. The alleged court auction sale and delivery of possession are all false. The plaintiff is not in possession of the suit properties. The defendants 1 to 3 are in physical possession of the suit properties and therefore, they prayed to dismiss the suit.

6. The averments made in the additional written statement filed by the fourth defendant and adopted by the fifth defendant are in brief as follows:

The suit is barred by the principle of res judicata in view of the judgment and decree passed in O.S.No.467 of 1975 on the file of the District Munsif, Cuddalore. The defendants have been in open, hostile and continuous possession of the suit properties for more than statutory period and thus they prescribed title by adverse possession also and therefore, they prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned District Munsif, Panruti, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1. He also examined 3 more witnesses as PWs 2 to 4. He had marked Exs.A1 to A14 as exhibits. On the side of the defendants, the fourth defendant was examined as DW1 and the fifth defendant was examined as DW2 and one more witness was examined as DW3. They had marked Exs.B1 to B31 as exhibits.

8. The learned District Munsif, Panruti, after considering the materials placed before him, found that since in the suit in O.S.No.467 of 1975, the plaintiff had not stated that the fifth defendant had purchased the properties after

knowing the fact that already, the properties were attached in E.P.No.48 of 1975 and hence the said attachment and court auction sale will not bind upon the fifth defendant and consequently, the plaintiff has not obtained any title over the suit properties. He further found that the plaintiff failed to prove that he was in possession of the suit property even on the date of the suit. He further found that since the plaintiff failed to prove title over the suit properties, he is not entitled to get any relief in this suit. Accordingly, he dismissed the suit with costs.

9. Aggrieved by the aforesaid judgment and decree of the learned District Munsif, Panruti, the plaintiff had filed an appeal in A.S.No.83 of 1996 and also filed two applications in I.A.Nos.27 of 1997 and 47 of 1998 under Order 41 Rule 27 of CPC seeking permission of the first appellate court to adduce additional evidence. The learned Sub-Judge, Panruti, by the order and judgment dated 30.10.1998 had dismissed the said applications in I.A.Nos.27 of 1997 and 47 of 1998 and also dismissed the appeal in A.S.No.83 of 1996 and thereby confirmed the judgment and decree passed by the trial court. Feeling further aggrieved, the plaintiff has filed the present second appeal.

10. This Court at the time of admitting the Second Appeal has formulated the following Substantial Questions of law:

" 1) Whether in law the Courts below are right in deciding that the suit is barred by res judicata when there was no identity of title in both the suits?

2) Whether in law the Courts below are right in finding that there was no attachment at the time of purchase by the 5th respondent overlooking that the court ordered attachment to continue while dismissing the E.P?

11. Heard Mrs.Hema Sampath, learned Senior Counsel assisted by Ms.R.Meenal, the learned Counsel for the appellant and Mr.R.Sunil Kumar, learned counsel for respondents 1 to 3, 5 and 7.

12. Substantial Questions of Law 1 and 2:

The learned Senior Counsel for the appellant has submitted that the Court below failed to see that when the E.P.was dismissed on 10.01.1975 due to Debt Relief Act was in force, the attachment was ordered to continue and hence, the purchase of the properties on 12.03.1975 pending attachment by the fifth respondent is invalid. She further submitted that the

Courts below failed to see that the sale in favour of the appellant from the court auction purchaser is valid. She further submitted that the Courts below erred in holding that the court auction was not conducted after following due procedure. She further submitted that the Courts below failed to see that there was no appeal against the Order of sale and that the sale has become final. She further submitted that the Courts below erred in holding that the decision in O.S.No.467 of 1975 will operate as res judicata to the present suit even after holding that the matter in issue is not identical in both the cases.

13. The learned Senior Counsel for the appellant has further submitted that the Courts below failed to see that it was only the plaintiff's father Muthu Padayachi has filed a suit on the basis of a Promissory Note against the original owner of the suit properties namely Arumugam Padayachi in O.S.No.735 of 1973 on the file of the District Munsif of Cuddalore and after obtaining decree, he filed E.P.No.48 of 1975 and got an order of attachment of suit properties and accordingly, the suit properties were attached on 10.01.1975 and subsequently, he died and hence, the plaintiff had no knowledge about the aforesaid proceedings and that was the reason for not mentioning those proceedings in O.S.No.467 of 1975 on the file of the District Munsif, Cuddalore. She further submitted that subsequently the plaintiff came to know about the proceedings in EP.No.48 of 1975 and only thereafter, the plaintiff and his family members filed another EP and brought the property for sale and in the said court auction sale, one Krishnamurthy emerged as successful auction purchaser and sale was confirmed in his favour and sale certificate was also issued and thereafter, the said Krishnamurthy had sold the suit property to the plaintiff on 09.08.1985 and the said developments would give new cause of action for filing fresh suit and hence, the Principle of Res judicata will not apply. She further submitted that the Courts below erroneously applied the Principle of Constructive Resjudicata and rejected the plaintiff's claim and therefore, she prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and decree the suit as prayed for.

14. The learned Senior Counsel for the appellant/plaintiff in support of the aforesaid contentions, relied upon the following decisions:

- (i) C.S.Mani (deceased) by LR C.S.Dhanapalan Vs. Chinnasami Naidu (deceased) through Lrs (2010) 9 SCC 513;

(ii) M/s. Nalli Textiles Vs. Minor Krishnan and another 2001 SCC Online MAD 406: 2002 AIHC 4152;

(iii) K.L.Ganapathy and another Vs. Ganapathy Bhatta and another 2002 AIHC 1167;

(iv) Nallamuthu Padayachi Vs. Srinivasa Ayyar AIR 1924 Madras 516 ;

(v) Ramaswamy Aiyar Vs. Vythinatha Aiyar 1903(13) MLJ 448 and

(vi) Chinnasami Vs. Subakmul Gulecha and another AIR 2003 MAD 46

15. Per contra, Mr.R.Sunil Kumar, the learned counsel for respondents 1 to 3, 5 and 7 has submitted that the plaintiff's father Muthu Padayachi and one Arumugam Padayachi are brothers and the said Arumugam Padayachi had purchased the suit properties from one Saravana Padayachi under a registered sale deed dated 02.03.1964. He further submitted that from the date of said purchase, the plaintiff and his father had an eye over the suit properties and attempted to grab the said properties by adopting several methods and one such method is filing of the present suit in O.S.No.174 of 1990. He further submitted that the plaintiffs herein had already filed a suit in O.S.No.467 of 1975 on the file of the District Munsif of Cuddalore against the fifth defendant herein namely Arunayampathi Padayachi for the relief of declaration of title and for permanent injunction. In that suit, the plaintiff herein and his family members took a stand that the said Arumugam Padayachi had filed a suit in O.S.No.145 of 1968 on the file of the District Munsif of Cuddalore for the relief of partition and in the said suit, a compromise decree was passed. As per the compromise decree, the present suit properties were allotted to his father Muthu Padayachi and his grand father Chinnasami Padayachi and subsequently, the said Chinnasami Padayachi had executed a registered settlement deed dated 26.02.1973 in favour of the plaintiff and his family members. He further submitted that the said suit was dismissed by the learned District Munsif, Cuddalore, on 29.11.1976. As against the said judgment and decree, the plaintiff and his family members had filed an appeal in A.S.No.5 of 1977 on the file of the Sub-Judge, Cuddalore and the said appeal was also dismissed on 07.12.1977. Feeling further aggrieved, the plaintiff and his family members had filed a second appeal in S.A.No.1216 of 1978 on the file of this Court and the same was also dismissed by this Court on 24.11.1981. He further submitted that only after dismissal of

the said second appeal, the plaintiff herein and his family members had filed an execution petition in EP.No.134 of 1983 and brought the property for sale and in the said court auction sale, the plaintiff's sister's husband Krishnamurthy said to have purchased the suit properties and subsequently, the plaintiff claimed that he purchased the suit properties from the said Krishnamurthy.

16. He further submitted that the plaintiff has not stated anything in his plaint that when he came to know about the proceedings in O.S.No.735 of 1973 and EP.No.48 of 1975 and it would show that the plaintiff had knowledge about the proceedings in O.S.No.735 of 1973 and in EP.No.48 of 1975 even at the time of filing the suit in O.S.No.467 of 1975, but, he wantonly suppressed the proceedings in O.S.No.735 of 1973 and EP.No.48 of 1975, in the plaint filed in O.S.No.467 of 1975. He further submitted that the conduct of the plaintiff would clearly shows that he kept in abeyance of the orders passed in EP.No.48 of 1975 and proceeded to file the suit in O.S.No.465 of 1975 claiming that as per the compromise decree passed in O.S.No.145 of 1968, the suit properties were allotted to the share of his grand father Chinnasamy Padayachi and his father Muthu Padayachi and subsequently, the said Chinnasamy Padayachi had executed a registered settlement deed dated 26.02.1973 in favour of the plaintiff and his family members.

17. He further submitted that having lost his claim before the trial court, first appellate court and second appellate court, he attempted to grab the suit properties by using the decree, said to have been obtained by his father Muthu Padayachi in a pronote suit in the year 1973 against the said Arumugam Padayachi and filed execution petition and clandestinely brought the property for sale. He further submitted that in the court auction sale, he set up his own sister's husband Krishnamurthy and took the property in auction and subsequently, he got the sale deed from the said Krishnamurthy. He further submitted that in O.S.No.467 of 1975, it was the case of the plaintiff that the suit properties not belong to Arumugam Padayachi, but, strangely, the plaintiff's father Muthu Padayachi had filed EP.No.48 of 1975 in O.S.No.735 of 1973 and got the order of attachment of the suit properties by saying that the suit properties belong to the same Arumugam Padayachi and after the death of Muthu Padayachi, the plaintiff and his family members had filed another EP and brought the property for sale. He further submitted that the plaintiff cannot approbate and reprobate. He further submitted that the conduct of the plaintiff would clearly show that he wantonly suppressed the execution proceedings in EP.No.148 of 1975 in O.S.No.467 of 1975

and hence, the subsequent suit suffered by the Principle of Suppression of Facts and also barred by the Principle of Resjudicata.

18. He further submitted that in the present suit, the plaintiff in his plaint, throughout has pleaded that he is in possession and enjoyment of the suit properties and also filed the suit for declaration and permanent injunction, but, subsequently, he amended the plaint stating that in case, the court comes to the conclusion that on the date of filing of the suit, the plaintiff was not in possession of the suit properties, the court may grant relief for delivery of possession and for mesne profits and the said act also would show that the plaintiff was not in possession of the suit properties at any point of time. He further submitted that the plaintiff failed to prove that the suit properties were attached as per the procedure prescribed under Order 21 Rule 54 of CPC and hence, the sale in favour of the fifth defendant is not hit by Section 64 of CPC. He further submitted that the Trial Court taking into consideration of the aforesaid facts, had rightly dismissed the suit and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

19. It is an admitted fact that the plaintiff's father Muthu Padayachi and his brother Arumugam Padayachi are the sons of one Chinnasami Padayachi. The plaintiff had admitted in his plaint that the said Arumugam Padayachi had purchased the suit properties from one Saravana Padayachi under a registered sale deed dated 02.03.1964 and he was in possession and enjoyment of the same till he migrated from the said village to Lalpuram village, Chidambaram Taluk in the year 1970. He further stated in his plaint that the said Arumugam Padayachi executed a promissory note for Rs.2,000/- in favour of his father Muthu Padayachi on 24.07.1970 and based on the said promissory note, the said Muthu Padayachi filed a suit in O.S.No.735 of 1973 on the file of the District Munsif, Cuddalore and obtained a decree on 14.07.1973. He further stated that the said Muthu Padayachi had filed an execution petition in E.P.No.48 of 1975 for attachment and sale of the suit properties in execution of the decree in O.S.No.735 of 1973 and the suit properties were attached on 10.01.1975 and subsequently, the said EP was dismissed in view of the Ordinance 1/1975 on 03.02.1975, but, the attachment was made to continue.

20. Exs.B1 to B5 would show that the plaintiff and his family members had filed a suit in O.S.No.467 of 1975 on the

file of the District Munsif of Cuddalore against the fifth defendant herein namely Arunayampathi for the relief of declaration of title and permanent injunction and the said suit was dismissed with costs on 29.11.1976. As against the same, the plaintiff and his family members had filed an appeal in A.S.No.5 of 1977 on the file of the Sub Judge, Cuddalore and the same was also dismissed on 07.12.1977 with costs.

Thereafter, the plaintiff and his family members had filed a second appeal in S.A.No.1216 of 1978 before this Court and the same was also dismissed on 24.11.1981, but, in the plaint filed in the present suit, the plaintiff has not whispered anything about the proceedings in O.S.No.467 of 1975, A.S.No.5 of 1977 and S.A.No.1216 of 1978.

21. According to the plaintiff, his father Muthu Padayachi had filed a suit on a promissory note against the said Arumugam Padayachi in O.S.No.735 of 1973 on the file of the District Munsif of Cuddalore and got a decree on 14.07.1973 and thereafter filed an EP.No.48 of 1975 and the suit properties were attached on 10.01.1975 and thereafter, the said execution petition was dismissed in view of Ordinance 1/1975 on 03.02.1975, but, the attachment was made to continue. The said facts were not stated in the previous proceedings i.e., in O.S.No.467 of 1975. After dismissal of the said suit, the appeal and the second appeal, the plaintiff and his family members had proceeded to use the weapon (decree obtained in a pronote suit) which was kept in abeyance.

22. The learned Senior Counsel for the appellant/plaintiff has submitted that the suit in O.S.No.735 of 1973 was filed by the plaintiff's father Muthu Padayachi on a promissory note against his brother Arumugam Padayachi and got the decree on 14.07.1973 and subsequently, he filed EP.No.48 of 1975 and attached the suit properties on 10.01.1975 and thereafter, the said Muthu Padayachi died and hence, the plaintiff and his family members had no knowledge about the aforesaid proceedings and that was the reason for not mentioning about the aforesaid proceedings in O.S.No.467 of 1975, but, there is no averment to that effect in the plaint filed in the present suit. There is also no evidence to that effect. The plaintiff has not given any explanation as to why they failed to mention about the execution proceedings in O.S.No.467 of 1975. Eventhough, the said suit went up to second appeal, throughout the said proceedings neither the plaintiff nor his family members whispered anything about proceedings in E.P.No.48 of 1975 in O.S.No.735 of 1973. The conduct of the plaintiff and his family members would show that they wantonly suppressed the

aforesaid execution proceedings in O.S.No.467 of 1975. It is also to be pointed out that the plaintiff has not stated either in his plaint or in his evidence as to when he came to know about the proceedings in EP.No.48 of 1975. Ex.A1 shows that the plaintiff's father had filed the pronote suit and EP against Arumugam Padayachi by engaging Mr.S.Srinivasan, Advocate as his counsel. Ex.B30 shows the plaintiff and his family members engaged the very same counsel and filed the suit in OS.No.467 of 1975. Therefore, it has to be presumed that the plaintiff got the knowledge about the aforesaid execution proceedings even at the time of the filing of the suit in O.S.No.467 of 1975, but, he and his family members have wilfully suppressed the aforesaid execution proceedings in O.S.No.467 of 1975.

23. In C.S.Mani (deceased) by LR C.S.Dhanapalan Vs. Chinnasami Naidu (deceased) through L.Rs (cited supra), the Hon'ble Supreme Court has held in Paragraph No.14 as follows:

"14. The execution application of the appellant was closed on 15.02.1975 in view of Section 4 of the Debt Relief Act staying executions against agriculturists. The stay of further proceedings in execution under Section 4 of the Debt Relief Act was only for a specified limited period. The proviso to Section 4 clearly implied that any attachment made in such stayed execution proceedings shall continue to be in effect, by providing that the court will have to pass, if necessary, the orders for custody or preservation of the attached property during the pendency of stay under the Debt Relief Act. Therefore, the enactment of the Debt Relief Act did not determine the attachment. What was stayed or kept in abeyance during the period when the statutory stay of execution operated, was not the attachment, but the further proceedings in pursuance of the attachment, that is, sale of the attached property. On the expiry of the moratorium period under the Debt Relief Act on 17.10.1979, the decree holder became entitled to continue the execution by proceeding with the sale. There is thus no question of determination or the period when the statutory stay under the Debt Relief Act, nor any revival of attachment thereafter. Attachments in execution, already effected, continued and were in effect during the entire period of stay of execution by the Debt Relief Act. The alienations by Mokshammal under sale deeds dated 17.02.1978 and 18.02.1980 were therefore void as against the claim enforceable under the attachment obtained by the appellant, having regard to Section 64 of the Code. As

the attachment obtained by the appellant continued, the sale in his favour was valid and the sales by Mokshammal were invalid".

24. From the aforesaid decision, it is clear that on the expiry of the moratorium period under the Debt Relief Act on 17.10.1979, the decree holder became entitled to continue the execution by proceeding with the sale. It is also clear that the attachments in execution, already effected, continue and were in effect during the entire period of stay of execution by the Debt Relief Act and if any alienation is made during the said period is void as per Section 64 of CPC. There is no quarrel with regard to the aforesaid proposition of law.

25. In Padmavathi Ammal Vs. Maruthachalam Pillai and Others (1966) (1) MLJ 413, a Division Bench of this court has held that the requirements of Order 21, Rule 54 (1) and (2) are mandatory and every one of the prescribed things must be done before an attachment could be said to have been made for Section 64 of CPC, to come into operation. It is further held that once it is held that a legally perfected attachment is an essential requisite for the operation of Section 64 of CPC, the question whether the alienee had notice or not of the decree or of the execution proceedings would be of little consequence. A mere notice will not complete and legalise an imperfect attachment.

26. We must also take note of Madras Amendment of Sub-rules (2) and (3) of Rule 54 of Order 21 of CPC which reads thus:-

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode. A copy of the order shall be affixed on a conspicuous part of the property and on a conspicuous part of the Court-house. Where the property is land paying revenue to the Government, a copy of the order shall be similarly affixed in the office of the Revenue Divisional Officer of the area where the land is situated. Where the property is situated within Cantonment limits the order shall be similarly affixed in the office of the Local Cantonment Board and the Military Estates Officer concerned, and where the property is situated within the limits of a Municipality, in the Office of the Municipality within the limits of which the property is situated."

(3) The order of attachment shall be deemed to have been made as against transferees

without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is earlier;"

27. From the aforesaid provisions, it is clear that the order of attachment shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and affixture of the order on part of the property and on a conspicuous part of the court-house and also affixture in the office of the Revenue Divisional Officer of the area. It is also clear that the order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under Sub-Rule (2), whichever is earlier.

28. In this case, it is not the case of the plaintiff that the fifth defendant had purchased the property from the said Arumugam Padayachi without any consideration. Therefore, it has to be presumed that the fifth defendant had purchased the suit properties for valuable consideration and in such a case, the order of said attachment shall be deemed to have been made either from the date on which, the fifth defendant had knowledge of the order of attachment or the date on which the order was duly proclaimed under Sub-Rule(2) whichever is earlier.

29. In this case, the fifth defendant while examining himself as D.W.2 has categorically stated that he does not know about the said attachment and he further stated that no proclamation also has been made. Under the said circumstances, the burden is upon the plaintiff to prove that the order of attachment was properly proclaimed as prescribed under Sub-Rule (2) of Rule 54 of Order 21 of CPC or the fifth defendant had knowledge about the said attachment before purchasing the property from the judgment-debtor Arumugam Padayachi. In this case, though the plaintiff had examined one Amin as P.W.4 to prove the fact that the delivery of possession was given to one Court auction purchaser Krishnamurthy, he failed to examine the Court Amin who executed the order of attachment or any other Officer to prove the manner of attachment made on the suit property. He also failed to produce the certified copy of the attachment warrant and the report submitted by the Court Amin

with regard to the attachment said to have been made on 03.02.1975. In Exs.A1 and A13, it has been stated that the properties were attached on 10.01.1975, but, it is not stated what was the procedure followed at the time of effecting the said attachment.

30. In Chinnasami Vs Subakmul Gulecha and another (cited supra), to prove the attachment, one person was examined as D.W.1 and he deposed that the attachment was effected by Amin through Court and by tom-tom, planting sticks and of the attestation of the local people. Further, through him the order of attachment was marked as Ex.B1. In Ex.B1 gave details about how attachment was effected. Taking into consideration of the said facts, this Court has held that the attachment has been properly made. But, in this case, even though, the fifth defendant had specifically denied in his evidence that no such attachment has been made and no proclamation has been made, the plaintiff has not adduced any contra evidence. The plaintiff has not discharged the burden that the attachment was effected as per the procedure prescribed under Sub-Rule 2 of Rule 54 of Order 21 of CPC by examining any of the persons who are acquainted with the aforesaid facts. Therefore, the aforesaid decision will not apply to this case.

31. In Nalli Textiles Vs Minor Krishnan and another (cited supra) this court has held that when the property is purchased from the judgment debtor with full knowledge of the attachment, then the sale is hit by the provisions of Section 64 of CPC and also by the Principle of Lispendens, but in this case, as already pointed out that the plaintiff failed to prove that a valid attachment was made and also that the fifth defendant had purchased the property from the judgment debtor with full knowledge of the attachment. Therefore, the aforesaid decision also will not apply to this case.

32. In K.L.Ganapathy and another Vs Ganapathy Bhatta and another (cited supra), the High Court of Karnataka has held that if the additional evidence will help the court to come to a proper conclusion, it should be received, but, in this case, though, the first appellate court judgment shows that the appellant herein has filed two applications in I.A.Nos.28 of 1977 and 47 of 1978 seeking permission of the appellate court for adducing additional evidence and the said petitions were dismissed on the ground that the appellant has not stated any valid reason for not adducing evidence before the trial court, the appellant has not stated any reason for not examining the Court Amin before the trial court and also for not producing certified copy of the report submitted by the court Amin with

regard to the attachment made by him before the trial court. Under the said circumstances, this Court is of the view that the aforesaid decision will not help the appellant.

33. In Nallamuthu Padayachi Vs. Srinivasa Ayyar (cited supra) it was held that the Section 11 of CPC which deals with res judicata, requires as one of the conditions for the plea of res judicata to be supported, that the parties should be litigating under the same title in the subsequent suit as, they were litigating under, in the first suit. In this case, as already pointed out that though the plaintiff claimed title through court auction sale, in the previous suit, i.e., in O.S.No.467 of 1975, the plaintiff herein and his family members had claimed title based on the settlement deed said to have been executed by his grand father Chinnasami Padayachi dated 26.02.1973. But, the main contention of the plaintiff, in this case, is that in the pronote suit filed by his father against Arumugam Padayachi, he got a decree and filed EP and attached the suit property on 10.01.1975 and when the said attachment was in force, the 5th defendant herein had purchased the suit property on 12.03.1975 and hence, the said sale is vitiated. In the previous suit, i.e., in OS.No.467 of 1975, the plaintiff herein also one of the plaintiffs. In that suit itself, he could have pleaded the fact that since the 5th defendant herein had purchased the suit property when the attachment was in force, the said sale is vitiated. But, in that suit, the plaintiff had totally suppressed the Execution Petition and attachment proceedings.

34. At this juncture, it would be relevant to refer to the decision in State of Karnataka Vs. All India Manufacturers Organization, AIR 2006 SC 1846, wherein a three Judges Bench of the Hon'ble Supreme Court has held as follows:

"Further, Explanation IV to Section 11, states: "Explanation IV:- Any matter which might and ought to have been made ground defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." The spirit behind Explanation IV is brought out in the pithy words of Wigram, V.C. in Henderson v. Henderson as follows:

"The plea of res judicata applies, except in special case (sic), not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at

the time."

In *Greenhalgh v. Mallard* (hereinafter "Greenhalgh"), Somervell L.J. observed thus:

"I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

The judgment in *Greenhalgh* (supra) was approvingly referred to by this Court in *State of U.P. v. Nawab Hussain*. Combining all these principles, a Constitution Bench of this Court in *Direct Recruit, Class II Engineering Officers' Association v. State of Maharashtra* expounded on the principle laid down in *Forward Construction Co.* (supra) by holding that: "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had (sic) decided as incidental to or essentially connected with (sic) subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*."

" The Principle and Philosophy behind Explanation IV, namely to prevent "the abuse of the process of the Court" (as stated in *GreenHalgh* (supra) through re-agitation of settled issues, provides yet another ground to reject the appellants' contentions....."

35. From the aforesaid decision, it is clear that the plea of *resjudicata* applies, not only to points upon which the court was actually required by the parties to decide, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. It is also clear that the principle and philosophy behind Explanation IV to Section 11 of

CPC is to prevent the abuse of process of the court', through re-agitation of the settled issues.

36. In this case, as already pointed out that the plaintiff herein might and ought to have pleaded in the previous suit i.e., in OS.No.467 of 1975 that since the 5th defendant herein had purchased the suit properties, when the attachment was in force, the sale in his favour is vitiated. But the plaintiff did not take such a plea in the previous suit. Hence, the principle of constructive resjudicata underlying Explanation IV to Section 11 of CPC will apply to this case.

37. A certified copy of the plaint filed in O.S.No.467 of 1975 has been produced and marked as Ex.B.30. In the said plaint, in Paragraph No.3, it has been stated that the said Chinna Padayachi had executed a registered settlement deed dated 26.02.1973 and the same was brought out with the consent of Muthu Padayachi. For proper appreciation, the relevant portion of the said plaint is extracted here under:

" While so, Chinna Padayachi executed a settlement deed in respect of his share in all the items including suit items in favour of plaintiffs 1 to 4 under a registered deed dated 26.02.1973. It is true valid and it was accepted and acted upon. It was brought about with the consent of Muthu Padayachi and that too after division in status created by the filling of the suit in O.S.No.145 of 1968".

38. A plain reading of the aforesaid averments would show that the plaintiff herein and his family members have categorically admitted in O.S.No.467 of 1975 that the said Chinna Padayachi had executed a registered settlement deed dated 26.02.1973 in favour of the plaintiffs therein with the knowledge of Muthu Padayachi. According to the plaintiff, his father Muthu Padayachi attached the suit properties on 10.01.1975 as if the properties belonged to Arumugam Padayachi. The conduct of the plaintiff and his father Muthu Padayachi and grand father Chinna Padayachi would show that they blow hot and cold. At one stage, they claimed that the suit properties belonged to themselves by virtue of the registered settlement deed dated 26.02.1973, stating that the said Arumugam Padayachi did not have any title or right over the suit properties, but another stage, they claimed that they attached the suit properties as if they belong to Arumugam Padayachi.

39. After getting the said attachment order, they did not proceed on the said attachment order and they kept the same

in abeyance and they proceeded to file the suit in O.S.No.467 of 1975 totally suppressing the said attachment proceedings. After loosing the said case before three forums, they had decided to use the Asthra (Weapon) of attachment order by filing another EP and brought the property for sale and the plaintiff's own sister's husband took the property in auction and from him, he purchased the property. So, the conduct of the plaintiff and his father would show that the whole aim is to get the suit properties by one way or other by suppressing the earlier proceedings. So, it is clear that the plaintiff has not come to the court with clean hands. The relief of declaration and permanent injunction are equitable reliefs. The person who seeks equity, should keep equity and he should come to the court with clean hands. Further, the plaintiff has suppressed the attachment proceedings in O.S.No.467 of 1975 and after loosing the case in the previous round of litigation up to this court, he filed Execution Petition and brought the property for sale and the plaintiff's own sister's husband took the property in auction and purchased the property by himself and filed the present suit. In the present suit also, he suppressed all the proceedings in O.S.No.467 of 1975. Therefore, the plaintiff is not entitled to seek any relief on the ground of suppression of material facts.

40. It is also to be pointed out that originally the plaintiff has filed the suit as if he is in possession of the suit properties, but, subsequently, he amended the plaint by saying that if the court comes to the conclusion that on the date of filing of the suit, he was not in possession, the court may order delivery of possession and mesne profits. It also would show that he filed the suit with false averments that his vendor Krishnamurthy took possession of the property in pursuance of the court sale and subsequently he handed over the possession to him in pursuance of the sale deed. In the previous suit i.e., in O.S.No.467 of 1975 in three forums, it was categorically held that the plaintiffs therein (including the present plaintiff) were not in possession of the suit properties and on the contrary, the fifth defendant was in possession of the suit properties and that being so, the plaintiff's vendor Krishnamurthy would not have taken possession in pursuance of the said sale certificate issued in his favour and consequently, he could not have handed over the possession to the plaintiff also. The alleged cause of action appears to be false one. Therefore, on that ground also, the suit is liable to be dismissed.

41. The learned trial court judge taking into consideration of the aforesaid facts, had rightly dismissed the plaintiff's suit and the same has been confirmed by the first appellate court. In the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered.

42. In the result, the second appeal is dismissed confirming the judgments and decrees of the courts below. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Asst.Registrar

/true copy/
Sub Asst. Registrar

gv/Vv
To

1. The Sub Judge, Panruti
2. The District Munsif's Panruti.
3. The Section Officer, VR Section,
High Court, Madras.

+1 cc to Mr.R.Suhil Kumar Advocate sr9247
+1 cc to M/s.R.Subramanian Advocate sr9285

S.A.No.264 of 1999

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