(1929) 11 MAD CK 0034

In the Madras High Court

Adaikappa Chettiar APPELLANT

Vs

Natesan Chettiar RESPONDENT

Date of Decision : 26-11-1929

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 48

Citation : AIR 1931 Mad 381

Hon'ble Judges : Venkatasubba Rao, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—The lower Court made an order transmitting the decree for execution as against defendants 4 and 5. This appeal

has been filed by defendant 5 who impeaches that order. The following pedigree may be found useful:

| |

Lakshman Chetty Ramaswamy Chetti

defendant 1 (died) prior to the filing

| of O.S. No. 10 of 1912

Kasi Chetti defendant 2 |

(died) |

|

|

| |

Kasi Chetti Adaikappa Chetti

defendant 3 defendant 4

died 29th March 1922

|

Adaikappan Chetti

defendant 5

2. A certain Sreenivasa Naicker filed O.S. No. 10 of 1912 in the Sub-Court of Tuticorin for the recovery of about Rs. 23,000 due upon a

promissory note executed by Lakshmana, defendant 1, in his favour. In that suit four persons were joined as defendants, Lakshmana and his son

(representing one branch) and the two sons of Ramaswami (representing the other branch). I may note at once that defendant 5 was not made a

party to that suit. A decree was passed on 10th February 1913, against defendant 1 personally and against the family properties, of all the

defendants that had been impleaded. The plaintiff, Sreenivasa, assigned the decree on 27th July 1914, in favour of the respondent Natesa Chetti.

His right as assignee-decree-holder was recognized by the High Court on 23rd January 1917. On 28th November 1924, defendants 1 and 4 were

respectively brought on the record as the legal representatives of the second and third, who had in the meantime died. Several execution

applications were from time to time filed, so that the decree might not get barred under the three years rule. The respondent filed the execution

application (E.A. No. 1028 of 1928) which is the subject of this appeal in the usual form, on 1st October 1928. In addition to that application, he

filed on the same date a separate petition for bringing defendant 5 on the record, in the place of his deceased father, defendant 3. The two

applications were resisted by both defendants 4 and 5, but their objections were overruled by the learned Subordinate Judge, who directed the

decree to be transmitted for execution as against them.

3. From this statement, it is clear that when the execution application in question was filed, more than 12 years had elapsed from the date of the

decree. Section 48, Civil P.C., would ordinarily be a bar to the execution, but the respondent relies upon certain fraud, under Clause 2 (a) of that section, which he contends prevents the running of the Statute of Limitation. That clause runs thus:

Nothing in this section shall be deemed

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years,

where the judgment-debtor has by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date

of the application.

4. He admits that the fraud alleged by him is that of defendant 1, but says that it enables him to treat the decree as being alive even as against

defendant 4. The first question that this appeal raises is, whether this contention is correct. He next urges that defendant 4 is prevented on the

ground of res judicata from pleading that the decree is barred by the 12 year rule. The facts that need be referred to in this connexion are the

following. The respondent filed on 1st November 1927, E.A. No. 1509 of 1927. Defendant 4 did not appear to contest it and an order was made

on 18th April 1928, transmitting the decree for execution. It will be seen that this application of November 1927, was itself filed after the lapse of

12 years from the date of the decree. What the respondent urges is, that the order then made, involves the decision that the decree was

nevertheless in force and that defendant 4 is precluded from now raising the plea that it is barred by the twelve year rule. I may observe that the

question of res judicata is a new point raised by the respondent for the first time in appeal. He next contends that if defendant 4 is barred by res

judicata, defendant 5 is equally barred on the principle of representation. The latter, besides controverting each of these positions, further asserts

that the application as against him is in any event barred as it was filed more than three years-after his father''s death.

5. The facts which are said to constitute fraud on the part of defendant 1 are these. I have said that the plaintiff, Sreenivasa assigned his decree to

the respondent on 24th July 1914. Two petitions were subsequently filed, one by the respondent and the other by Lakshmana, defendant 1. The

former applied that the transfer to him should be recognized; Lakshmana prayed that satisfaction of the decree should be recorded. His case was

shortly this. He executed a mortgage in favour of one Ramanatha, allowing a part of the consideration to remain in his hands, with that part,

Ramanatha discharged the decree but he fraudulently obtained its transfer in favour of the respondent. This was his. case and the first Court

believing it, refused to recognize the transfer in favour of the respondent and dismissed his application, but somewhat strangely rejected also the

application of Lakshmana. Both Lakshmana and the respondent being dissatisfied with these orders, filed appeals to the High Court. It found that

defendant 1 did not make out his case and rejected his application and as a necessary consequence, recognized the transfer in favour of the

respondent. The application for recording, satisfaction was made on 31st July 1914, and the judgment of the High Court was pronounced on 23rd

January 1917. The respondent contends that the fraud of defendant 1 having been only then discovered, the time began to run u/s 48, Clause 2 (a),

from that date.

6. I think I have stated the material facts and shall now proceed to consider the legal contentions raised.

7. Numerous cases have held that the word .""fraud"" in this provision should be liberally interpreted. In Visalakshi Ammal v. Sivasankara Taker

[1882] 4 Mad. 292 a fictitious transfer of his property made by a judgment-debtor, was held to amount to "" fraud"". In Annamalai Goundan v.

Rangaswami Chetti [1883] 6 Mad. 365 eluding service of warrant and making applications which had the effect of staying execution, was held to

be ""fraud."" In Venkayya v. Raghavacharlu [1899] 22 Mad. 320 locking up the house so as to prevent attachment of moveable property was

similarly held to be ""fraud."" In Ramanathan Chettiar v. Mohideen Sahib AIR 1924 Mad. 836 it was again held that the evasion of arrest was

fraud"" within the meaning of Section 48. Having regard to these and other similar rulings, the appellant''s learned Counsel did not contest the

position that defendant 1''s conduct in pleading a payment, found not to have been made, amounts to ""fraud"" under this section.

8. The question then is, does the fraud of defendant 1 extend the time even as against defendant 4? Section 48 cannot, in my opinion, mean that the

fraud on the part of one judgment-debtor, gives a new starting point as against his co-debtors. The construction suggested for the respondent leads

to manifest injustice. It is enacted by way of exception, that the judgment-debtor guilty of fraud cannot avail himself of the rule which says, that a

decree shall not be executed after the lapse of the 12 years. Why should an innocent judgment-debtor suffer for the fraud of his co-debtor? The

view of Sundara Iyer, J., in Abdul Khadir v. Ahammad Shaiwa Rowther [1912] 35 Mad. 670 which differed from that of Phillips, J., was upheld

in the Letters Patent appeal by a Bench of three Judges : Abdul Khadir v.'' Ahammad Shaiwa Rowther [1915] 33 Mad. 419. The following

sentence embodies the opinion of Sundara Aiyar, J.:

At any time, I am unable, against what appears to me to be the plain meaning of the words of the section, to hold that fraud by one judgment-

debtor would give relief to the decree-holder against his co-judgment-debtor.

9. Sir Arnold White, C. J., says in his judgment at p. 423 in the Letters Patent appeal, in which the other two Judges concurred:

It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be

deprived of the benefit of the prescribed limitation by reason of acts done by his joint judgment-debtor, over whom he has presumably no control

and for whose action he is not responsible.

10. It is argued for the respondent that the fraud here being of a different kind, ''the present case is distinguishable from the case cited. Defendant 1

in that case evaded arrest and it was held that his fraud did not give a fresh starting point as against defendant 2. The fraudulent act there could

benefit only the party who committed it. But in the present case, it was falsely asserted that the decree became satisfied and that plea would enure

to the benefit of not only the party who put it forward but also his co-judgment-debtors. This is the contention advanced, but the distinction

adverted to does not affect the principle, namely, that it would be unjust that one party should suffer for the wrongdoing of another.

11. I may cite a Privy Council case John v. Dodwell & Co. [1918] A.C. 563 which though not a decision on the Limitation Act, is yet very

instructive by analogy.

12. The respondents authorized the manager of their business at Colombo to draw cheques in their names upon their banking account for the

purpose of the business. In 1909 and 1910 the manager bought shares on his own behalf through the appellants as brokers, and in payment of the price fraudulently gave them cheques drawn by him upon the respondent''s account. The appellants received the amount of the cheques without

fraud but with knowledge that the manager without apparent authority, was drawing for his own purposes upon the respondents'' funds. The

appellants paid over the proceeds of the cheques (except a small part) to the sellers of the shares. The respondents did not discover the fraud of

their manager until October 1911; In January 1913, they sued the appellants in Ceylon to recover the amount of the cheques.

13. It was held that the claim fell within Section 11 of the Prescription Ordinance of Ceylon which allows a three year period in cases not expressly

provided for, and that whether under English law or Roman - Dutch law as administered in Ceylon no new cause of action arose when the fraud

was discovered, since the fraud was not that of the appellants nor of any person for whom the they were responsible. Viscount Haldane observes

in his judgment thus:

Mr. Upjohn, in arguing the case of the respondents with conspicuous fairness, drew their Lordships'' attention to these pages in the Digest. They

think that they illustrate a general principle, applicable in Ceylon or in England, that to enable the defence of concealed fraud to be relied on as

giving a new cause of action, the fraud must be shown to be the fraud either of the defendant himself or of some one for whose action in the matter

in question he has assumed responsibility.

14. The Supreme Court thought that it was sufficient to show that the appellants had obtained the cheques from a person who had committed a

fraud and concealed it, although they themselves had not been guilty of fraud. In coming to that conclusion, they were influenced by the decisions of

the English Courts of Chancery such as that of Lord Eldon in Huguenin v. Baseley [1806] 15 Ves. 180 who said, in his judgment:

that he should regret that any doubt could be entertained whether it is not competent to a Court of equity to take away from third persons the

benefits which they have derived from the fraud, imposition, or undue influence, of others.

15. Their Lordships of the Committee then point out that the doctrine of restitution of property by third persons deriving a benefit does not apply to

a new cause of action arising from a concealed fraud. The law is tersely stated in the following passage:

In the present case there is a statute of limitation and in order to escape from its application it is necessary to show that there is a subsequent and

independent cause of action which arises from the concealment of the fraud. Such a separate cause of action arises, as their Lordships have

already said, only out of the conduct of a person who is held to have been responsible for the fraud and has in breach of his duty concealed it.

16. I shall not cite any English cases recognizing this principle beyond merely referring to the judgment of Lord Alverston, C. J., in McCallum In

Re: McCallum v. MoCallum [1901] 1 Ch. 143. The respondent''s contention that the fraud of defendant 1 gives rise to a new cause of action even

as against defendant 4 by reason of his having derived a supposed benefit, is thus clearly untenable and must be rejected.

17. For the respondent it is next argued, that defendant 1 must be deemed to have been the agent of defendant 2-3 and that the fraud of the agent

gives a fresh starting point as against the principal. The facts relied on for this argument are these: The decree was passed in 1913 on a promissory

note executed by defendant 1 in 1910. The suit itself was filed in 1912. There was a partition in 1911 between Lakshmanan Chetty and

Ramaswami Chetty. It contains no reference to the debt in question, but there is a general clause that each party is to be liable for his own debts. It

is now argued that this deed makes defendant 1 liable for the debt in question and that by implication he must be deemed to have been constituted

defendant 3''s agent for paying, it off. It is next asserted that the debt became merged in the decree of 1913, and that when defendant 1 falsely

pleaded that it had been discharged, it must be deemed that he was acting not only on his own behalf but also on behalf of his principal defendant

3. We must point out that this contention has been for the first time raised in this Court. There is not a scrap of evidence to show that defendant 1

was the agent of defendant 3. The partition dead does not in the least avail the respondent. It merely accounts for defendant 3 not having taken any

steps in regard to this decree. It-did no more than provide that each of the executants was to be liable for his own debts and this debt was not

even specified. When subsequently the decree'' was passed against both, defendant 3 as between themselves was in a position to say:

The debt is not mine; I shall have nothing to do with it.

18. I fail to see how any agency can be implied from these facts. If the respondent wished to rely upon any such ground, he ought to have made

below a. specific allegation and proved it by evidence. This contention therefore must be rejected.

19. I shall now proceed to deal with the contention of res judicata raised. As I have pointed out in an earlier paragraph, the assignee decree-holder

contends that defendant 4, by reason of a certain previous order, is now precluded from pleading, that the execution is barred under the 12 year

rule. If this contention fails, the further question does not arise, whether defendant 5 is also barred by res judicata on the theory of constructive

representation. The respondent''s argument on the point of res judicata I have already sat forth. The order which is said to operate as res judicata

is the one made on Execution Petition 1509 of 1927. It was filed on 1st November 1927, that is, more than 14 years after the date of the decree.

On 4th January 1928, the Judge endorsed upon this the word ""notice"" and on 18th April 1928 ha made the final order ""send."" This means that the

Judge directed the decree to be transmitted. The respondent''s argument is that the order then made decides by implication, that the decree was in

force on the date of the previous petition. His argument is so far sound, but how does it follow, from this that the present application is not barred?

Now let us look at the previous petition to find out what was decided on the former occasion. The application presented was in the prescribed

tabular form. In the column headed "" Date of decree"" the respondent gave two dates : (1) 19th February 1913, (2) 23rd January 1917. This is

obviously misleading. How can the decree have two dates? It may be stated (with the information we now possess) that the second date happens

to be that, when the High Court recognized the assignment in his favour. Under no other column in this petition does he again refer to this date. Nor

does his application contain any hint that it was on; that date that his right was recognized. The Judge, as is usual in such cases, trusted to his

clerks. They endorsed on the docket of the petition : .

D. D, 23rd January 1917;

D. L. P., 28th November 1924;

More than one year.

20. The Judge, without further, scrutiny, ordered ""notice."" I may explain that D. D. means ""date of decree"" and D. L. P. stands for ""date of last

petition."" The respondent having raised the point of res judicata for the first time in this Court no formal evidence is forthcoming as to what these

symbols mean. What then happened is however quite manifest. As the Judge had no reason to suspect that the decree was not one of 1917 the

only point that mattered was, what was the interval of time between the petition before him and the previous one? That being more than a year, the

Judge, in the usual course, ordered notice, and defendant 4 having failed to appear on the due date and contest the petition, the Court ordered

execution. Eight or wrong this order involves the decision that the decree was then executable and defendant 4 is estopped in any proceeding from

asserting the contrary.

21. But is there any implied finding either that there was fraud or that it was discovered on 23rd January 1917? There was not a word said about

fraud; in deed, not the remotest suggestion of it. On the contrary, the decree-holder, misled the Court (wilfully or not, it; matters little) into believing

that the decree was passed in 1917. Are we now to assume that the previous order had the effect of holding that, contrary to patent facts, the

proper date of the decree is 23rd January 1917? Fortunately, we are not asked to proceed on any such absurd hypothesis. It is not in regard to

the date of the decree that the ground of res judicata is urged. But what the respondent contends is, that we must hold that in the previous order is

involved the finding, that owing to fraud, the time was extended. This contention is utterly untenable. I may in this connexion refer to a circumstance

which, in my opinion, is most significant. E.A. No. 831 of 1924 is one of the previous execution applications filed by the respondent. It was filed

on 1st August 1921, that is before the expiry of 12 years from the date of the decree. In that petition, as in those that followed, he mentions the

date of the decree as being 10th February 1913 as well as 23rd January 1917. The 12 year period not having then expired, it was inconceivable

that the decree-holder was then relying upon any fraud. This shows how utterly futile the argument is, that by referring to the date, 23rd January

1917, in the latter petition, (that is E.A. No. 1509 of 1927 filed on 1st November 1927) the decree-holder intended to rely upon the ground of fraud.

22. Having made this observation I shall now approach the question from a somewhat different standpoint. The previous application defendant 4

could have resisted by pleading limitation. Had he appeared in Court and said that the execution was barred, the matter would have been enquired

into. That being then a defence open to him, the former order must be held to involve the decision. that the application was not barred. He cannot

now assert that the previous application was in fact barred by limitation. He is debarred from showing that and nothing more. Can the former order

be said to involve any adjudication as to the starting point? The date of the previous petition is, as I have said, 1st November 1927. The order, for

aught we know, might have proceeded upon the footing that the starting point was in 1915; even in which case the former petition of 1927 would

be in time, but the present one of 1928 would not. Conversely, the previous order might similarly be said to involve that the starting point was

somewhere in 1926, in which case it would be open to the plaintiff to contend that the decree would not be barred till 1938. In other words, the

previous order is not inconsistent with there being an implied decision, that the starting point was any one of the numerous (365 by 12) days, that

intervened between 1st November 1915 and 1st November 1927. The argument is clearly unsound and must be rejected.

Certainty is essential for the application of the rule of res judicata and the Court would not prevent the re-agitation of a matter whore it is not

certain that the previous decision proceeded on a particular ground: B. Bayyan Naidu v. B. Suryanarayana [1913] 37 Mad. 70 :

If it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed without

indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large:

Russell v. Place [1854] 2 W.R. 248 quoted in Vythilinga Mudaliar Vs. Ramachendra Naicker, .

Where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the

conclusion, But ...''such a conclusion must be inevitable or it cannot be drawn''...If there is ambiguity...the matter is open to controversy in subsequent proceedings: Munisami Naidu Vs. Ammani Ammal, .

23. This principle of res judicata is applied also in In Re: Alsop and Joy''s Contract [1889] 61 L.T. 213.

24. I may also extract the following passage from the judgment of Mellish, L. J., in In Re: Bank of Hindustan, China & Japan (Alison''s case) (15):

It is clear I apprehend that the judgment of the Courts of Common law is not only conclusive with reference to the actual matter decided but that it

is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be

clearly discovered : In Re: Bank of Hindustan etc. [1873] 9 Ch. A. 1.

25. Mr. T.M. Krishnaswami Aiyar for the respondent contends that any matter which might and ought to have been made a ground of defence on

the former occasion should be deemed to have been directly and substantially in issue : see Section 11, Expl. 4, Civil P.C. I fail to see how this rule

can help him. How could defendant 4 be expected to answer a charge of fraud not made? The rule refers to a ground of defence which might and

ought to have been raised, but any such defence can relate only to a matter either expressly or impliedly alleged. Let me take an example.: A sues

B for the first instalment due under a bond, and though the claim on the face of it is barred, succeeds in obtaining an ex parte decree. Let us

suppose that he could have relied on an acknowledgment in writing signed by B, but that it was not referred to for some reason in the plaint. He

then ''brings a second suit for a subsequent instalment. Can he assert that the previous ex parte decision has impliedly decided that the writing

produced then for the first time amounts to a valid acknowledgment? Can he contend that it was decided by implication in the former suit, that the

writing furnishes the starting point from which limitation is to be computed? The answer is plainly in the negative. The present case does not differ in

substance from this illustration.

26. The rule referred to, means this and nothing more, that defendant 4 was bound to resist the previous petition, on all the grounds possible for

him to urge according to his knowledge at that time, at the risk of being debarred from relying on them in any subsequent proceeding. The

application of the rule may be thus illustrated. A, a Hindu, dies leaving a widow and a brother, B. The widow sues B for recovery of certain property alleging that it was the self-acquired property of her husband. B alleges that the property was joint family property and that on the death

of A he became entitled to it by right of survivorship. The Court finds that the property was the self-acquired property of A and decrees the

widow''s claim. Subsequently B sues the widow to recover the same property from her, claiming the same as a devisee under A''s will. The suit is

barred as res judicata, for B might and ought to have set up the claim under the will as a ground of defence in the former suit.

When a plaintiff claims an estate, and that defendant, being in possession, resists that claim, ha is bound to resist upon all the grounds that it is

possible for him according to his knowledge then to bring forward. Srimutt Rajah Moottoo Vijaya v. Katama Natchiar [1866] 11 M.I.A. 50.

27. Similarly, the present defendant 4 cannot be permitted on any ground to show that the decree was not in full force on the date of the former

petition. But what the respondent contends is something very different; he says that defandant 4 is debarred from showing that the decree is not

alive when the present application was filed.

28. Let me go back to the example given. The first suit decided that the property belongs to A''s widow and not to B. That is the decision in the

suit and the relief granted is based on that decision. B cannot urge on any ground in a subsequent proceeding, that the property is his. Apart from

the relief granted, there is an adjudication of the issue, express or implied, that A and B became divided. That question again is barred as res

judicata. But to bring out the respondent''s point, I shall vary the facts of this example. Suppose that A''s widow was in a position to, but did not,

rely upon a writing that evidences the separation she had alleged. She now brings a second suit to enforce a covenant in it by B, to pay a stated

sum to A''s husband. B disputes the genuineness of that writing. Can it be maintained that the previous decision contains an implied finding in favour

of this document? Such an argument is fanciful, but this is on all fours with what the respondent urges. The point does not admit of serious doubt,

but I have dwelt upon it at this length, as the opposite of what I am holding has been very strongly contended for.

29. The respondent''s contention fails on yet another ground. When the judgment-debtor has no sufficient notice of the right claimed against him,

the order passed in execution proceedings cannot operate as res judicata. In Narayana Pattar v. Gopalakrishna Pattar [1905] 28 Mad. 355 the

notice to B on A''s execution application did not specify that interest was claimed; held: that the order granting interest ex parte had not the force of

res judicata, so as to estop B from disputing the claim in subsequent proceedings. To the same effect is the ruling in Ramasami Naik v. Ramasami

Chetty [1907] 30 Mad. 255. In Sheik Sudan v. Ramchandra Bhunjgaya [1887] 11 Bom. 537 the application went beyond the terms of the decree

and West, J., observes:

Such an order, prima facie, only of an executive character, could not possibly have the effect of res judicata, unless the judgment-debtor being

called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-

creditor, had then either failed in his contention to the contrary, or at any rate, allowed the judgment to go by default: see also Chidambaram Chetti

v. Kandasami Goundan AIR 1924 Mad. 1.

30. The cases relied on by the respondent do not really help him. What they decide is, that the judgment-debtor is bound by the order previously

made. He is precluded from showing that it is wrong. The cases generally deal with the three year rule of limitation. The starting point being the

previous application, if that was by the former order held to be in time, the judgment-debtor cannot show that it was in fact barred. He is bound by

the former decision right or wrong, and if the previous petition was in time, that furnishing the starting point, the second one filed within three years

of it is necessarily not barred. This is all that the rulings relied upon by the respondent decide. In the present case we are concerned with the twelve

year rule of limitation. The point to note is that previous petition, unlike in the other case, does not furnish the starting point. To maintain that the

present application is out of time the judgment-debtor has no need to show that the former order is wrong. Ho can accept it as right and still

contend that the present petition is barred. This fundamental difference the argument of the respondent ignores. Mungul Persahd Dichit v. Grija

Kant Lahiri [1882] 8 Cal. 51 and Rajah of Ramnad v. Velusami Thevar AIR 1921 P.C. 23 do not therefore support the respondents'' contention.

The same remark applies to Rajit Giripathi v. Bhavani Shanker AIR 1924 Mad.

673. I fail to see what bearing any of the three following eases

cited has on the point to be decided:

Govinda Menon v. Krishna Mannadiar AIR 1923 Mad. 649 Rama Kirpal v. Rup Kuari [1884] 6 All. 269 and Beni Ram v. Nanhu Mal [1885] 7

All. 102.

31. The only decided case on the point is Dakshinamurthy Pillai Vs. Vedamurthy Mudaliar and Others, to which ray learned brother was a party.

In that a contention similar to the one now alleged for the respondent was raised and was summarily rejected.

32. For the various reasons I have given, the ground of res judicata taken by the respondent fails.

33. If defendant 4 himself is not precluded from raising the plea, the question whether defendant 5 is so precluded on the principle of

representation does not arise. Nor is it necessary, in the view I take, to deal with the point raised by the appellant that the application as against

him is, in any event, barred by time as it was filed more than three years after his father''s death.

34. In the result, the appeal of defendant 5 is allowed with costs throughout.

Madhavan Nair, J.

35. This appeal arises out of application E.P. No. 1028 of 1928 made by the assignee decree-holder in O.S. No. 10 of 1912 on the file of the

Subordinate Judge''s Court, Tuticorin, for the transmission of the decree for concurrent execution to the sub-Courts at Ramnad, Madura,

Devakotta, Sivaganga and Dindigul as the properties of the defendants are situate within the jurisdiction of those Courts.

36. The decree was passed on 10th February 1913 and the application for transmission was presented on 1st October 1928, i. e., more than 12

years after the decree. The judgment-debtor objected that the execution of the decree was barred by Section 48 (1), Civil P. C, as more than 12

years had elapsed since the date of the decree and the decree-holder had made prior application for execution. The assignee decree-holder

claimed exemption from the bar of limitation under sub Clause 2 (a) of the section. The relevant portions of Clauses 1 and. 2, Section 48, Civil

P.C., are as follows:

(1) ""Where an application to execute a decree....his been made, no order for the execution of the same decree shall be made upon any fresh

application presented after the expiration of 12 years from (a) the date of the decree sought to be executed.

(2) Nothing in this section shall be deemed (a) to preclude the Court from ordering the execution of a decree upon an application presented after

the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time

immediately before the date of the application.

37. The contention of the assignee decree-holder in the lower Court was that his application was not barred by time as the execution of the decree

was prevented by the fraud of defendant 1 definitely established on 23rd January 1917, i. e., ""at some time within 12 years immediately before the

date of his application,"" that is 1st October 1928, as required by Clause 2, Section 48, Civil P.C. This contention was upheld by the lower Court

and the transmission of the decree as prayed for was ordered.

38. This appeal has been filed by defendant 5 against that order. It may be stated here that in this Court the respondent, i. e. the assignee decree-

holder, has not only relied on the contention urged in the lower Court, but has also sought to support the lower Court''s order by raising another

contention, namely that the appellant is precluded from raising the present contention by a previous order dated 4th January 1928, passed by the

Subordinate Judge on E.A. No. 1509 of 1927, dated 1st November 1927, for transmitting the decree for execution to the Madura Sub-Court.

39. To appreciate the arguments of the parties in all their fulness it is necessary to state a few facts. The plaintiff in O.S. No. 10 of 1912, one

Srinivas Naick, obtained a decree for Rs. 28,283-12-0 due on a promissory note dated 15th September 1910, and executed by defendant 1 in

favour of the plaintiff for Rs. 21,000. The decree was against defendant 1 and the family properties of all the defendants. There were four

defendants to the suit. Defendant 5 was not a party to it. The relationship of the defendants to each other appears from the following table:

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Lakshmanan Chettiar Ramaswamy Chettiar

(defendant 1) (died)

| |

defendant 2. ------------------

| |

defendant 3 defendant 4.

|

defendant 5.

40. Defendant 1 and the deceased father of defendants 3 and 4 are brothers. Defendant 2 is the son of defendant 1. Defendant 5, the present

appellant, was brought on record in the course of the late execution application as the legal representative of defendant 3. After obtaining the

decree the decree-holder, on 18th October 1913, filed E.P. No. 101 of 1913 for attachment and sale of the immovables of defendant 1. The sale

was ordered, but it was stopped for want of proper bids on 30th July 1914. On 29th July 1914, the decree-holder assigned the decree in favour

of the present respondent, i. e., the petitioner in E.P. No. 1028 of 1928 for Rs. 25,000. On 31st July 1914, defendant 1 filed C. M. P. No. 330 of

1914, praying for recording full satisfaction of the decree. Ho stated that one M. L. M. Ramanathan Chettiar paid the money to the decree-holder

on his behalf through his brothers-in-law Ramanathan Chettiar and Murugappa Chettiar and his agents in pursuance of an agreement made for the

discharge of the decree debt and that the decree was thus entirely discharged. He also stated that he had learned that the said Ramanathan

Chettiar, without taking a receipt, that the decree was fully discharged, had obtained the assignment of the decree in the name of a person who is

his own man (see paras. 4 and 6 of the affidavit of defendant 1 in C.M.P. No. 330 of 1914) meaning evidently the present respondent. On 22nd

February 1915, the respondent, i. e., the assignee decree-holder, filed E.P. No. 15 of 1915 for recognizing the assignment and for the attachment

and sale of the immovables of defendant 1. Both the petitions, E.P. No. 15 of 1915 and C. M. P. No. 330 of 1914 were hoard together by the

Subordinate Judge and both were dismissed by him. The assignee decree-holder as well as defendant 1, preferred appeals against the order of the

Subordinate Judge. In these appeals i. e., C. M. P. No. 307 of 1915 and C. M. A.

No. 362 of 1915 the learned Judges of the High Court came

to the conclusion that the probabilities

are on the whole against the counter-petitioner''s (defendant 1''s) contention and in favour of the petitioner (assignee decree-holder).

41. C.M.A. No. 362 of 1915 was therefore dismissed with costs and C.M.A. No. 307 of 1915 was allowed with costs. In the result, the

petitioner in E.P. No. 15 of 1915 was recognized as the assignee decree-holder and the lower Court was directed to restore his petition to its file

and proceed with the execution. A more detailed statement of the allegations of the assignee decree-holder and defendant 1 in their respective

applications and of the findings of the Courts is not necessary for the purposes of this appeal, as it is conceded by the appellant that the High Court

may be taken to have impliedly found in its order on C. M. A. No. 307 of 1915 and C. M. A. No. 362 of 1915 that fraud may be imputed to

defendant 1, as any improper means resorted to, to prevent execution, has been held to be fraud within the meaning of Clause 2, Section 48, Civil

P.C. The date of the High Court''s order is 23rd January 1917. This order is relied on by the assignee decree-holder to show that the judgment-

debtor has by fraud prevented the execution of the decree on 23rd January 1917, i. e.,

sometime within 12 years immediately before the date of the present application as required by Clause 2, Section 48 of the Code.

42. After the order of the High Court, the assignee decree-holder filed eight execution applications including the present one, all of which were

petitions for transmission of the decree for execution to other Courts. It is not necessary to refer to all these applications for the purposes of this

appeal but mention must be made of E.A. No. 1509 of 1927, dated 1st November 1927, the petition filed immediately before the present

application, as the order made on this application is relied on to show that the appellant is precluded from raising the plea of the bar of limitation in

the present application. The details of the application will be referred to later on. Before this application was filed defendants 2 and 3 had died.

Defendant 1 was made the legal representative of the deceased defendant 2 and defendant & who was already on record, was made the legal

representative of the deceased defendant 3 by application No. 1378 of 1924 by the assignee decree-holder. Defendant 1 has been now adjudged

an insolvent. The order for transmission on E.A. No. 1509 of 1927 was passed on 4th January 1928 after notice to the defendants. As no steps

were taken in the Madura Sub-Court in pursuance of this order the records were returned and the assignee decree-holder filed the present

application, E.A. No. 1028 of 1928 for again transmitting the decree to other Courts. Along with this application a civil miscellaneous petition was

filed by the assignee decree-holder to implead the present appellant, styled therein defendant 5, as the legal representative of the deceased

defendant 3. He is the son of defendant 3. The assignee decree-holder pleaded ignorance of this fact till now, and the learned Subordinate Judge,

on the ground that the decree debt is binding on the estate of defendant 3 in the hands of defendant 5, directed him to be impleaded as defendant

3''s legal representative and ordered the transmission of the decree as prayed for.

43. Defendants 2 and 3 having died, and defendant 1 having been adjudged an insolvent the defendants who contest the petition are defendants 4

and 5, and this appeal has been filed, as already mentioned, by defendant 5.

44. The first question that arises for consideration in this appeal is whether the ''fraud"" of defendant 1 can be availed of by the assignee decree-

holder under Clause 2, Section 48, Civil P.C., to claim exemption as against the other defendants from the bar of limitation enacted by Clause 1 of

the section. The learned District Judge answered the question in the affirmative as the fraud practised by defendant 1 and the obstruction to

execution caused by him enured to the benefit of the other defendants, and inasmuch as by such fraud the decree-holder was not able to execute

the decree. It is argued on behalf of the appellant that the judgment-creditor in this case, the assignee decree-holder, could claim the benefit of

Clause 2 of the section only as against the judgment-debtor who had by force or fraud prevented the execution of the decree, i. e. defendant 1,

and not as against the other defendants. On the other side it is contended that, in a case like the present one, where the joint judgment debtor has

by fraud prevented the execution of the decree, the judgment-creditor can claim exemption under the proviso not only against that judgment-

debtor but also against the other judgment-debtors who have not prevented the execution of the decree by the commission of any such fraud. The question is not free from difficulty; but so far as this Court is concerned, the point is clearly covered by authority : see Abdul Khadir v. Ahammad

Shaiwa Ravuthar. In that case, as in the one before us, a creditor obtained a joint and several decree against two judgment-debtors, defendants 1

and 2. Defendant 1 prevented by fraud the execution of the decree at some time within twelve years immediately before the date of the application

to execute the decree. Defendant 2 did not commit any fraud nor was he a party to the fraud committed by defendant 1. The case first came up for

decision before a Bench of two Judges, Sundara Ayyar and Phillips, JJ. : see Abdul Kadir v. Ahammad Shaiwa Rowther, but owing to a

difference of opinion between them Sundara Ayyar, J., holding that execution was barred as against defendant 2, and Phillips, J., holding that

execution was not barred as against both, an appeal was preferred under Article 15, Letters Patent. The case then came up for decision before a

Bench of three Judges : Sir Arnold White, C. J., Sankaran Nair and Tyabji, JJ. The learned Judges agreed with the opinion of Sundara Ayyar J.,

and held that the application in that case was barred as against defendant 2, i. e. the judgment-debtor who did not commit the fraud nor was a

party to it.

45. In support of his conclusion, the learned Chief Justice, with whom the other Judges agreed, relies on the use of the expression "" judgment-

debtor "" in the singular number in Clause 2. This is what. he says:

Now, the words are ""the judgment-debtor."" No doubt the expression ""judgment-debtor"" in the singular includes the plural. But as it seems to me it

includes the plural in this sense: ""where the judgment-debtor has, or if there are two or more judgment-debtors the judgment-debtors have, by

fraud or force, prevented the execution of the decree, etc."" That construction of the section is in accordance with the literal meaning of the words

and with the well-known principle of construction, which is now embodied in the statute, that the singular includes the plural.

46. It is pointed out in the judgment that if we accept the other conclusion suggested, then we would be reading into the section a great deal which

is not there and doing violence to the express language of the section. The argument that the construction of the section accepted by the Judges

would be inequitable to the decree-holder is met with this observation:

It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be

deprived of the benefit of the prescribed limitation by reason of acts done by his judgment-debtor, over whom he has presumably no control and

for whose action he is not responsible.

47. I think the reasoning adopted by the learned Chief Justice and the general considerations referred to in his judgment may well be applied to the

facts of the case before us. I can see no reason why the fact that benefit has accrued to the joint judgment-debtors by the fraud of one of them with

which they had nothing to do should be a reason for exempting a judgment-creditor from the bar of limitation as against those judgment-debtors. It

was open him to proceed against them in spite of the fraud of the particular judgment-debtor. His inactivity, for which he now claims exemption

was not brought about by their conduct. As the learned Chief Justice points out in the passage already quoted, it is inequitable that one judgment-

debtor should be deprived of the benefit of the law by acts done by his joint judgment-debtor over whose action he has no control. It seems to me

that, on principle, as well as on authority, the contention of the appellant should be upheld. I do not think that the decision in Abdul Khadir v.

Ahammad Shaiwa Rawthar is distinguishable on the ground that the fraud of defendant 1 in that case, which consisted in evading the execution of

the warrant of arrest taken out against him was purely a personal one and resulted only to his exclusive advantage and not to the advantage of the

other judgment-debtor. The judgment is clearly not based on any such special consideration, but on general principles and on the natural meaning

of the words used in the section, In this connexion attention may be drawn to the decision in Thorne v. Heard and Marsh [1855] A.C. 495. That

case dealt with Section 8, Trustee Act of 1888, 51 and 52 Vict. C. 59, and exemption was claimed under the section from the operation of the

Statute of Limitations on the ground that the person proceeded against was guilty of acts of fraud. In the course of the judgment, Lord Davey made

the following observations:

I only desire to say this: In my opinion, if fraud,, or a nondiscovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it

must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations.

48. If I may respectfully say so, I think this observation embodies a general principle and may well be applied in"" interpreting the expression ""fraud

of the judgment-debtor"" in Clause 2, Section 48, Civil P.C., though the decision having regard to its facts has no direct bearing on the case before

us. I would therefore hold that the fraud of defendant 1 in this case cannot be availed of by the assignee decree-holder to claim exemption from the

bar of limitation as against defendant 3 and consequently as against his legal representative, defendant 5 also.

49. I shall now refer to another plea urged by the respondent to make defendant 3 liable on account of the "" fraud "" of defendant 1 and that is, that

defendant 1 must be considered to have been the agent of the defendants for taking the necessary steps for the discharge and satisfaction of the

decree and that therefore the fraud committed by him must be attributed to the principals, as he, their agent, must be considered to have acted

within his authority when he com-mitted the fraud. It is impossible in this appeal to give any serious attention to this argument. The question of

agency is a mixed question of fact and law very largely depending upon the evidence in the particular case. This question which is now very

strongly urged was not put forward in the lower Court. There is no trace of it in the lower Court''s judgment and the materials now put before us

are not by any means sufficient to arrive at a decision on the question. In support of the plea that defendant 1 must be considered to be an agent of

defendant 3 reliance is placed upon the counter affidavit of the present appellant, filed by him in the civil miscellaneous application put in the lower

Court along with E.P. No. 1028 of 1923 to make him the legal representative of defendant 3: para. 3 of this affidavit to which our attention was

drawn is as follows:

...Defendant 1 is the divided uncle of defendant 3, and under the registered deed of partition between defendant 3''s father and defendant 1, the

present debt has to be paid exclusively by defendant 1. The decree-holder was aware of the deed of partition, and the undertaking under it of

defendant 1.

50. In this paragraph the appellant was pointing out to the petitioner that there was no purpose in conducting execution proceedings against

defendants as the debt covered by the decree had to be paid according to the partition arrangement by defendant 1 exclusively and so in justice

the discharge of that debt was his exclusive duty and that though the decree is a joint decree, defendant 3 should not be troubled with its

performance. What is urged is that the debt is. the personal debt of defendant 1 which only defendant 1 should be called upon to pay. This does

not by any means show that defendant 1 has been constituted an agent for the payment of the decree debt by defendant 3 or the other defendants.

On the contrary the statement in the paragraph negatives any idea of agency. No other paragraphs in the affidavit have been referred to in support

of the present contention. No question of agency was suggested in the affidavit filed by the assignee decree-holder and I can find no reference to it

in the counter affidavit filed by defendant 5. The partition deed referred to has not been filed in these proceedings; but we were invited to look into

some paragraphs of it to find out the nature of the debt referred to in the counter affidavit. Neither party has been able to give an intelligible

explanation as to what this dead says about this debt. On these flimsy and unsatisfactory materials it is impossible to decide whether defendant 1

acted as the agent of the third and other defendants with regard to the satisfaction of the decree. The appellant points out that, throughout the

course of these proceedings, neither defendant 3 nor defendant 4 at any time acted in unison with defendant 1. In all the execution proceedings

prior to E.P. No. 15 of 1915 and C. M. P. No. 330 of 1915 all the four defendants were parties; but in the proceedings relating to E.P. No. 15 of

1915 and C. M. P. No. 330 of 1915, in which the fraud of defendant 1 was established, defendants 3 and 4 did not appear either in person or by

pleader. I have no doubt that the argument that defendant 1 should be deemed to be the agent of defendant 3 and the other defendants is purely an

afterthought and has therefore been urged here for the first time. In this view there is no need to discuss the numerous cases, that were brought to

our notice to show that defendant 3 is liable on account of the fraud of defendant 1 on the ground that he is his agent.

51. The next argument raises the question whether the principle of constructive res judicata referred to in Expl. 4, Section 11, Civil P.C., can apply

to execution proceedings; and whether the appellant is precluded from raising the plea of the bar by limitation put forward by him by reason of the fact that he had opportunity of raising the same objection in the proceedings in E.P. No. 1509 of 1927 dated 1st November 1927, but had failed

to do so. In that application as in the present one, the assignee-decree-holder requested the Court to transmit the decree for execution to another

Court. The application contained the usual particulars required to be mentioned under Order 21, Rule 11 and Section 39, Civil P.,C. It is not

necessary to describe the contents of this application, but reference may be made to para. 3 of the application wherein the date of decree is given,

as this is important in connexion with the argument relating to constructive res judicata. The following details appear in para. 3 against the heading

date of the decree "":

10th February 1913.

3. Date of the decree.

23rd January 1917.

52. To this application defendant 4 was a party not only on his own behalf, but also as the legal representative of his deceased brother, defendant

3, but defendant 5, the present appellant was not a party at he had not been brought on record as the legal representative of defendant 3 at that

date. The following endorsements made by the Court appear on the back of the application:

Order 21, Rule 25.

DD. 23rd January 1917.

DLP. 28th November 1924.

More than a year.

Notice by 4th January 1928.

25th November 1927. (Judge''s signature).

53. There was some discussion at the Bar as to what D D and D L P meant. D D refers obviously to the date of the decree (sea Col, 3 of the

application) and D L P means the date of the last application which was, B.A. No. 1378 of 1921, dated 28th November 1921. The copy of the

notice sent to the judgment-debtors has not been produced; but it may be taken to be the usual notice under Order 21, Rule 22, Civil P.C., as

required by Rule 138, Civil Rules of Practice which states that in an application for transmission notice of the application shall be given in all cases in which under Order 21, Rule 22 notice of application for execution is required. Under Order 21, Rule 22, the Court executing the decree is

directed to issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree

should not be executed against him. We may take it therefore that the notice sent to defendant 4 in this case simply asked him to show cause on a

specified date why the decree should not be executed against him. On the day fixed for hearing, the judgment-debtors on whom the notice had

been served did not appear, and the Court passed an order Send'' as appears from the endorsement on the back of the application. Afterwards

nothing further was done on this application. It is on this application and the order passed on it that the argument of constructive res judicata is

based by the respondent.

54. The provisions of the CPC having a bearing on the question are Section 11 and Expl. 4 to that section which run as follows:

55. Section 11:

No Court shall try any suit or issue in which be matter directly and substantially in issue has been directly and substantially in issue in a former suit

between the same parties or between parties under whom they or any of thorn claim, and litigating under the same title, in a Court competent to try

such subsequent suit or the suit in which such issue has been subsequently raised, and his been heard and finally decided by such Court.

56. Explanation 4:

Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter

directly and substantially in issue in such suit.

57. Having regard to those provisions the respondent puts his argument in this way: on the receipt of the notice issued to him to show cause why

the decree should not be executed, defendant 4 had an opportunity of appearing before the Court and pleading that the execution of the decree

was barrel at that date u/s 48, Civil P. C, as the application for execution was presented 12 years after the decree and that the assignee decree-

holder could not rely on the fraud of defendant 1 to claim exemption from the bar of limitation against the other judgment-debtors; and since he

failed to raise this plea which he ought to have raised as a ground of defence, it should be presumed that the Court when it passed the order ''send''

finally decided the question of limitation against the judgment-debtors thereby holding impliedly that fraud within the meaning of Clause 2, Section

48, was found to have been committed by defendant 1 on 23rd January 1917 and that by his fraud the execution of the decree was prevented

against all the judgment-debtors and that the. assignee-decree-holder has a period of 12 years to execute the decree commencing from 23rd

January 1917. It is argued that since all these matters should be deemed to have been decided by the Court when it passed its order ''send'' in E.P.

No. 1509 of 1927, it is not open to defendant 4 to raise those very contentions in the present application having regard to Expl. 4, Section 11,

Civil P.C. It is further urged that since defendant 4 who represents the estate of the deceased defendant 3 is precluded from raising the above

contentions, defendant 5 the present appellant is also bound though he was not a party to E.P. No. 1509 of 1927 since he also is a representative

of the deceased defendant 3 and the estate which he represents should be deemed to have been sufficiently represented by defendant 4 when the

Court passed its order so as to make that order binding on the estate, i. e., on all its representatives. This means that the previous order becomes

binding on the present appellant through defendant 4. The appellant meets these contentions with the argument that the rule of constructive res

judicata as explained in Clause 4, Section 11, Civil P. C, does not apply to execution proceedings, that the order on E.P. No. 1509 of 1927 has

not impliedly decided that the starting point of limitation is 23rd January 1917, and that even if defendant 4 is bound by the order, the appellant,

defendant 5 is not in any way bound by it. I shall deal with both those arguments separately.

58. On the question whether the principle of constructive res judicata as contained in Clause 4, Section 11, Civil P. C, applies to execution

proceedings, the following decisions of the various High Courts were brought to our notice : Lahshmanan Chetty v. Kuttayan Chetty [1901] 24

Mad. 669 Narayana Pattar v. Gopalakrishna Pattar, Ramasami Naik v. Ramasami Chetty, Allupati Kopila Patro v. Allupati Kasinadha Patro

[1907] 17 M.L.J. 310 Somasundaram Pillai v. Chokkalingam Pillai [1917] 40 Mad. 780 Subramania Aiyar v. Raja Rajeswara Dorai [1917] 40

Mad. 1016 Chidambaram Chetti v. Kandasami Goundan, Nachiappa Chettiar v. Subbier AIR 1923 Mad. 505, Kandaswami Chettiar v. Maruda

Pillai AIR 1924 Mad. 145 Govinda Menon v. Krishna Mannadiar, Rajit Giripathi v. Bhavani Shankar, T.R. Kaliya Perumal Naidu and Others Vs.

T.P.L.S. Subramanian Chettiar and Another, , M.R.A.L. Lakshmanan Chetty Vs. M.R.A.P.L. Palaniappa Chetty, , S.N. Subramanian Chettiar

Vs. Ramanadhan Chettiar, , Sheik Budan v. Ramchandra Bhunjgaya, Mahadeo v. Trimbakbhat [1919] 50 I.C. 972 Ramchandra Venkatesh v.

Shrinivas Krishna AIR 1922 Bom. 238 Gadigappa Chanbasappa Malkarjun Vs. Shidappa Gurushidappa Yalehalli, Kishan Sahai v. Aladad Khan

[1891] 14 All. 64 Behari Lal v. Majid Ali [1897] 24 All. 138 Kalian Singh v. Jagan Prasad [1915] 27 I.C. 950 Kalian Singh v. Jagan Prasad

[1915] 37 All. 589 Phulchand and Others Vs. Kandhya Lal, Sheo Mangal Vs. Musammat Hulsa and Others, Dwarka Das Vs. Muhammad

Ashfaqullah, , Dip Prakash and Others Vs. Dwarka Prasad and Another and Prithi Mahton v. Jamshed Khan AIR 1922 Pat. 289.

59. There is no question that the general principles of law underlying the doctrine of res judicara apply to execution proceedings. This has been

decided in a series of cases by the Privy Council: see Delhi and London Bank Limited v. Orchard [1877] 3 Cal. 47 Rama Kirpal v. Rup Kuari and

Beni Ram v. Nanhumal in the loading case of which Rama Kirpal v. Rup Kuari the following observations occur in the judgment delivered by Sir

Barnes Peacock:

The question (if the term ""res judicata"" was intended as it doubtless was, and was understood by the Full Bench to refer to a matter decided by a

Court of competent jurisdiction in a former suit) was irrelevant and inapplicable to the pre-sent case. The matter decided by Mr. Probyn was not

decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a

continuation. It was as binding between the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying

the judgment into execution. The binding force of such a judgment depends, not upon Section 13, Act 10 of 1877, but upon general principles of

law. In it were not binding, there would be no end to litigation.

60. In England the principle of res judicata. has been applied to proceedings in

the same suit: see Pearth v. Marriott [1883] 22 Ch. D. 182.. In that case in the Court of Appeal Jessol, M.R., observed thus:

What is the meaning of res judicata

