

(2000) 04 MAD CK 0013

In the Madras High Court

Case No : S.A. No's. 2066/84 and 1886/86

Annamalai Mudaliar and 2 others

APPELLANT

Vs

Krishnaveni Ammal and 5 others (1st Respondent is the wife and respondents 2 to 6 the sons of late Subramania Mudaliar)

RESPONDENT

Date of Decision : 28-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, 100, 11

Evidence Act, 1872 — Section 13, 43

Transfer of Property Act, 1882 — Section 54

Citation : (2000) 04 MAD CK 0013

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : M.N. Padmanabhan, for Mr. A.S. Chakravarthi, for the Appellant; T. Ravikumar, for the Respondent

Judgement

1. S.A. No. 2066/84 is filed against A.S. No. 174/83 on the file of the Principal District Court, North Arcot at Vellore, which was filed against

O.S. No. 463/74 on the file of the District Munsif, Sholinghur. S.A. No. 1886/ 86 is against A.S. No. 175/83 on the file of the District Court,

North Arcot at Vellore, which in turn was against O.S. No. 849/78 on the file of the District Munsif's Court, Sholinghur. For the purpose of

appreciating the facts leading to the two Second Appeals it would be easier to have a genealogical tree which is as follows:

2. For the sake of convenience parties will be referred to by their names or their ranks in the suit as the occasion warrants. Annamalai,

Mangayarkarasi and Padmavathi, who were the defendants in O.S. No.463/74 are the appellants in S.A. No. 2066/84. The plaintiff Subramanian

is the respondent in the Second Appeal.

3. The plaintiffs Mangayarkarasi and Padmavathi in O.S. No. 849/78 are the appellants in S.A. No. 1886/86. The defendants Subramanian and

Natesan are the respondents in the Second Appeal.

4. Subramanian filed O.S. No 463/74 for declaration, permanent injunction and for a mandatory injunction for restoration of the suit channel. The

averments as set out in the suit are as under:

The suit property belonged to one Thangavehi, who died in the year 1974. He also had a half right in the well and pump-set and also the channel

shown as A to F. He executed a settlement deed on 6.12.1971 in favour of Subramanian. Subramanian had been in possession and enjoyment in

pursuance of the settlement deed. He and his predecessors in title had been in open and uninterrupted possession and had also prescribed for title

by adverse possession. It is also stated in the plaint that the sale deed dated 15.3.1938 executed by Thangavelu in favour of his brother Sambasiva

on 15.3.1938 (father of Mangayarkarasi and Padmavathi) is not true and valid in law. Thangavelu never delivered possession to Sambasiva.

5. Annamalai resisted the suit contending inter alia as follows:

Thangavelu and Sambasiva had an equal share in the suit well. Thangavelu executed a sale deed of the properties including his share in the well on

15.3.1938 in favour of his brother Sambasiva. Ever since that date Sambasiva was enjoying his share as well as the properties purchased from his

brother till his death leaving behind Mangayarkarasi and Padmavathi and his widow Poongavanam Ammal, who died later. Subramanian and his

predecessors in title had no right in the well or in the channel and they also never enjoyed it. The channel shown as BCD in the plaint plan runs

through S.F. No. 140/3 belonging to Mangayarkarasi and Padmavathi and the channel was constructed only by Sambasiva about five years prior

to the suit with the permission of Mangayarkarasi with an agreement and understanding that he should supply water from the suit well in S. No.

140/3. Subramani was not entitled to the restoration of the channel nor had he any right to the well or to the channel.

6. Annamalai filed an additional written statement contending that 74 cents in S.N. 140/3 belonged to him by virtue of a settlement deed executed

by Ramasamy Mudaliar and that he was in possession of the same in his own

right and Subramanian had no right to any channel through his land.

7. Mangayarkarasi and Padmavathi resisted the suit contending inter alia as follows:

Subramanian did not have any right in the well as it was ancestral property. He had no right to take water from the suit well or pump set .The suit

channel was constructed by Sambasiva Mudaliar with the permission of Annamalai. Thangavelu Mudaliar had sold away his share in the properties

as early as 15.3.1938. It was only Sambasiva who dug the well and installed the pump set and Subramanian was not entitled to make any claim.

An additional written statement was filed to the effect that Thangavelu Mudaliar himself had filed a written statement in O.S. No. 409/ 40 asserting

the truth and validity of the sale deed in favour of Sambasiva that Subramanian who was claiming title through Thangavelu was estopped from

denying the title of Sambasiva or Mangayarkarasi and Padmavathi. Mangayarkarasi and Padmavathi had filed O.S. No. 849/78 for declaration of

their title and the suit was, therefore, liable to be dismissed.

8. The suit in O.S. No. 849/78 was filed by Mangayarkarasi and Padmavathi on the following averments:

Sambasiva and Thangavelu were brothers. There was a partition in respect of the joint family property long time ago. After the partition

Thangavelu sold the plaint schedule items 1 to 4 to his brother Sambasiva Mudaliar on 15.3.1938 and from that date Sambasiva Mudaliar was in

possession and enjoyment of the property in his own right till his death in 1971. Poongavanammal was his widow and Mangayarkarasi and

Padmavathi were his daughters. Poogavanammal died in 1977 leaving behind Mangayarkarasi and Padmavathi as her legal heirs. They had been in

possession and enjoyment and Sambasiva Mudali was in possession for over the statutory period and they had also perfected title by adverse

possession. Sambasiva dug a well in item No. 5 at his own cost and also installed a pump set and was enjoying them in his own right till his death.

The starter and switch, electric motor and pump set in item No. 5 had been stolen away. Subramanian and Natesa, the defendants in the suit, were

brothers and they were not entitled to claim the suit property under Thangavel Mudaliar as Thangavel Mudaliar had no right to these properties

after 15.3.1938. The suit was therefore filed for declaration and permanent

injunction.

8. (a) The defence was as follows:

The suit had been filed at the instigation of one Annamalai, the first defendant in the other suit, who had demolished a portion of the channel. It had been held in an earlier suit that the sale by Thangavel Mudaliar in favour of Sambasiva Mudaliar was a bogus one. So Mangayarkarasi and Padmavathi could not rely on the sale deed to claim title over the property. Mangayarkarasi and her husband in collusion with Annamalai, the first defendant in the suit, had removed the pump set and had filed the present suit.

9. Issues were framed in the two suits on the basis of the pleadings. On the materials placed the learned District Munsif dismissed the suit O.S. No.

463/74 and decreed the suit O.S. No. 849/78 by a common judgment on 28.1.1983.

10. However, on appeal the learned Principal District Judge, North Arcot at Vellore, allowed the appeal A.S. No. 174/83 in part and passed a

decree declaring the right of Subramanian to 53 cents in S. No. 140/2 and half right in the well, 5 H.P. electric motor and half right in the channel A

to F shown in the plaint, for a mandatory injunction to Annamalai directing restoration of the channel demolished by him and for an injunction

restraining Annamalai Mangayarkarasi and Padmavathi from interfering with Subramanian's possession and enjoyment of the land and half right in

the well, pump set and the channel. A.S. No. 175/83 was allowed in toto. The judgment and the decree of the trial Court were set aside and the

suit O.S. No. 849/78 was dismissed.

11. Aggrieved the present Second Appeals have been filed. At the time of admission the following substantial questions of law were framed for

decision in S.A. No. 2066/84:

(1) Whether reliance placed by the court on the prior judgment (Ex. A-7) is proper? and

(2) Whether the lower Appellate Court is correct in its finding that Ex. B-1 is sham and nominal?

12. In S.A. No. 1886/86 the following substantial question of law was framed for decision:

Whether the judgment and decree in O.S. No. 409/40 on the file of the District Munsif's Court, Sholinghur, are binding on the

plaintiffs/appellants?

13. Mr. M.N. Padmanabhan, learned Senior Counsel for the appellants in both the Second Appeals, made the following submissions:

The whole question related to whether the sale deed dated 15.3.1938 marked as Ex. B-1 was true, valid and binding on Subramanian/the plaintiff

in O.S. No. 463/74 In the earlier suit O.S. No. 409/40 on the file of the District Munsif s Court, Sholinghur. Thangavel had filed a written

statement that the sale deed was true, valid and supported by consideration. When such was the position, any person claiming title through

Thangavel was estopped from contending that the sale deed was neither true nor supported by consideration. The present suit came to be filed in

1974 after a lapse of 36 years. It was an ancient document and could not be questioned after the lapse of so many years by persons who were not

parties to the same. Subramanian's witnesses also did not know anything about the sale deed. Subsequent to the sale deed patta also was

transferred in the name of Sambasiva who also paid kist for the suit property. The various exhibits marked on the side of Padmavathi would go to

show that the sale deed was true, valid and binding. The recitals in Ex. A-1 sale deed dated 15.3.1938 would clearly go to show that

consideration had been passed and possession also was delivered to Sambasiva. The recitals in the document should be given due weight as

against oral evidence let in after 38 years. Patta was intended to be transferred in the name of Sambasiva as early as 1947 as would be evident

from Ex. A-14 notice issued by Tahsildar to Sambasiva on 2.7.1947 for transfer of patta in his name. When once the sale is upheld Thangavel had

no right to execute any settlement deed in favour of Subramanian as Thangavelu had lost his title after the execution of the sale. According to the

learned Senior Counsel, the lower Appellate Court observed that the settlement deed dated 6.12.1971 had not been questioned. The Appellate

Judge had overlooked the specific averments in the written statement denying the truth, validity and genuineness. The suit O.S. No. 409/40 was a

suit between the creditor and Sambasiva Mudaliar. When Thangavel Mudaliar had pleaded that the sale deed was a true and genuine document,

the finding in that suit would not operate as res judicata as between co-defendants. Even conceding that no sale consideration was passed under

the document, the remedy if any the vendor had, was to sue for recovery of the sale consideration. The title of the purchaser could not be negatived for nonpayment of the sale consideration u/s 54 of the Transfer of Property Act. The various debts undertaken by the purchaser were discharged by him and even conceding that the debts were not discharged by him, the remedy of the creditors would be to file a suit for recovery of the same. The learned Senior Counsel also criticised the comment made by the lower Appellate Court that nobody connected with the sale deed was examined overlooking that it was a 30 years document and a presumption ought to have been drawn regarding the genuineness and passing of consideration in support of the same. The lower Appellate Court was not justified in embarking upon such a discussion regarding the genuineness of and the consideration for the sale deed after a lapse of 45 years. Once it is accepted that Subramanian was not entitled to the suit property under the settlement deed alleged to have been executed by Thangavel Mudaliar, then his claim to the motor and the pump set or right in the well could not be countenanced. The various Exhibits, viz. Ex. A-10 and Ex.A-11 would go to show that Sambasiva and after his death Mangayarkarasi and Padmavathi would be entitled to the properties. It was not Subramanian's case that the sale deed executed by Thangavel in favour of Sambasiva was a sham and nominal document. The learned Senior Counsel also relied on a number of decisions which will be referred to in the course of the judgment.

14. Mr. Ravikumar, learned counsel for the respondents in the Second Appeals, submitted as follows:

The claim of the appellants in the Second Appeal is on the basis of the sale deed. The settlement deed by Thangavel in favour of Subramanian was challenged in the plaint. The validity of the sale was considered in the earlier suit and a finding was given. Even otherwise the lower Appellate Court had gone into the question independently and also had considered the other aspects and found that the sale deed was not acted upon. Sambasiva continued to be the owner. The lower Appellate Court had gone into the title elaborately and found that consideration had not been passed. The sale deed had been found to be not accepted and acted upon. The lower Appellate Court had found as a fact in favour of the respondents and no

interference was called for in the Second Appeals.

15. The whole question will depend on the decision regarding the sale deed Ex. B-1 in O.S. No.463/74 and the original of which is Ex. A-1 in

O.S, No. 849/78, dated 15.3.1938 whether it is true, valid and binding on Subramanian, who claims under a settlement deed dated 6.12.1971,

which is Ex.A-4 in O.S No. 463/74 from Thangavel. The sale deed dated 15.3.1938 was the subject matter of decision in O.S. No. 409/40. That

was a suit by a creditor of Thangavel under Order 21, Rule 63 of the Code of Civil Procedure. There was suit O.S. No. 849/38 filed by one

Chinnappa Mudali against Thangavel for recovery of Rs 250/- on a promissory note. Thangavel had borrowed that amount on 25.10.1928 from

Chinnappa Mudali's mother one Parvathiammal. On 19.3.1938 notice was issued by Chinnappa to Thangavel and the notice was received by

Thangavel on 25.3.1938. Even prior to the notice on 19.3.1938, on 15.3.1938 Thangavel had sold several items of properties under Ex. B-1=Ex.

A-1 for Rs. 1,300/-. The properties belonging to both Thangavel and Sambasiva were attached. Sambasiva filed E.A. No. 1087/39 in E.P. No.

299/39 for raising of attachment. The claim petition was allowed and the court released the properties from attachment. The suit O.S. No. 409/40

came to be filed by Chinnappa Mudali for himself and as representative of the creditors of Thangavel against Thangavel and Sambasiva.

Sambasiva claimed that there was a partition between him and his brother Thangavel about 20 years prior to the suit and subsequently, on

15.3.1938 he had purchased the half share in the suit property belonging to Thangavel. The recitals as to consideration under Ex.B-1= Ex. A-1

dated 15.3.1938 were Rs. 500/- for discharging a debt due by Thangavel to a Co-operative Society, a sum of Rs. 300/- due to Subba Reddy and

for purchase of bulls and Rs. 500/- towards discharge of a mortgage debt of the year 1923 created by Thangavel and Sambasiva, in all Rs.

1,300/-in favour of Narasimhlu Chetty. It was contended by Sambasiva that he was bona fide purchaser for value, that he paid off the debt due to

the Co-operative Society as well as to Narasimhlu Chetty. The case of the plaintiff in that suit was that the sale deed had come into existence in

anticipation of the suit to defeat the claim of the creditor.

16. The trial Court relied on the recitals in Ex.A-1 and the admission of

Thangavel in O.S. No. 409/40 i.e. he sold his half share to Sambasiva for consideration and Subramanian claiming as he did under Thangavel, was estopped from denying the title of Sambasiva to the suit properties. The trial Court also held that the decision in O.S. No. 409/40 to the effect that the sale deed Ex. B-1 = Ex. A-1 was a sham and nominal document would not operate as res judicata in the present proceedings as there was no conflict of interest between Thangavel and Sambasiva in the prior suit. The question of title of the suit properties, was not the subject matter of O.S. No. 409/40. Even as late as 1947 a notice had been issued by the Tahsildar to Sambasiva Mudaliar under Ex.A-14 relating to transfer of patta from the name of Thangavel to Sambasiva and the cumulative effect of all these things would clearly show that Ex. B-1 = Ex. A-1 was acted upon.

17. However, the lower Appellate Court held that Ex. B-1 = Ex. A-1 was only a sham and nominal document, that it did not convey any title to

Sambasiva and Mangayarkarasi and Padmavathi, the heirs of Sambasiva, could not claim any right in the items covered by the said sale deed. In

coming to the conclusion the lower Appellate Court found that even the debts directed to be discharged by Sambasiva were discharged only by

Thangavel, that in the suit O.S. No. 409/40 it was held that the sale deed dated 15.3.1938 was a sham and nominal document created by

Thangavel in favour of Sambasiva to safeguard the properties and that the grounds given in the previous judgment could be taken into

consideration. The lower Appellate Court also took into consideration that the discharged mortgage deed was produced by Subramanian, who

had got it from Thangavel at the time. Thangavel executed a settlement deed in favour of Subramanian and this would show that it was only

Thangavel who discharged the mortgage. The lower court also found relying on Ex. A-7 that the question of discharge by Sambasiva had been

discussed in the judgment and a finding given that the debt had not been discharged and it was still outstanding, that Thangavel continued to be in

possession even after the sale on 15.3.1938, that as late as 1952 he had written to Sambasiva at Kancheepuram under Ex. B-4 asking Sambasiva

to send an application in the format Ex. B-3 to get subsidy for digging a well in the properties. No doubt, the lower Appellate Court also found that

the decision in the earlier suit O.S. No. 409/40 would not operate as *res judicata*, but however observed that the grounds given, as already

noticed, could be taken into consideration as the material documents produced in that suit were the same as the documents produced in the

present suit and the reasoning of the Subordinate Judge in the earlier suit was very much valid for reaching the conclusion in the present suit.

18. Let us first examine whether the decision in the earlier suit would operate as *res judicata*. As already noticed, that was a suit by a creditor of

Thangavel under Order 21, Rule 63 of the CPC as it stood prior to its repeal in 1976. The suit was decreed and the claim order in favour of

Sambasiva was set aside in respect of the properties covered by the sale deed Ex. B-1 = Ex. A-1.

19. The scope of the suit under Order 21, Rule 63 of the CPC was subject matter of decision in *Kandadai Narasimhachariar v. Raghava*

Padayachi and others (AIR 1945 Madras 333) = 58 L.W. 354, (F.B.) by a Full Bench of this Court. It was held in that case that,

an order on a claim petition filed under O. 21, Rule 58 or a decree in a suit filed under Rule 63 does not extend beyond the execution of the

decree which has given rise to those proceedings.

20. In *Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others*, it has been held that.

A claim proceeding under O. 21, Rule 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceedings does not operate as

res judicata. It is because of R. 63 that the order becomes conclusive. The effect of R. 63 is that unless a suit is brought as provided by the rule,

the party against whom the order in the claim proceeding is made or any person claiming through him cannot reagitate in any other suit or

proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and

sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further.

The Supreme Court approved the earlier Madras Full Bench decision already referred to. In the Supreme Court decision no suit under Order 21,

Rule 63 was filed.

21. In *Yakub Rowther v Poongavanammal and others* (1990 1 L.W. 444) another

Full Bench of this Court referred to the decision of the S.C. in

Bant Singh Gill Vs. Shanti Devi and Others, and observed as follows:

... We find that the decision of the Supreme Court in Mangru v Taraknathji was rendered with regard to the implications of an unsuccessful

claimant not taking up the matter further as contemplated under O. 21, R. 63 and the force of O. 21, R. 63 coming in the way as a bar with regard

to further agitation by him on the question as to whether the property was or was not liable to attachment and sale in execution of the decree out of

which the claim proceedings arose. It was opined that the bar of R 63 extends no further. The approval by the Supreme Court of the ratio of the

Full Bench could only be understood as confined to the above aspect. As already noted, the decision of the Division Bench in Peda Rami Reddy v

Bichalu (65 L.W. 261 = 1952 (1) MLJ 475) was rendered in a different context. In our view ultimately the question as to whether a decision in a

suit filed pursuant to O. 21, R. 63 will operate as res judicata in a subsequent litigation will depend upon the scope of the controversy in that suit,

and as to whether the matter was directly and substantially in issue in the suit between the same parties or between the parties under whom they or

any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such an issue has been

subsequently raised and has been heard and decided finally by such Court within the meaning of S. 11 of the Code of Civil Procedure. Certainly,

there are Explanations in S. 11 before the amendment brought in by Central Act 104 of 1976, to provide guidance as to the scope and amplitude

of such implications.

It would be worthwhile to extract the editor's note to the said decision:

The decision of the Full Bench reported below has settled a vexed question as to the scope of a decision on claims by way of objection by third

parties to execution of decrees. Though the Full Bench in Kandadai Narasimhachariar Vs. Raghava Padayachi, had recognised that res judicata

may be attracted, there has often remained a doubt -- a lingering one, if it can be so described. The changes effected by Act 104 of 1976

substituting an appeal and a second one, instead of a suit under O. 21, R. 63, have not made any change in the basic law. If the legal position is

clearly visualised, the dispute as to the debtors' entitlement to the property

which alone the creditor/ decree-holder is setting up with a view to realising his decree, and the dispute of such claim to the debtor's entitlement thereto urged by the claimant-third party, when adjudged whether in a suit under O. 21, R. 63 of yonder days or by the appellate procedure since 1976, is and remains an adjudication of claim of title between the debtor (personified in his creditor) and the claimant. That it (the adjudication) is res judicata as stated in Section 11, C.P.C., need not have to be decided at all. It is the law. The present Full Bench decision has reiterated the position.

If the subject matter of suits is the same and the parties are the same and the issues involved for decision are the same, then a decision rendered in a claim suit filed under Order 21, Rule 63 will operate as res judicata and not otherwise.

22. If we apply the ratio of the Full Bench, it would be clear that in the instant case the tests laid down are not satisfied and the courts below have rightly held that there is no question of res judicata operating in the case, though the lower Appellate Court has said that the grounds given in the previous judgment could be taken into consideration.

23. In AIR 1930 99 (Privy Council)) it has been held that,.

The Indian Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case.

Following this in AIR 1930 1 (Nagpur) a Full Bench of the Nagpur High Court held that,

Where a judgment was not in rem, nor relating to matter of public nature, nor between the parties to subsequent suit is the fact that the Court by that judgment decided a point in a particular way relevant for the purpose of the decision of the same point in the subsequent suit?

24. In Raj Kumar Gobinda Narayan Singh and others v Sham Lal Singh and others (61 MLJ 9 = (1931) 33 L.W. 70 P.C.) the Privy Council has observed as follows:

Although a judgment in a previous suit not inter partes may be admissible under the provisions of Ss. 13 and 43 of the Indian Evidence Act, 1872,

as establishing a particular transaction, the reasons upon which the judgment was founded are no part of the transaction and cannot be considered,

nor can any finding of fact there come to, other than the transaction itself, be relevant evidence.

25. I had occasion to consider the position in *Chinnavengavayal Hamlet Pillayarandal etc. v C. Ramiah Pillai* (1998 3 L.W. 696). After referring to

the provisions of the Evidence Act and the various decisions of the Supreme Court, I have said that the judgments should fulfil the conditions of

Section 43 of the Evidence Act to be relevant u/s 13 of the Evidence Act. As pointed out by the Supreme Court in *Tirumala Tirupati*

Devasthanams Vs. K.M. Krishnaiah,) that the judgment in the previous suit was evidence enough to prove the title of the appellant before the

Supreme Court in regard to the suit property therein even though the plaintiff/respondent was not a party to the suit.

26. I had also occasion to consider the distinction between judgment in rem and judgment in personam and also the admissibility of judgments inter

partes and not inter partes in *Subramaniam & Co. v The State of Tamil Nadu* (1998 3 L.W. 1).

27. It is the contention of Mr. M.N. Padmanabhan, learned Senior Counsel, that the lower Appellate Court, though aware of the legal position that

the decision in the prior suit would not operate as res judicata, still was consciously influenced by the decision in the prior suit for holding that the

sale deed dated 15.3.1938 was a sham and nominal document. According to the learned Senior Counsel, the lower Appellate Court was wholly

unjustified in relying on even the reasoning adopted by the Subordinate Judge in the prior suit.

28. Let us now have a look at what the lower Appellate Court has done in this regard. After referring to the contention of Annamalai,

Mangayarkarasi and Padmavathi that after Thangavel had conveyed all his interest in the properties even in 1938 to Sambastva, he did not have

any right, title or interest in the properties or in the well and that the well was dug by Sambasiva, that the motor was installed only by him, that

Subramanian had no title or interest in the suit lane in O.S. No. 849/78 or in the well, that the portion of the channel was passing through S. No.

140/3 which had been got by Annamalai by virtue of a settlement deed from one Ramasamy Pillai, that Sambasiva was permitted to put up the

channel under an agreement to supply water to Annamalai's lands, that as the water was not supplied and licence was cancelled and Annamalai

demolished portions of the channel and that after purchase Sambasiva was in possession and enjoyment of properties and after his death their

mother and Mangayarkarasi and Padmavathi were in possession and enjoyment of the properties, the learned District Judge refers to the sale deed

and analyses the various items of consideration.

29. In paragraph 15 of its judgment, the learned Judge gives the background as regards O.S. No. 409/40 and how he could take into

consideration the grounds on which the finding in O.S. No. 409/40 was reached particularly when the same document filed in that suit had been

filed in the present suit also, though in those proceedings Sambasiva was available to give evidence as also Thangavel and it would have been easy

then to place all the materials before court than for the parties in the present proceedings who claimed only under Thangavel and Sambasiva and

who might not have personal knowledge about the sale deed or the circumstances under which the sale had been effected. In paragraph 16 of its

judgment the learned Judge refers to the three items of consideration mentioned in Ex. B-1 = Ex. A 1 dated 15.3.1938. Ex.-A 19 is a mortgage

deed executed by Thangavel and Sambasiva in favour of one Narasimhlu Chetty for Rs. 1000/- . That was executed on 25.7.1923. The

endorsement of payments found in Ex.A-19 are referred to by learned Judge. The learned Judge notices payments by Sambasiva and Thangavel

separately in 1926, by both of them in 1927 and 1933, by Sambasiva alone from 1934 to 1941, in 1950 by Thangavel and lastly on

24.12.1955 by payment of Rs. 650/- and though there is no mention as to who made the payment on 24.12.1955 the learned Judge infers from

the production of Ex.A-19 by Subramanian that Thangavel should have handed over the discharged mortgage deed to Subramanian at the time he

executed the settlement deed in 1971 in favour of Subramanian that the payment of Rs. 650/- was by Thangavel. The two payments made by

Thangavel have been taken into consideration by the learned Judge as probalising the fact that Sambasiva did not discharge the mortgage as

directed by him and as recited in Ex.B-1 as an item of consideration. While coming to this conclusion the learned Judge observed that in Ex. A-7

(judgment in O.S. No. 409/40) this question had been discussed and a finding given that the debt had not been discharged by Sambasiva and it

was found to be outstanding. According to the learned Judge endorsements in Ex.A-19 show that Thangavel paid Rs. 985.96 and Sambasiva paid

Rs. 1087.09 towards discharge of the mortgage debt. In the reasoning of the learned Judge the finding in O.S.No-409/40 coupled with the fact

that Thangavel also contributed for the discharge of the mortgage debt would show that Thangavel continued to retain interest in the items subject

matter of the sale dated 15.3.1938.

30. I had a lingering doubt as to whether Thangavel was left with absolutely no property in the suit village after the disputed sale in favour of

Sambasiva. If it is found that he had no interest in any property other than what was the subject matter of sale in favour of Sambasiva, there might

be some point in the contention on the side of the settlee from Thangavel that the sale on 15.3.1938 was only a nominal sale. I directed the parties

to find out whether Thangavel had owned other properties in the village. The parties produced some sale deeds and pattas. From those documents

I could see that there are certain other properties belonging to Thangavel during the relevant time. I am not placing any reliance on these

documents. This was more to satisfy myself. Even otherwise, under Ex. A-19 in S. No. 114 the brothers owned 3.43 acres, out of which 1.66

acres find a place in the sale deed dated 15.3.1938. Some 10 cents were still available in the said survey numbers. Thus Thangavel retained his

interest in at least a portion of an item in S. No. 114. Indeed, Sambasiva had not paid the entire Rs. 500/- as undertaken by him under Ex.B-1=

Ex.A-1. But the fact remains that between 1938 and 1941 Thangavel was out of the picture. Only Sambasiva paid Rs. 352/ - towards discharge

of the mortgage to Narasimhlu Chetty. Even the learned District Judge has noticed that between 1934 and 1941 it was only Sambasiva who had

made payments and Thangavel enters the picture only in 1950. Thangavel had still a subsisting interest in the hypotheca. The conclusion reached by

the learned District Judge that it has not been shown that this debt was discharged by Sambasiva and if so, it cannot be stated that this portion of

consideration had been paid for the sale deed, is wrong. It has also to be noticed that according to the lower Appellate Court Rs. 985.96 had

been paid by Thangavel and 1087.09 by Sambasiva in the ultimate analysis. It is possible to hold that Thangavel had still some interest left in the

properties covered by the mortgage Ex.A-19 and he had a portion of the liability to be discharged under the mortgage. On the date Ex. A-7

judgment came to be rendered on 19.8.1942 it was not as if the entire debt had to be discharged, but that by itself would not mean that no amount

was paid towards discharge of the mortgage debt under Ex.A-19. In fact as already noticed Sambasiva had paid Rs. 352-1-0 between 1.11.1938

and 1.8.1941. The reliance by the lower Appellate Court on Ex. A-7 on this aspect is not correct.

31. The next item of consideration is payment of Rs. 500/- to the Co-operative Society. Mangayarkarasi and Padmavathi have filed Ex. A-12 in

O.S. No. 849/78 to show the payment of Rs. 300/- and Rs. 250/- to Punnai Co-operative Society. The dates of payments are 20.6.1938 and

27-7-1938. According to the teamed District Judge, the above two payments have been made after the issue of notice in S.C. No. 949/38 by the

plaintiff in that suit to Sambasiva on 6.6. 1938 and that Thangavel and Sambasiva cleverly created records as if the amounts were paid by

Sambasiva, the purchaser, but in the receipt dated 27.7.1939, according to the learned District Judge, there is no reference to Thangavel and the

loan number had not been mentioned and it cannot therefore be stated that it was paid by Sambasiva for Thangavel. When the learned District

Judge could draw an inference on the basis of the production of Ex. A-19 by Subramanian that Thangavel made payment on 24.12.1955 towards

the mortgage Ex. A-19, it is surprising how the learned District Judge would not accept the receipt dated 27.7.1939 as evidencing payment by

Sambasiva on behalf of Thangavel, particularly when the heirs of Sambasiva, viz. Mangayarkarasi and Padmavathi had produced the receipt. The

receipt had come from proper custody. The learned Judge did not stop with that, but referred to the finding in the prior suit that the receipts should

have been got to show that the sale deed was supported by consideration after disbelieving the evidence of Sambasiva that he paid the money. The

learned Judge was also influenced by the fact that a further finding had been given in the judgment that Sambasiva could not have the money for

paying the amounts. I do not find that the reasoning of the learned District Judge, particularly as it is based on the reasoning and finding in the

judgment Ex. A-7, to be sound. This is amply demonstrated by what the learned District Judge has said in paragraph 17.

It was rightly pointed out by the appellants' Counsel and also in Ex. A-7 that as Sambasiva and Thangavel were anxious to secrete the property

by the execution of the sale deed when the suit had already been filed, and property attached, it was but natural that Thangavel would have paid

the money and got the receipt specifically in the name of Sambasiva to create an impression that the sale was true.

32. It is seen from Ex. A-7 that notice demanding payment by the plaintiff in S.C. 949/ 38 was sent on 19.3.1938 to Thangavel and received by

him on 25.3.1938. The sale deed Ex. B-1 = Ex. A-1 was executed on 15.3.1938 It is surprising as to how the learned District Judge could say

that when only the notice had been issued and that too after the execution and registration of the sale deed, that a suit had already been filed and

property attached. It is also understandable as to why Thangavel should make payments in the name of Sambasiva and obtain receipts. If he could

command so much of money he could as well have discharged the small cause debt instead of thinking of a circuitous route to defeat the rights of

the plaintiff in the small cause suit. Thus, so far as the payment to the Co-operative Society is concerned, I am satisfied that the lower Appellate

Court grievously erred in holding that it was Thangavel who made the payments and got receipts in the name of Sambasiva to create an impression

that the sale deed was a true transaction. The first of the receipts is dated 20.6.1938 and the second receipt is after one full year on 27.7.1939.

33. The third item of consideration is the payment of Rs. 300/- for discharging the debt due to Subbiah and for purchase of bulls. The learned

District Judge has reasoned that in Ex. B-1 = Ex. A-1 it is mentioned that Thangavel had received cash of Rs. 300/- and when such was the

position how could Mangayarkarasi and Padmavathi file a receipt Ex. A-11 bearing date 25.3.1938 alleged to have been passed by Subbiah

Reddy to Sambasiva Mudali for Rs. 255/-. It is difficult to hazard a guess as to what happened in the year 1938. It is possible that Sambasiva to

ensure sufficient evidence, might have actually paid Subbiah Reddy and obtained a receipt. In coming to the conclusion that Ex. A-11 should have

been obtained by Sambasiva just for production in the prior suit, the learned District Judge was influenced by the observations in Ex. A-7 to the

effect that accounts of Subbiah Reddy were not produced and that he was also not examined and therefore this item of consideration had also not

been established satisfactorily even in the present suits, in that no witness had been examined to prove the sale and none of the witnesses had any personal knowledge about the original of Ex. B-1. There is a recital in the sale deed Ex. B-1 = Ex. A-1 for payment of Rs. 300/-. It is possible that Thangavel would have asked Sambasiva to pay Subbiah Reddy direct; conceivably it had been done. But, merely because cash payment had been mentioned in the sale deed, it would not mean that that is a false recital. The name of Subbiah Reddy is mentioned in the sale deed and a receipt is also produced from Subbiah Reddy. The learned District Judge had stretched the matter too far more to find fault with the case of Mangayarkarasi and Padmavathi.

34. Conceding that no consideration passed under the sale deed, let us examine as to what could be the position. Payment of consideration is not a sine qua non for the completion of a sale u/s 54 of the Transfer of Property Act. Section 54 of the Transfer of Property Act runs as follows:

""Sale"" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised"".

(The rest of the section is omitted.)

35. In Madam Pillai v Badrakali Ammal and another (42 MLJ 414) = (1922) 15 L.W. 404, (F.B.) a Full Bench of this Court has held that,

"price" means money, such money need not necessarily be handed over in current coin at the time, but includes money which might be already due or might be payable in the future.

36. Admittedly, the items of consideration recited in Ex. B-1 = Ex. A-1 referred to discharge of two debts and also cash consideration for discharging a debt due to Subbiah Reddy and for purchase of bulls. The recitals as to consideration satisfy the definition of "price" in Section 54 of the Transfer of Property Act.

37. Let us now visualise a situation as found by the lower Appellate Court that no consideration was paid under Ex. B-1 = Ex. A-1 whether it would render the sale itself void. It is well established that the non-payment of consideration does not prevent the passing of title.

38. It has been held by a Bench of this Court in Yella Krishnamma v Kotipalle Mali (AIR 1920 Mad 164= 11 L.W. 563) as follows:

A vendee of immovable property under a registered deed of conveyance, who

has not paid the purchase money of the property, can maintain a suit for possession of the property without paying for it, or submitting a decree for payment or a condition attached to the decree as to the purchase money which he had agreed to pay.

39. In *The Melur Co-operative Marketing Society Rep. by its President v Salia Mariam and others* (1972 11 MLJ 406= 85 L.W. 621) it has

been held by a learned single Judge of this Court that,

payment of the price is not necessarily a sine qua non to the completion of the sale. If the intention is that the property should pass on registration,

the sale is complete as soon as the deed is registered, whether the price has been paid or not. Then the purchaser is entitled to sue for possession

although he has not paid the price. This would follow from the words of Section 54 of the Transfer of Property Act, "price paid or promised or

part paid or part-promised." If the price is not paid, the seller on that account cannot repudiate the sale and his only remedy is to sue for the price

or the balance of the price unpaid.

40. It has been held in *Kotcherlakota Vijayalakshmi v Raddieti Rajarathniba and others* (AIR 1991 Andhra Pradesh 50) that,

even if consideration under registered sale deed is not paid, still the purchaser gets title. The only remedy of the vendor is to claim the

consideration and of course he will have a right or lien over the properties sold, for sale consideration or balance of sale consideration as the case

may be.

The Supreme Court relied on the Full Bench decision of this Court in *Yella Krishnamma v Kotipalle Mali* (AIR 1920 Mad 164= 11 L.W. 563)

already referred to.

41. It has been held in *Premnarayan and Another Vs. Kunwarji and Another*, that, where the document on its face is a deed of sale, duly executed and registered and it is not the plea of the vendor that title in the suit property was

not intended to be passed on to the vendee and was postponed to be passed until the consideration was paid, even if the possession was not

delivered and the price was not paid, on the contents of the document the title passed to the vendee. If the vendee was deprived of possession he

was well justified in asking for the same. The remedy of the vendor lay in asking

for payment of price.

412. S.S. Subramani, J., has in Sellappa Gounder (died) and others v Ramasami Gounder & Karuppa Gounder (dead) and others (Second

Appeal Nos. 1351/81 and 757/82) referred to all the above four cases and also the Supreme Court decision in State of Kerala Vs. Cochin

Chemical Refineries Ltd., arising under mortgage and applied the ratio of the decisions to the document impugned in the cases before him and

came to the conclusion that title passed under the document. Thus, if at all the vendor had any remedy he could sue for recovery of the amount.

43. The learned District Judge distinguishes The Melur Co-operative Marketing Society etc. v Salia Mariam and others (1972 II MLJ 406= 85

L.W. 621) by observing that, in the case decided in 1972 11 MLJ 406- 85 L.W. 621 the question was whether the passing of consideration was

a condition precedent for the passing of the title while in the case before us the question is raised only to show as to whether the sale deed was a

true one and according to the learned District Judge it had not been proved that consideration passed under the document and that in Ex. A-7

judgment the question had been considered and the same lends support to the case of Subramanian that the same deed was not intended to be

acted upon.

44. It has been held in Official Receiver of Salem v Chinna Goundan and another (1957 11 MLJ 414) that,

the mere fact that there is a recital that the consideration had been received while as a matter of fact it has not been received is not enough to

show that no consideration was intended to pass and that the document was a bogus one executed gratuitously. Specific evidence of a convincing

nature must be adduced to show that a document reciting the payment of consideration was really executed for no consideration and that no

consideration was intended to be paid.

45. It is also to be noticed that in the prior proceedings Thangavel and Sambasiva made common cause. They supported the sale. No doubt, in

O.S. No. 409/40 it has been held the sale deed is a nominal one. But, that finding should be confined to that case only and it cannot be stretched

to find a case of invalidity for all purposes.

46. It has been held in Kallubandi Nanjamma Vs. Kethe Rangappa and Others,)

as follows:

When a transfer is declared void as against creditors under S. 53 the result is not to annul it altogether, but only to render it inoperative as against

creditors and that too only to the extent necessary to satisfy their claims, and subject to their claims the transaction is valid and enforceable.

47. I have come to the conclusion that Ex. B-1 - Ex. A-1 would be a document binding as between Thangavel and Sambasiva. In the earlier suit

full satisfaction was recorded on 27.9.1944 and the attachment was raised in entirety. Thangavel had already executed Ex. B-1 = Ex. A-1 in favour

of Sambasiva. He did not take steps to have the sale deed declared as a void or inoperative or nominal document. He did not do anything till he

purported to execute a settlement deed in favour of Subramanian in 1971. The Tahsildar of Arakonam sent a notice under Ex. A-14 on 2.7.1947

to Sambasiva regarding the enquiry for the transfer of patta. Absolutely no explanation is forthcoming from Subramanian as to why such a notice

was issued to Sambasiva when Thangavel did not intend to convey his properties under Ex. B-1 = Ex. A-1, The learned District Judge gets over

this by saying that this notice was issued nearly 9 years after Ex. B-1 and after the prior suit had been disposed of and nothing had been produced

to show as to what happened subsequent to the notice under Ex. A-14. The fact remains that Thangavel had wanted to stand by the sale deed Ex.

B-1 = Ex. A-1.

48. There are certain other documents put against Mangayarkarasi and Padmavathi. They are Exs. B-3 and B-4. Ex. B-4 is a letter from

Thangavel to Sambasiva informing Sambasiva that he had applied for subsidy for digging a well and Sambasiva also might apply for similar subsidy

for digging well in his properties. Thangavel had enclosed a specimen form for applying to the Tahsildar for subsidy. According to the learned

District Judge, if Thangavel did not have any interest in any property and when according to the parties the entirety of the holdings had been sold

away to Sambasiva under Ex. B-1 = Ex. A-1 there was no need for applying for subsidy by Thangavel. The learned Judge in this connection has

overlooked two things. Under Ex. A-19 Thangavel had still some interest left in S. No. 114 and it is in evidence and it is also referred to by the

learned District Judge that Thangavel purchased properties between 1950 and

1963 under Exs. A-14 to A-18. Thus the reasoning of the learned

Judge on this aspect cannot at all be supported. It is also worthwhile to mention that in the specimen form enclosed to Ex. B-4 letter from

Thangavel to Sambasiva four items of properties are referred to as belonging to Sambasiva. They are as follows:

(1) 171/3 ... 1.34 acres

(2) 114 ... 3.32 acres

(3) 145/2 ... 2.25 acres

(4) 140/2 ... 81 cents,

the total extent coming to 7.72 acres.

The letter Ex. B-4 from Thangavel to Sambasiva mentions about his application given to the Tahsildar on 12.2.1952 for subsidy, but it does not

mention about any survey number, though in the application to be given by Sambasiva it is stated that Sambasiva wanted to dig a well in S. No.

140/2.

49. The lower Appellate Court has also commented on the fact that nobody connected with the sale deed was examined. Ex. A-1, the original of

Ex. B-1 is more than 30 years old and as contended by Mr. M.N. Padmanabhan, learned Senior Counsel, a presumption has to be drawn

regarding the genuineness and passing of consideration in respect of the sale deed. The lower Appellate Court was not justified, according to the

learned Senior Counsel, in embarking upon an enquiry as to passing of consideration for the sale deed after a lapse of 45 years. There is substance

in the contention of the learned Senior Counsel. Having regard to the discussion already made, I have no hesitation in holding that Ex. A-1 is a true

and valid document and in any event binding on Thangavel and consequently on Subramanian claiming as he does under Thangavel under a

settlement deed. The finding contra by the lower Appellate Court cannot stand.

50. The next point relates to the truth and genuineness of Ex. A-4 settlement deed dated 6.12.1971 executed by Thangavel in favour of

Subramanian. The lower Appellate Court has proceeded on the assumption that the truth and genuineness of the settlement deed had not been

questioned. This is factually incorrect. In the written statement it is specifically questioned. The truth and validity and genuineness not having been

admitted and in any event, having regard to the finding on Ex. A-1 the genuineness or otherwise of Ex. A-4 does not fall for consideration. It is not correct as contended by Mr. Ravikumar that the settlement is not challenged in the plaint. The argument of Mr. Ravikumar is that the validity of the sale deed had been considered in the earlier suit and the decision would be binding in the present proceedings also. I have already adverted to this aspect and held that the earlier decision would not operate as *res judicata* and that it could at the most be binding as between the creditor and Thangavel and not between Thangavel and Sambasiva.

51. Mr. Ravikumar further contended that the lower Appellate Court has gone independently into the other aspects and held in favour of Subramanian. For the reasons already stated, it cannot be held that the sale deed Ex. A-1 is not acted upon. As regards the possession of Thangavel, it has already been noticed that he was in the village looking after the lands and Sambasiva was working in some cloth shop in Kancheepuram and Thangavel was also looking after his brother's lands also. The contentions raised by the learned Counsel Mr. Ravikumar have been found against.

52. The next question relates to the installation of pump set. It cannot be disputed that in S. No. 140/2 Subramanian had 26 cents out of 81 cents.

However, having regard to the certificate Ex. B-5 issued by the Karnam regarding the share in the well and the pump set and also the oral

evidence of D.W.3 regarding the installation of the pump set, Subramanian cannot claim any right in the well and in the pump set. It is not the case

of Subramanian in the plaint that the sale deed executed by Thangavel in favour of Sambasiva was a sham and nominal document. The transfer of

patta in favour of Subramanian consequent on the settlement deed Ex. A-4 would not disentitle the claim of Mangayarkarasi and Padmavathi. The

mere change of patta will not clothe or grant any title in favour of Subramanian.

53. As regards adverse possession claimed by Subramanian, the necessary ingredients for finding adverse possession are not satisfied and there is

no evidence that Thangavel was in possession hostile to Sambasiva. Necessary animus was lacking. There is no question of adverse possession

arising in the instant case.

54. The lower Appellate Court has not focussed its attention on the materials on

record in the proper perspective. It has not drawn proper

inference from the facts spelt out from the documents. In these circumstances, it has become necessary to interfere u/s 100 of the Code of Civil

Procedure. The substantial question of law raised are answered as follows:

The lower Appellate Court clearly erred in adopting the reasoning of the judgment in the prior suit, viz. Ex. A-7, though it found that the decision

would not operate as res judicata. Equally, the lower Appellate Court erred in law in finding that Ex. A-1 = Ex. B-1 is sham and nominal.

Consequently, the Second Appeals are allowed. The judgments and decrees of the lower Appellate Court are set aside and those of the trial Court

restored. However, there will be no order as to costs.