

(1986) 12 MAD CK 0010
In the Madras High Court
Case No : Appeal Suit No. 93 of 1980

Dkanalakshmi Ammal

APPELLANT

Vs

Perie D. Gonzaga and others

RESPONDENT

Date of Decision : 09-12-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 32

Citation : (1986) 12 MAD CK 0010

Hon'ble Judges : Swamikkannu, J

Bench : Single Bench

Advocate : R.S. Venkatachari, for the Appellant; V. Venkataraman, V. Chandrakantan and S. Govindaswami, Government Pleader for Pondicherry, for the Respondent

Judgement

Swamikkannu, J.—This is an appeal filed by the plaintiff, Dhanalakshmi Ammal against the judgment and decree dated 11-10-1979 in O.S.

No. 347 of 1977 on the file of the Court of the learned Principal Subordinate Judge, Cuddalore, dismissing the suit for partition and separate

possession, but in the circumstances of the case without costs. The case of the plaintiff/Appellant before the lower Court is that the properties set

out in the plaint "A" schedule were all the absolute properties of one Joseph De. Gonzaga. For the sake of convenience, Joseph De. Gonzaga is

referred to as Joseph in the plaint. Joseph was employed as a senior clerk in the Finger Print Bureau attached to crime Department at Indo-China,

and he was serving in Saigon in such capacity and retired in the year 1950 on a salary of Rs. 441 and settled down at Manjakuppam, Cuddalore.

He had considerable properties which are set out in a Schedule. Joseph is a much married man. First he married one Viyakula Mari also known as

Arumaikannu about the year 1914 at Saigon, which was also duly registered and as per the formalities adumbrated for the French Citizens.

Through his first wife referred to above, he had five children and now only defendants 1 and 2 are alive, and the rest died long ago. The said

Joseph married for a second time one Roger about the year 1927 at Pondicherry, and through her, he begot the third defendant. Even prior to his

death, at ripe old age, the said Joseph appears to have married one Muslim woman and also a Harijan. Of course, the subsequent marriages of

Hindu and Muslim for the third and fourth time are illegal and invalid in law. Apart from that, they have no issue and they were also dead. Both the

first defendant and the third defendant sold away all the properties comprised in "A" schedule as if they are the sole persons entitled to such

properties conveyed by them exclusively and ignored the share of the second defendant. Thus, there was a dispute between the first defendant and

the third defendant as to who is really the legitimate son entitled to convey the properties. There was a competition that ensued to substantiate a

sale transaction effected by the third defendant in a prior litigation in O.S. No. 229 of 1963 on the file of the District Munsif's Court, Cuddalore.

between the purchaser from the third defendant and the purchaser from the first defendant. The fourth defendant's husband and father of

defendants 5 to 11 was one Govindaraju, and Govindaraju was the purchaser from the third defendant, while the plaintiff/Appellant herein is the

purchaser from the third defendant. The said Joseph died on 15-10-1956. Admittedly, defendants 1 to 3 are all French Citizens and Roman

Catholic and are governed by the French Civil Laws. Under French Law, in the case of intestate succession, when the deceased leaves children,

whether of the same or of different marriages, the children succeed equally without distinction of age or sex. Thus, on the death of Joseph on 15-

10-1956, when succession opened, the children of late Joseph alive are defendants 1 to 3, and therefore, each of them are entitled to one-third

share in all the properties of late Joseph. Thus, each of them are in the position of co-sharers or co-owners, and they take as tenants-in-common.

Under French Law, therefore, there can be no adverse possession against co-sharers and no amount of possession by a co-sharer, much less by a

third party, can ripen into one of adverse possession. Possession by third party under French Law is deemed to be on behalf of the sharer and

therefore, even though if a sharer who has not joined in the sale and is out of possession yet, the purchaser cannot, under French Law, prescribe

adverse possession in respect of the share belonging to non-alienating co-sharer. The plaintiff/appellant states that she has purchased the properties

set out in "B" schedule, which are items 1 to 4 in "A" schedule from the first defendant under a registered sale deed dated 7-2-1959 for a valuable

consideration of Rs. 1,000. The vendor under the document viz., the first defendant had admitted the passing of consideration also. The fourth

defendant is the wife of one Govindaraju, and the said Govindaraju is also a purchaser of the very same properties purchased by the plaintiff under

subsequent sale deed dated 6.6.1962 executed by the third defendant for an apparent consideration of Rs. 2,000. The plaintiff/appellant states that

she has been in possession of the properties conveyed to her ever since the date of sale. The fourth defendant's husband after purchase filed a suit

in O.S. No. 229 of 1963 on the file of the Court of the learned District Munsif, Cuddalore, for declaration and possession as against the

plaintiff/appellant herein and the second defendant among others. That was a suit between the alienee from the first defendant and the alienee from

the third defendant. The whole question was as to which sale was to prevail over the other. The said suit was dismissed at the first instance on 26-

2-1965 and it was found that the third defendant had no title to convey to the fourth defendant's husband. An appeal by Govindaraju in A.S. No.

138 of 1965 on the file of the lower Court was also dismissed. Ultimately, in the Second Appeal No. 1431 of 1973 in the High Court preferred by

Govindaraju, the fourth defendant was held to be a sharer and a lesser relief of a decree for partition of one-third share was granted on 6-7-1976.

Defendants 4 to 11 are the heirs of Govindaraju, who died few years ago and hence they have been impleaded as parties. The 12th defendant,

Divapriyam, has purchased items 5 and 6 of "A" schedule from the third defendant under a sale deed dated 5-11-1958 for a sum of Rs. 900. The

13th defendant-- Nandanar Kalvi Kazhagam-- has purchased items 6 and 8 of "A" schedule under a sale deed dated 17-2-1960 for a sum of Rs.

700 from the third defendant. All the two alienations by the third defendant in respect of the entire extent are far in excess of his share and he is not

entitled to anything more than one-third share, and any sale deed beyond that extent is invalid and inoperative. To that extent, defendants 1 and 2

are entitled to two third share in those properties also. Similarly, in the sale deed executed by the first defendant in favour of the plaintiff/appellant

herein, the first defendant is entitled to convey only one-third share and for the balance extent the sale is not valid and as such defendants 2 and 4

to 11 are entitled to two-third share. Thus, it will be seen that all the sharers have got their respective shares in the properties alienated by them and

the respective shares of the sharers in all the suit "A" schedule properties have to be worked out. Under law, in equity the plaintiff/appellant having

purchased the property first, from a co-sharer is entitled to have the entire property so purchased by him allotted to the share of his alienating co-

parcener or co-sharer and the subsequent purchaser of the very same property from another co-sharer will not be entitled to claim in equity any

share in the property previously purchased by another person. Under law, the subsequent stranger purchaser from the co-sharer will get only such

properties in lieu thereof, as are belonging to the sharers who effected the subsequent transfer. Thus, in view of the said provision, under equity, the

plaintiff/appellant herein is entitled to have the entire properties purchased by her which are set out in "B" schedule allotted to the share of the first

defendant and the defendants 2 and 4 to 11 may be allotted their one-third share each in the properties comprised in "A" schedule items 5 to 7.

Having regard to the value of the properties of suit items 4 to 7 of "A" schedule items 5 to 7. Having regard to the value of the properties of suit

items 4 to 7 of "A" schedule and the value of the entire "B" schedule properties, equity can be very well worked out and the value of one-third

share in "B" schedule which is as decreed to defendants 4 to 11 can easily be adjusted and fixed for the one-third share of the third defendant in

the other "A" schedule properties. Hence the suit was instituted by the plaintiff/appellant before the lower Court.

2. The first defendant-Perie D. Gonzaga/first respondent herein, who is the vendor of the plaintiff/appellant herein remained ex-parte before the lower Court.

3. That second defendant-Cessile Defermary/second respondent herein, who is the sister of the first defendant filed written statement resisting the

plaintiff/appellant's claim of partition and disputing the truth and validity of the plaintiff/appellant's sale deed dated 7-2-1959. Further she contends

that by virtue of the decision rendered in S.A. 1431 of 1973 by High Court, the plaintiff/appellant's claim of partition in suit properties cannot be maintained as barred by res-judicata. The equitable relief sought for by the plaintiff also cannot be countenanced in this action, having purchased the property from a Christian governed by French Law. The principle of equity invoked by the plaintiff cannot be sustained and the suit is liable to be dismissed. Further the suit is not properly valued and proper Court fee has not been paid. All the properties of late Joseph De Gonzaga have not been included in the suit and hence the suit is bad for partial partition.

4. The fourth defendant/respondent Visalakshi Ammal filed a separate written statement, which is adopted by defendants 6 to 11. In the said written statement it is, inter alia, contended that the sale deed dated 7-2-1959 in favour of the plaintiff/appellant herein is not true, valid and supported by consideration to any extent. The further allegation that the plaintiff/appellant is in lawful possession of the properties purchased by her is also not true and correct. As stated in the plaint, in S.A. No. 1431 of 1973 on the file of the High Court, Madras, a preliminary decree for partition and separate possession of this defendant's one-third share has been passed in the presence of the plaintiff/appellant. In pursuance of the preliminary decree, this defendant has filed a petition for passing of a final decree in terms of the preliminary decree on the file of the Court of the learned District Munsif, Cuddalore. The plaintiff/appellant has appeared by an advocate and has filed her counter. At this stage, this suit has been filed to squat in the suit properties as long as possible without any manner of right. A preliminary decree for partition has already been passed admittedly. Hence it is no longer open to the plaintiff/appellant now to file another suit for partition in respect of the same properties and other properties. If at all the plaintiff/appellant had any right of equity, she should have agitated it in the High Court itself and prayed for suitable directions. Because the plaintiff/appellant cannot claim equity in law, she kept quiet at the time of preliminary decree. She is now barred. On this sole ground, the suit is liable to be dismissed. The plaintiff/appellant is not entitled to any equity. In law she cannot claim any equity, she having purchased the property from a Christian. No question of co-parcenary arises in the case of Christian families and consequently, the

plaintiff/appellant cannot claim equity. The plaintiff/appellant is not entitled to claim the value of any improvements as the same has been negated

by the High Court. Except one hut, all the constructions were made by the plaintiff/appellant after notice and suit. She has even put up some

construction in 1977 and has leased to third parties. All the properties of Joseph have not been included in the suit and hence the suit, in any event,

is bad for partial partition. Hence the suit is liable to be dismissed.

5. Defendants 3, 5 and 12/respondents herein remained ex-parte before the lower Court.

6. The 13th defendant / respondent Omakulam Nandanar Kalvi Kazhagam represented by its General Secretary L. Elaiyaperumal filed separate

written statement claiming exclusive title to the suit item No. 7 by virtue of purchase from the third defendant/respondent for a valid consideration

of Rs. 1,500 and contended that the plaintiff/appellant has no legal right to question the sale in the 13th defendant/respondent's favour and claims

to be a bona fide purchaser for value, and further this defendant claims that he has perfected title by adverse possession.

7. On the above pleadings, the following issues were framed for trial by the lower court:-

1. "Whether the sale deed dated 7-2-1959 in favour of the plaintiff is, true, valid and supported by consideration?

2. Whether the plaintiff is entitled in equity to have property purchased by her allotted to her share?

3. Whether the plaintiff is entitled to value of improvements?

4. Whether the suit is bad for partial partition?

5. Whether the suit is bad for non-joinder of necessary party?

6. Whether the suit is barred by the principle of res-judicata, as contended by the second defendant?

7. Whether the suit is not properly valued for purposes of Court fees and jurisdiction?

8. Whether the sale by the third defendant in favour of the 13th defendant is true and valid?

9. Whether, in any event, the 13th defendant has prescribed for absolute title by adverse possession?

10. Whether the decrees in O.S. No. 229 of 1963 and the second appeal

therefrom are not binding on the 13th defendant?" on behalf of the plaintiff/appellant.

P.W. 1 Narayanaswami Naidu, and P.W. 2 Perie De Gonzaga first defendant/respondent herein have been examined. Ex.A1 typed copy of

judgment dated 6-7-1976 in S.A. No. 1431 of 1973 of High Court, Madras; Ex A2. registration copy of sale deed dated 7-2-1959 executed by

the first defendant and his minor sons in favour of the plaintiff/appellant for Rs. 1,000 Ex.A3 registration copy of the sale deed dated 5-11-1958

executed by the third defendant in favour of the 12th defendant for Rs. 900 Ex.A4 registration copy of the sale deed dated 17-2-1960 executed

by the third defendant in favour of the 13th defendant for Rs. 1,500 and Ex.A5 typed copy of decree dated 6-7-1976 in S.A. No. 1431 of 1973

of High Court, Madras have been filed on the side of the plaintiff/appellant before the lower Court. On behalf of the defendants/respondents, D.W.

1 Petro Bharata Bath and D.W. 2 K. Kader Nawas Khan were examined. Ex.B1 dated 17-12-1964, portion marked at page 3 of the certified

copy of deposition of Narayanaswami (P.W. 1 in the instant case before us) in O.S. No. 229 of 1963 on the file of the Court of the learned

District Munsif, Cuddalore Ex.B2 dated 11-4-1963, certified copy of the plaint in O.S. No. 229 of 1963 on the file of the Court of the learned

District Munsif, Cuddalore and Ex.B3 registered sale deed dated 17-2-1960 executed by the third defendant in favour of the 13th defendant for

Rs. 1,500 were marked on behalf of the defendant/respondents before the lower Court.

8. On the consideration of the above evidence, both oral and documentary, under issue No. 1, the lower Court came to the conclusion that the

sale deed in favour of the plaintiff/appellant herein is true, valid and supported by consideration but by virtue of the said purchase the

plaintiff/appellant is entitled to one-third share in the plaint "B" schedule properties, as declared by the High Court in S.A. No. 1431 of 1973, and

if there is any deficiency, the plaintiff/appellant has to sue for damages for breach of warranty of title as against her vendor the first

defendant/respondent herein if it is feasible, and for the reasons above stated, the plaintiff/appellant is not entitled to any equity to have the properly

purchased by her allotted to her share, and hence the lower Court answered

issue No. 2 accordingly. Under issue No. 6, the lower Court came to the conclusion that the suit is barred by the principle of res judicata as regards the claim of equity for allotment of "B" schedule properties for her share. Under issue No. 3, the lower Court held that the plaintiff/appellant's claim for the value of improvements cannot be sustained in S.A. No. 1431 of 1973 in which the High Court considered this aspect, and negated the claim of improvements purported to have been effected in "B" schedule properties. Under issues Nos. 4, 5 and 7, the lower Court held that these issues have not been urged before it by the respective parties and hence it answered these issues against the defendant/respondents. Under issues Nos. 8, 9 and 10, the lower court held that in view of its answers to the previous issues that the plaintiff/appellant is not entitled for partition, these issues will not arise for consideration. Under the circumstances, the suit was dismissed, but without costs.

9. Aggrieved by the above decision of the lower Court, the plaintiff Dhanalakshmi Animal has come forward with this appeal before this Court, Inter alia, contending that the lower Court should have held that as purchaser of items 1 to 4 of "A" schedule properties for valuable consideration on 7-2-1959, ("B" schedule properties under Ex.A2) and having been put in possession and enjoyment of the same ever since the date of her purchase, she is entitled to relief for partition and separate possession, consequent to the terms of the judgment and decree of the High Court in S.A. No. 1431 of 1973 which was reported in Visalakshi Ammal v. Narayanaswami Naidu 1977-II M.L.J. 88. It is further contended on behalf of the plaintiff/appellant that the court below should have seen that there is no bar of res judicata in regard to the maintainability of the present suit by reasons of the decision in O.S. No. 229 of 1963 on the file of the Court of the learned District Munsif, Cuddalore. It is also contended that the learned Subordinate Judge, Cuddalore should have found issue No. 2 in favour of the appellant and that she is entitled to equities. Consequent and flowing from the decision of the High Court in S.A. No. 1431 of 1973 and that suit has been filed only to effectuate the reliefs and rights as declared by the High Court in the above proceedings. The further contention raised on behalf of the appellant is that the lower Court erred in holding on issue No. 6 that the present suit is barred by the principle of res

judicata, as regards the claim of equity for allotment of "B" schedule property for her share. According to the appellant, the lower Court failed to see that none of the essential requirements for operation of the principle of res judicata are present in the instant case before us. The suit in O.S. No. 229 of 1963 on the file of the District Munsif Court, Cuddalore, according to the appellant, is not for the same relief nor of the same character as the present suit before us, and that in both the suits, the issues raised and adjudicated upon are not identical nor are properties common or identical and that the parties also are not the same. It is also pointed out on behalf of the appellant that the lower Court failed to note that it is only on the basis of the decree in O.S. No. 229 of 1963 on the file of the District Munsif's Court, Cuddalore and the observations made in S.A. No. 1431 of 1973 that the present suit is instituted, and the lower Court has misconstrued the scope of the plaint in the present suit and the nature of reliefs sought for thereunder and this has vitiated its conclusion and judgment, and rendered its judgment and decree invalid and illegal, it is also contended on behalf of the appellant that issues Nos. 8, 9 and 10 ought to have been found in favour of the appellant on the facts and circumstances in the present case, and the lower Court should have granted decree in regard to items Nos. 5 and 6 in the possession of the 12th defendant, and items Nos. 7 and 8 in the possession of the 13th defendant, and that the appellant is entitled to claim allotment of portions in the rest of items for the deficiency of her share, consequent to the decree in O.S. No. 229 of 1963 on the file of the Court of the District Munsif, Cuddalore and pursuant to the judgment and decree in S.A. No. 1431 of 1973 on the file of the High Court. It is further contended that the lower Court should have seen that the claims made in the present suit and the reliefs sought for in the present suit are not intended by way of collateral attack or avoidance of earlier decree made in the previous suit and that the reliefs sought for are not in derogation of the decree passed in earlier litigation, especially when they were not between the same parties, as wrongly assumed by the lower Court. It is also the contention of the appellant that the lower Court has not applied its mind with reference to the decision in S.A. No. 1431 of 1973, dated 6-7-1976 and that the said judgment did not crystallise any of the rights of the parties before it, but only

declared the law as regards the legitimacy of John De. Gonzaga and as to who are the legal heirs of Joseph De. Gonzaga, and that the present suit

for partition, far from inconsistent with the claims recognised in the earlier proceedings, seeks only to crystallise those rights as between all the legal

heirs and all the items of Joseph De. Gonzaga by getting the equities of all the owners suitably adjusted. It is also contended on behalf of the

appellant that the judgment and decree of the lower Court failed to recognise that even under French Law, equities in regard to allotment of

specific shares to the alienees from co-owners exist and it is not peculiar to Hindu Law or to Hindu co-parcenary and alienees to Hindu Law or to

Hindu co-parcenary and alienees from them and that is only due to judge-made-law that such equities have got their foundation and recognition. In

these circumstances, the appellant herein prays that the judgment and decree of the lower Court have to be set aside since it is opposed to

principles of equity evolved by the Courts and it is even otherwise unjust.

10. On the other hand, on behalf of the respondents herein, it is contended that the lower Court had comprehensively discussed the evidence, both

oral and documentary and came to the correct conclusion, and as such there is no ground for setting aside the judgment and decree of the lower

Court.

11. In the instant appeal before us, viz., A.S. No. 93 of 1980, notice was given to Mr. S. Govindaswami, Government Pleader for Pondicherry,

since this Court felt that the State has to be heard with regard to the various questions of law that were argued by Mr. R.S. Venkatachari, learned

counsel for the appellant herein, and as such Mr. S. Govindaswami has argued on behalf of the State of Pondicherry.

12. The points that arise for consideration in the instant appeal before us are.

1. "Whether the sale deed dated 7-2-1959, original of Ex.A2 executed by the first defendant and his minor sons in favour of the plaintiff/appellant

herein is true, valid and supported by consideration?

2. Whether the plaintiff/appellant is entitled to equity to have the property purchased by her allotted to her share?

3. Whether the plaintiff/appellant is entitled to the value of improvements?

4. Whether the suit is bad for partial partition?

5. Whether the suit is bad for non-joinder of necessary party?
6. Whether the suit is barred by the principle of res-judicata, as contended by the second defendant/respondent?
7. Whether the suit is not properly valued for purposes of Court fees and jurisdiction?
8. Whether the sale by the third defendant/respondent in favour of the 13th defendant/respondent Omakulam Nandanar Kalvi Kazhakam represented by its General Secretary L. Elaiyaperumal is true and valid?
9. Whether in any event, the 13th defendant/respondent has prescribed for absolute title by adverse possession?
10. Whether the decrees in O.S. No. 229 of 1963 and S.A. No. 1431 of 1973 are not binding on 13th defendant/respondent Omakulam Nandanar Kalvi Kazhagam?

13. Points Nos.(1) to (10):-Mr. R.S. Venkatachari, learned counsel for the plaintiff/appellant herein, inter alia, contends that the lower Court had not taken into account many aspects, both factual and legal, and dismissed the suit without applying its mind to the evidence available on record.

14. In the instant case before us, as already seen, Narayanaswami Naidu has been examined as P.W. 1. The first defendant Perie De Gonzaga has been examined as P.W. 2. On behalf of the defendants, Petro Bharata Bath and K. Kader Nawas Khan examined themselves as D.W. 1 and D.W. 2 respectively. Ex.A1 to Ex.A5 have been marked on behalf of the plaintiff/appellant. Ex.B1 to Ex.B3 have been marked on behalf of the defendants/respondents.

15. The plaintiff/appellant herein has alleged in paragraphs 9 and 10 of the plaint as follows:-

9. ""Plaintiff submits that all the two alienations by the third defendant in respect of the entire extent are far in excess of his share and he is not entitled to convey to anything more than 1/3 share and any sale deed beyond that extent is invalid and inoperative. To that extent, the defendants 1 and 2 are entitled to 2/3 share in those properties also. Similarly, In the sale deed executed by the first defendant in favour of the plaintiff herein the first defendant is entitled to convey only 1/3 share and for the balance extent the sale is not valid and as such the defendants 2 and 4 to 11 are entitled to 2/3 share. Thus, it will be seen that all the sharers have got their

respective shares in the properties alienated by them and the respective shares of the sharers in all the suit "A" schedule properties have to be worked out.

10. Plaintiff submits that under Law, inequity the plaintiff having purchased the property first, from a co-sharer is entitled to have the entire property

so purchased by him allotted to the share of his alienating co-parcener or co-sharer and the subsequent purchaser of the very same property from

another co-sharer will not be entitled to claim inequity any sharer in the property previously purchased by another person. Under Law, the

subsequent stranger purchaser from ""the co-sharer will get only such properties in lieu thereof, as are belonging to the sharers who effected the

subsequent transfer. Thus, in view of the said provision, under equity plaintiff is entitled to have to entire properties purchased by her which are set

out in "B" schedule allotted to the share of the first defendant and the defendants 2 and 4 to 11 may be allotted their 1/3 share each in the

properties comprised in "A" schedule items 5 to 7. Having regard to the value of the properties of suit items 4 to 7 of "A" schedule and the value

of the entire "B" schedule properties equity can be very well worked out and the value of 1/3 share in "B" schedule which is now decreed to

defendants 4 to 11 can be easily adjusted and fixed for the 1/3 share of the 3rd defendant in the other "A" schedule properties. Since 1st

defendant is a co-sharer in respect of all the items of "A" schedule, and since 3rd defendant alone has alienated, it is not binding upon 1st

defendant. In this suit for equity in allotment, plaintiff represents 1st defendant in all items. Hence plaintiff is deemed to be in first constructive

possession of all "A" schedule items.

Referring to the above two paragraphs, the learned counsel for the plaintiff/appellant submits that the basis for the claim has been made by the

plaintiff/appellant in paragraph 10 of the plaint.

16. It is contended on behalf of the appellant that the lower Court should have held that as purchaser of items 1 to 4 of "A" schedule properties for

valuable consideration on 7-2-1959 ("B" schedule properties under Ex.A2) and having been put in possession and enjoyment of the same ever

since the date of her purchase, she is entitled to the relief of partition and separate possession, consequent to the terms of the decree and judgment

of this Court in Second Appeal No. 1431 of 1973, and this decision, viz., Visalakshi Ammal v. Narayanaswami Naidu 1977-11 M.L.J. 88, has

been reported and in this decision, it has been held under Art. 187 of the French Civil Code wherever according to Art. 184, an action for

declaration of nullity may be brought by the interested parties, such an action cannot be brought by the collaterals or by the children born of

another marriage while the parties to the marriage are alive. Art. 188 provides that a husband or wife, whose rights have been violated by a second

marriage may demand the nullity of such marriage during the lifetime of the person who had been previously married to him or her. In such an

action it was open to the parties to the second marriage to plead that the first marriage was null. If the action is to be brought by the Public

Prosecutor he could only demand the nullity of marriage while the parties are still living and he must request the Court to order them to separate. It

was further held that if a husband or wife whose rights have been violated by the second marriage, wants to get the second marriage declared null,

he or she could do it only during the lifetime of the person who had been previously married to her or to him. Under the Code Civil, marriages

contracted in contravention of the provisions are not treated as void marriages and not taking effect ipso jure but it will have to be declared by

Courts on the ground of contravention as nullity. So long as there is no such declaration by judgment, neither the parties nor the strangers are

authorised to assume the nullity to be established. It was further held that under the French Law, in the case of intestate succession, when the

deceased leaves children whether of the same or of different marriages, the children succeed equally without distinction of age or sex.

17. It is further contended on behalf of the plaintiff/appellant that the Court below should have seen that there is no bar of res judicata in regard to

the maintainability of the present suit by reason of the decision in O.S. No. 229 of 1963 on the file of the Court of the learned District Munsif.

Cuddalore. It is relevant to note that Ex.B1 is the portion marked at page 3 of the certified copy of the deposition of P.W. 1 Narayanaswami

Naidu on 17-12-1964 in O.S. No. 229 of 1963 on the file of the Court of the learned District Munsif, Cuddalore. Ex.B2 is the certified copy of

the plaint in the said suit O.S. No. 229 of 1963 dated 11-4-1963. So far as the question of res judicata is concerned, it is submitted on behalf of

the appellant that the lower Court erred in holding that the present, suit is barred by the principle of res judicata as regards the claim of equity for allotment of "B" schedule property for her share.

18. It is further contended on behalf of the appellant by his learned counsel Mr. R.S. Venkatachari that the lower Court failed to see that none of the essential requirements for operation of the principles of res-judicata are present in the instant case before us. According to the learned counsel for the appellant, the suit O.S. No. 229 of 1973 on the file of the Court of the learned District Munsif, Cuddalore, is not for the same relief nor of the same character as the present suit, and that in both the suits, the issues raised and adjudicated upon are not identical. It is further contended that the lower Court has misconstrued the scope of the plaint in the present suit and the nature of relief sought for thereunder, and this has vitiated its conclusion and judgment and renders its decree illegal and invalid.

19. Mr. R.S. Venkatachari, learned counsel for the appellant herein, refers to the decision in Gulam Abbas v. State of U.P. AIR 1981 S.C. 2198 at p. 2212 and 2213, for the following proposition:-

It is well settled that S.11 of the C.P.C is not exhaustive of the general doctrine of res judicata and enacted in S.11 has some technical aspects the general doctrine is founded on considerations of "high public policy to achieve two objectives namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. Technical aspects of S.11 of C.P.C. as for instance, pecuniary, or subject wise competence of the earlier forum to adjudicate the subject matter to grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicate is to be invoked.

In paragraph 13 of the decision in Gulam Abbas v. State of U.P. 1884-12 Ind. Ap. 23, the Supreme Court has observed as follows:-

13. Counsel for respondents 5 and 6 next contended that the decision if this litigation (Suit No. 232 of 1934) would not operate as res judicata against them or the Sunni community of Mohalls Doshipura in as much as Munsiff's Court at Benaras did not have either pecuniary or subject wise jurisdiction to grant the reliefs claimed in the instant writ petition, in other words that Court was not competent to decide the present subject-matter, and as such, the bar of res judicata under S.11 of the C.P.C. 1908 was

not attracted, and it would be open to the respondents 5 and 6

and the members of the Sunni community to agitate question of title either to the plots or to the structures thereon or even the Shias' entitlement to

their customary rights over them.

In support of this contention counsel relied on two decisions, namely, *Rajah Rao Bahadoor Singh v. Mussumut Lachoo Koer* 1962-3 S.C.R.

483=A.I.R. 1962 S.C. 214, and *Mst. Gulab Bai v. Manphool Bai* 3. It is not possible to accept this contention for the reasons which we shall

presently indicate.

20. It is well settled that S.11 of the CPC is not exhaustive of the general doctrine of res judicata and though the rule of res judicata as enacted in

S.11 has some technical aspects the general doctrine is founded on considerations of "high public policy to achieve two objectives, namely, that

there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. In *Daryao v. State of*

V.P. 1962-1 S.C.R. 574=A.I.R. 1961 S.C. 1457, this Court at page 582 (of SCR) at p. 1462 of AIR has observed thus--

Now the rule of res judicata as indicated in S.11 of the CPC has no doubt some technical aspects, for instance, the rule of constructive res judicata

may be said to be technical but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public

at large that finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, "and it is also in the public interest that

individuals should not be vexed twice over with the same kind of litigation.

Reference in this connection was made by the Court to the famous decision in the leading *Duchess of Kingston's* case (2 Smith's Lead Cases 13th

Edn 644.645) Halsbury's Laws of England (3rd Edn. Vol 15 para 357 at P. 185) and *Corpus Juris* (Vol. 34, P. 743). In *Galabshand Chotalal*

Parish v. State of Bombay (now Gujarat) (1965) 2. S.C.R. 547=A.I.R. 1965 S.C. 1153, the question was whether after the dismissal of a writ

petition on merits after full contest by the High Court under Art. 226 of the Constitution a subsequent suit raising the same plea claiming discharge

from the liability on the same ground was entertainable or not and this Court held that on general principles of res judicata the decision of the High

Court on the writ petition operated as res judicata barring the subsequent suit

between the same parties with respect to the same matter. On a review of entire case law on the subject, including Privy Council decisions, the Court (at page 574 of SCR)=(at P. 1167 of AIR 1965 S.C. 1153), observed thus:-

As a result of the above discussion, we are of opinion that the provisions of S.11, C.P.C. are not exhaustive with respect to an earlier decision

operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle

of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove

their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the

matter formerly be competent to decide the subsequent suit or that the "former proceeding and the subsequent suit have the same subject matter.

The nature of the former proceeding is immaterial"-

We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Art. 226 of 32 of the Constitution

from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited

effect to the principle of the finality of decisions after full contest".

The above observations were approved by this Court in a subsequent decision in the case of Union of India v. Nanak Singh 1968 2. S.C.R. 887:

AIR 1968 S.C. 1370. It is thus clear that technical aspects of S.11 of C.P.C. as for instance, pecuniary or subject wise competence of the earlier

forum to adjudicate the subject-matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res

judicata is to be invoked. The two decisions relied upon by Counsel for respondents 5 and 6 were directly under S.11 of C.P.C. Even under S.11

the position has been clarified by inserting a new Explanation VII in 1976. It was not disputed that the Munsif's Court at Banaras was competent

to decide the issues that arose for determination before it in earlier litigation and, therefore, the decision of such competent Court on the concerned

issues must operate as a bar to any subsequent agitation of the same issues between the same parties on general principles of res judicata. The

contention raised by counsel for respondents 5 and 6 in this behalf, therefore, has

to be rejected. It was then faintly urged by counsel for respondents 5 and 6 that the dismissal of plaintiffs suit (No. 232 of 1934) would not confer any rights on the Shia community who were party defendants to the suit. The contention is merely required to be stated to be rejected. Not only were the Sunnis customary rights ("specified in para 4 of the plaint), over the plots and structures "in question put in issue during the trial but the customary rights to perform their religious ceremonies and functions on the plots and structures thereon claimed by (the Shias were also directly and substantially put in issue inasmuch as the plaintiffs (Sunni Muslims) had sought an injunction restraining the Shias from exercising their customary rights. Therefore, the decision in the litigation which bore a representative character not merely negated the Sunni customary rights claimed by them over the plots and structures but adjudicated, determined and declared the Shias entitlement to their customary rights to perform their religious ceremonies and functions on the plots and structures thereon in question and this decision is binding on both the communities of Mohallia Doshipure. There is no question of there being any gap or inadequacy of the material on record in the matter of proof of shias entitlement to customary rights over the plots and structures in question. Whatever be the position as regards their title to the plots of structures. We have already indicated that this decision even upholds their title to two main structures, Zanana Imambara and Mardana Imambara (Baradari). In our view, therefore, this is a clear case of an existing or established entitlement to the customary rights in favour of the Shias" community to perform their religious ceremonies and functions over the plots and structures in question under the decree of competent Civil Court for the enforcement¹ of which the instant writ petition has been filed.

21. The decision in *Forward Construction Co. v. Prabhat Madal (Regd) Andheri* AIR 1986 S.C. 391 is relied on for the following proposition that in view of S.11, Explan. IV it could not be said that the earlier "judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was conspicuous by its absence in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially

connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. It was further observed that S.11 in view of Expln. VI applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bona fide litigations in respect of a right which is common and is agitated in common with others. The onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avail of the decision.

22. The decision in *Gangabai v. Chhabubal* AIR 1982 S.C. 20, is relied upon for the following proposition:-

When a finding as to title to immovable property is rendered by a Court of Small Causes *res judicata* cannot be pleaded as a bar in a subsequent

regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding

must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by

the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the

case cannot be made the basis of a plea of *res judicata*. A question of title in a Small cause suit can be regarded as incidental only to the substantial

issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised.

23. It is submitted that the ratio decidendi in the above decisions have not been applied by the lower Court with respect to the application of provision of S.11 of the Code of Civil procedure.

24. Mr. R.S. Venkatachari, learned counsel for the appellant, also refers to the following passage at page 562 in *Dicey and Morris on the Conflict*

of Laws, Tenth Edition, Volume 2, which runs as follows:-

Rule 80: A title to a tangible movable acquired or reserved in accordance with Rule 79 will be recognised as valid in England if the movable is

removed from the country where it was situated at the time when such title was accrued, unless and until such title is displaced by a new title

acquired in accordance with the law of the country to which it is removed. Rule 79. The validity of a transfer of a tangible movable and its effect on

the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed (in general.) by the law of the country

where the movable is at the time of the transfer (lex situs) (1). A Transfer of a tangible movable which is valid and effective by the law of the

country where the movable is at the time of the transfer is valid and effective in England.

(2) Subject to the exception hereinafter mentioned, a transfer of a tangible movable which is invalid or ineffective by the law of the country where

the movable is at the time of the transfer is invalid or ineffective in England.

Exception: If a tangible movable is in transit, and its situs is casual or not known, a transfer which is valid and effective by its proper law will

(semble) be valid and effective in England".

25. R.S. Venkatachari, learned counsel for the appellant, refers to the following passage relating to corporation in the book "Indian Private

International Law" by R.S. Chavan, 1982 Edition, page 120 which runs as follows:-

In the State Trading Corporation of India's Case, AIR 1963 S.C. 1811 foreign Corporations enjoy the same privileges by the comity of nations.

These privileges which they share with natural persons do not make them citizens entitled to every other privileges under municipal law which that

law expressly confers on them.

26. In this regard, the decisions in Jansen v. Driefontein Consolidated Mines Ltd., 1902 A.C. 484 Dalmlar Company Ltd. v. Continental Tyre and

Rubber Co. (Great Britain) Ltd. 1910-2 A.C. 307, P.S. Anant Narayan v. Massey Ferguson Ltd. 1965-1 M.L.J. 550, Cesena Sulphur Co. v.

Nicholson 1876-1 Ex.D.428, Guardian Assurance Co. v. Thakur Shiv Mangal Singh AIR 1937 All. 208, Babulal Choukani v. Caltex (India) Ltd.

AIR 1967 Cal.205 S.584 of the Indian Companies Act, 1956 in re Frontier Bank Ltd., AIR 1939 Mad. 318 Mohanlal Huja v. Chawala Bank

Ltd. AIR 1949 A11.778, in re Frontier Bank Ltd. AIR 1951 Punj. 145 (F.B.). and Raja of Vizianangram v. Official Receiver AIR 1962 S.C.

500=(1962) Com, Cas.1 (S.C.), have also been referred to by the learned counsel for the appellant.

27. The decision in Labh Singh v. Chier Settlement Commr AIR 1959 Punj. 575, is relied on by the learned counsel for the appellant for the

following proposition:-

The lex situs is the governing law for all questions that arise with respect to immovable property, and no disposition can create interest in

immovable property ""which is in breach of the lex situs which must determine whether an effective and lawful transfer of title has taken place.

Acquisition of legal title must, generally speaking, conform to the lex situs.

28. The decision in Dr. Harmindar Singh v. Dr. Balbir Singh AIR 1957 Punj. 214, is relied on by learned counsel for the appellant for the following

proposition:.

It is a general principle of jurisdiction that title to land is to be directly determined, not merely according to the law of the country where the land is

situate, but by the Courts of that country.

The general doctrine of the exercise of civil jurisdiction in such matters is founded upon one or other of the two principles namely, the principle of

submission. In case like this the principle of effectiveness, must override the principle of ""Submission, on the ground that all jurisdiction ordinarily is

territorial and mainly for the reason that extra territorium jus discenti impune non paretur (""the sentence of one adjudicating beyond his jurisdiction

cannot be obeyed with impunity,). Hence even if it be assumed that the defendants had in fact submitted to the jurisdiction of Ludhiana Court, with

respect to the dispute relating to the properties situated in Pakistan, the effect of such submission is restricted and lies within a very narrow ambit.

Where a person voluntarily submits to the jurisdiction of such a Court the submission is taken to be only to the extent of the jurisdiction possessed

by such Court and no further. No amount of consent, waiver or acquiescence which is involved in a voluntary submission, can confer such

jurisdiction which such Court has not.

29. The decision in Viswanathan v. Abdul Wajid AIR 1963 S.C.1, is relied on by the learned counsel for the following proposition :-

Shares Situs of Situs of shares of a company which are movables may normally be the place where they can be effectively dealt with. What is

called private international law is not law governing relations between independent States; private international law, or as it is sometimes called

Conflict of Laws"", is simply a branch of the civil law of the state evolved to do justice between litigating parties in respect of transactions or

personal status involving a foreign element. The rules of private international law of each state must therefore in the very nature of things differ, but

by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each state these

common rules have been adopted to adjudicate upon disputes involving a "foreign element and to effectuate judgments of foreign Courts in certain

matters, or as a result of international conventions.

30. The decision in *Prithi Singh v. Ganesh P.D. Singh* AIR 1951 All. 462, is relied upon for the following proposition :-

Where a suit under S.12, U.P. Agriculturists Relief Act, includes lands lying partly in Banaras district and partly in Banaras State and the

mortgagee lived within the said district and the usufructuary mortgage deed was also executed there, the suit in so far as it embraced lands in the

Banaras state was not maintainable by Banaras Court. If, however, the plaintiff withdrew his claim for redemption regarding lands in the Banaras

State and offered to pay the entire principle amount to obtain redemption of the property in the Banaras district, the Court could not dismiss the

entire suit but could pass a decree in regard to the lands in Banaras district. But the Banaras Court was competent to entertain a claim for

accounting even as regards lands lying within the Banaras State and the accounting could be done at the statutory rate of interest prescribed by

S.30 read with Sch.3 of U.P. Agriculturist's "Relief Act (27 of 1934)"...A mortgage deed cannot be challenged on the mere ground that a part of

the property embraced by it was outside British India.

31 The decision in *Callwood v. Callwood* 1960 A.C. 659, is relied on for the following proposition:-

The question whether the system of community of property between spouses in force in a given country is regarded by the law of that country as

applying to immovables situated outside it is, for the purposes of proceedings in an English Court, a question of foreign law, and therefore of fact,

to be determined by competent evidence as to the law of the foreign country concerned. It appears to their Lordships that both courts erroneously

regarded the judgment of the United States Court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish System of

community in force in the Island of St. Thomas during the material period

included Great Thatch Island notwithstanding that it was situated in the territory of a foreign country. For the reason already stated, their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that basing themselves on this, as their Lordships think, erroneous, view of the evidence, the Courts below went on to hold that in as much as the community property according to the relevant Danish law included Great Thatch Island, the general references in the joint will to "our whole joint estate" and "our joint estate" must be construed, accordingly, as including Great Thatch Island, a conclusion from "which, had there been evidence that according to the relevant Danish law the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the Court below appears to have been that in as much as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their lordships are content to assume in favour of the plaintiff without deciding it) the joint will should be recognised by English law as effectively entitling the plaintiff to the beneficial interest is purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and greeting the adequacy of the joint will, in point of form and execution, to create with respect to Grea-Thatch Island, as part of the joint estate, the beneficial "interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the *lex situs* (i.e., English law) in accordance with the general rule see, for example, *Welch v. Tenne* (1891) A.C. 639 (H.L.). Their Lordships are much indebted to counsel for their full and careful argument on this question but as it appears to their Lordships that the case is concluded against the plaintiff by her failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish Law, no useful purpose would be served by debating it further.

32. "Snell has observed in his principles of Equity 27th Den., at page 38 (c) equal division (1) the principle. In addition to equity's ancient dislike

of a joint tenancy, the maxim Equality is equity" may be illustrated by a number of more modern instances. In general, the maxim will be applied

whenever property is to be distributed between rival claimants, and there is no other basis for division. I think that the principle which applies here

is Plato's definition of equality as a sort of justice; If you cannot find any other, equality is the proper basis".

33. In the case now before us, it having been proved that the acquisition of the A schedule properties were made by the joint efforts and with the

income accrued from the joint efforts of those brothers, which had been mixed up with the personal income of the first defendant from the reces, in

the absence of evidence as to what exactly was the-

Contribution made by the respective parties towards these acquisitions and in the absence of any agreement between the two brothers, as to their

respective interests in the joint acquisitions, the plaintiff will be certainly entitled to his half share in the A schedule properties.

34. Even in Snell's Principles of Equity, Twenty-eighth Edition, the following passage occurs, at page 39, regarding equal division:-

(C) Equal Division (1), The-Principle. In addition to equity's ancient dislike of a joint tenancy, the maxim "equality is equity" may be illustrated by a

number of more modern instances. In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is

no other basis for division. I think that the principle which applies here is Plato's definition of equality as a sort of justice. If you cannot find any

other, equality is the proper basis.

35. The decision in Dhadha Sahib v. Muhammed Sultan Sahib 12 L.W. 603 = ILR 44 Mad. 167, is relied on for the following proposition :-

Even though a vendee of specific lands from a co-parcener of a Hindu family, may be entitled to receive lands of equal value out of the lands

allotted to his vendor in a subsequent partition in the family, a vendee from the first vendee has no such right, his only remedy being to get damages

from his vendor. In assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands.

36. The following passage at page 75 of "Malta's Code of Civil Procedure",

Fourteenth Edition, Volume I, regarding res judicata is also relied on by the learned counsel for the appellant :-

Res judicata: the present section deals with the doctrine of res judicata. The leading case on the subject is the Duchess of Kingstone's case, 2

Smith's L.C. 13th Ed. 644, 645, "and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of res judicata.

From the variety of cases relative judgments being given in evidence in civil suits, these two deduction seem to follow as generally true first that

judgment of a Court of concurrent jurisdiction, directly upon the point: is, as a pleas, a bar, or as evidence conclusive, between the same parties,

upon the same matter, directly, in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly on the point, is

in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different

purpose. But neither the judgment of a Court, of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question,

though within their jurisdiction nor of any matter incidentally in question, though within their jurisdiction nor of any matter incidentally cognizable,

nor of any matter to be inferred by argument from the judgment.

37. Regarding principles of res judicata and estoppels the decision in Sarangapani v. Venkatanorasimhacharyulu 64 L.W. 863=A.J.R. 1952 Mad.

38 is relied on for the proposition that estoppel results from the acts and conduct of the parties and therefore the decision of a Court for which a

party is not responsible and which might be erroneous, cannot operate as an estoppel. Estoppel by record is what is provided for, in S. 11. It is

not within the province of a Court to introduce another kind of estoppel by judgment not covered by S.11 or the general principles of res judicata.

38. The decision in Ramaswami Naidu v. Commissioner, H.R. & C.E. Madras 87 L.W. 595, is relied on for the proposition that it is by now well

established that a decision in an earlier action between the appropriate parties can either operate as res judicata or as binding authority on them

only if the earlier action raises certain issues which are substantially the same as those raised in the later action. But, if the subject-matter of the

earlier action is totally different and if the circumstances under which the parties

litigated are entirely distinct, then the resultant decision in that suit

may not have an impact or bearing while considering the real issues that arise in another case and which has on a subject which is totally alien to

the one which was the subject-matter in the earlier suit. That is the position in the case under this decision. In S.A. No. 1037 of 1932, there was

no issue as to whether the institution was a private or a public temple, whereas the only issue in the present action is whether the institution is a

private temple or public temple.

39. The decision in *Ram Nagendra Tiwary v. Jagdamba Ojha* AIR 1984 Pat. 316, is relied on for the following proposition:-

It is well settled that even where the parties in the two suits are the same and the matter in issue is directly and substantially identical, still the

conditions of S.11 of the CPC are not fully satisfied if the Court which tried the former suit was not competent to try the subsequent suit.

Where a suit was filed by A before the Munsif to correct the mistake committed by pleader Commissioner in incorrectly mentioning the area of

land in a suit for partition between the same parties and make allotment of land to him which was to fall to his share, and "the partition, suit was

filed before the Subordinate Judge then the two Courts where the matters were filed had no concurrent jurisdiction and the subsequent suit by A

before the Munsif to correct the mistake would not be barred by principles of *res judicata*.

40. The decision in *Gulab Bai v. Manhook Bai* AIR 1962 S.C. 214, is relied on for the following proposition: -

The plain and grammatical meaning of the word "suit" occurring in clause in Court competent to try such subsequent suit of the suit in which such

issue has been subsequently raised of S.11 of C.P.C. includes the whole of the suit and not a part of the suit, so that giving the word "suit" its

ordinary meaning it is difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said word in the

material clause. It is the whole of the suit which should be within the competence of the Court at the earlier time and not a part of it. Having regard

to the legislative background of S.11 there can be no hesitation in holding that the word "suit" in the context must be construed literally and it

denotes the whole of the suit and not a part of it or a material issue arising in it.

41. The decision in *Janakirama. Iyer v. Nilakanta. Iyer* AIR 1962 S.C. 635, is relied on for the following proposition:-

Whether the plaintiffs in the earlier suit and the later suit are not the same or parties who claim through each other, S.11 in terms cannot apply.

Where S.11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. Where the Court is dealing with a suit

the only ground on which *res judicata* can be urged against such a suit can be the provisions of S.11 and no other.

42. The decision in *Talchar Coal Fields v. Central Coal Fields* AIR 1978 Cal. 449, is relied on by the learned counsel for the appellant for the

following proposition:- Principles of *res judicata* or principles of general law are applicable to arbitration proceedings as well as awards. It is also

well settled that questions of law can be submitted to Arbitration. Consequently, as a general rule all claims which are the subject matter of the

reference to Arbitration merge in the award and after pronouncement of an award, the respective rights and liabilities of the parties in respect of

any claim so referred can only be determined in the light of and on the basis of the award. So also, prior to an award being pronounced or even

thereafter, no second action can be commenced on the original claim which was the subject matter of the reference. Nor can it be disputed that if

an award which has been pronounced between the parties has in fact or can in law be deemed to have dealt with the dispute raised in the suit

subsequent to the award second adjudication of the same in the suit would be incompetent. ""Where the plaintiff claiming damages arising out of

nonpayment of certain dues failed to claim them in the prior arbitration proceedings for deciding the dispute regarding the dues in question, his suit

for the damages would be hit by the principles of constructive *res judicata*"". Mr. S. Govindasami, learned Government Pleader for Pondicherry

State, has referred to the decision in *Gulabchand v. State of Gujarat* AIR 1965 S.C. 1153, for the following proposition:-

The provisions of S.11, C.P.C. are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the

same matter in controversy in a subsequent regular suit and on the general principle of *res judicata*, any previous decision on a matter in

controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide, it will

operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceedings and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Art. 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effects to the principle of the finality of decisions after full contest. Consequently on the general principle of res judicata the decision of the High Court on a writ petition under Art. 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter.

43. The Learned Government Pleader for Pondicherry State also refers to the decision Maniammal v. Mangalakshmy 1986-1 M.L.J. 160, for the

following proposition: -

As far as Pondicherry is concerned, the law appears to be that during the lifetime of the father, if the father and sons live together that joint living was known as Regime de la Co-proprie Familiale. After the death of the father, if there is no partition between the sons and if they continued to live jointly that was known as Communisute.

The Characteristic feature of a Hindu family that remained undivided is that there exists unity in residence and joint interest. Therefore, the joint family system was not applicable to Pondicherry. Having regard to the documents and the oral evidence that the plaintiff's husband was in possession till his death and after his death it was only the plaintiff who was in possession of the suit properties and that the plaintiff's husband always treated the properties as his own and enjoyed them as such without any demur, the plaintiff must be held to have been in possession of the suit properties as of right.

If the property is acquired by the major son during the Regime De la Co-proprie Familiale, it has got to be presumed that he would not have acquired it out of any independent and separate source of his, and the property must have got merged with the family patrimony. The term "presumption" has not been understood and used by jurists and Courts

uniformly. The yardstick for rebuttable evidence is not always prosaic and an uniform one irrespective of the facts and circumstances of the case. The Court is asked to draw an existing fact of some other fact, by a process of probable reasoning. The terms in its strictly legal sense, is used to designate an inference, affirmative or dis-affirmative, of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning, from some matter of fact, either judicially noticed, or admitted or established by legal evidence to the satisfaction of the Tribunal. However, a presumption has to give way to facts which speak against it. The Court must be conscious that presumptive evidence is always inferior to "direct evidence, because presumptive evidence is only a substitute for direct evidence and it can have its way only in the absence of total lack of direct evidence to the contrary. Courts should always view the available rebuttable evidence liberally.

44. The learned Government Pleader for Pondicherry State also refers to the following passages at pages 34 and 35 in the book "English Law and

French Law" by Rene David, published in 1980 by Eastern Law House Private Ltd., Calcutta and Stevens and Sons Limited, London, ISBN 0

420 45750X, which run as follows:-

The core of private law is what is termed in France *droit civil*, an expression derived from the Latin *jus civile* (the law for the citizens). The words

droit civil are not used in France like in England the words *civil law*, to designate either the Roman law or the laws of "Civil law" countries. *Droit*

Civil has provided for centuries the only basis for study in the Law Schools of the Universities, and it is still regarded as the main subject of the

curriculum in our time.

Other subjects may be equal interest from the "point of view of practice nowadays but *droit civil* is still regarded by many as the subject best fitted

to frame a legal mind, for the reason that it has been studied more than any other branch of the law in history and that it has also provided the basis

starting from which lawyers have developed the other branches of the law Many books have been written on *droit civil*, comprehensive treatises

and Encyclopedias or monographs on special subjects. Annotated codes (*kommentare*) are still in favour in Germany and Switzerland, but not in

France nor in Italy where preference is given to textbooks or Encyclopedias.

Droit Civil:-is divided into various parts. A first part, which has no equivalent in English law, is termed law of persons. The major problem included in this part is the problem of "capacity", what is the status of a minor, of a married woman, of a person of unsound mind, of a corporate body, regarding the making of contracts or the commitment of a tort or the right to bring an action in Court. Another problem is also how the interests of persons may be cared for when "these person are disabled by reason of their age, state of mind, or matrimonial status. Wide differences exist in such matters between civil law countries and common law countries; they are due specially to the fact that the institution of the trust has not found acceptance in civil law countries, where the distinction between common law and equity has always been ignored. For this reason techniques of representation or assistance have been developed in the case of individuals, and groups have been recognised as "moral person" easier and to a larger extent than in England.

Family law is a second part in droit civil. Only two questions are taken into consideration under this heading in Franch: how people may get married and may be divorced on one hand, how the relation of parent and child is proved on the other. Questions of alimony are also dealt with, but not other questions relating to property. In most other civil law countries a broader conception of family law is entertained.

Family law includes there the matter of property relations between husband and wife. Here and there the law of successions is kept separate from family law, on account of the fact that property can devolve mortis cause, if there is a will, to a person who is not a member of the family.

A third part of droit civil is the law of property. The contental conception of property law (droit des biens) does not include real property and personal property only, but it does extend to a number of other subjects which are dealt with in England in the law of torts (conversion), in the law of trusts, or in the law of procedure. The English distinction of real property and personal property, which is derived from the old forms of action of English procedure, is unknown; the basic distinction in continental law is between movables and immovables. In all this part continental law is most different from English law, for the reason inter alia that codification has eliminated in continental law all traces of the feudal regime- It "must be

remembered also that the institution of the trust has remained alien to the continent the concept of estate and the category of bailment are likewise

unknown so that the relation between landlord and tenant is regarded as a relation based on contract, and is not dealt with in the law of property

Further differences exist in this matter between the laws of the civil law system, especially if we consider the law of immovables where little effort

has been made to work out uniformity in the law.

45. The lower Court has taken issues Nos. 1, 2 and 6 for discussion in the light of the evidence let in. So far as the question of equity is concerned,

it is seen that the lower Court has not considered that aspect satisfactorily. Similarly, the question of res judicata, which is framed as issue No. 6 in

the case, seems to have been dealt with by the lower Court without reference to the latest decisions of the High Court and the Supreme Court on

the point. Regarding both the principle of equity and the principle of res judicata number of decisions, as mentioned above, have been cited by Mr.

R. S. Venkatachari, learned counsel for the appellant.

46. In this case, Mr. S. Govindaswami, learned Government Pleader for Pondicherry State, has also been given notice and he has also advanced

arguments regarding the position of law, especially when the French Law is also said to be involved in the matter that has to be determined in the

dispute between the parties.

47. It is seen that the discussion relating to the various aspects including the above have not been properly approached by the lower Court. It is

further seen that even additional evidence has to be let in by both sides in order to appreciate the issues involved in accordance with law.

48. Therefore, without discussing the evidence available on record, this Court is of the opinion that, in the interests of justice, the judgment and

decree of the lower Court have to be set aside and the matter remanded to the lower Court for fresh disposal in accordance with law and in the

light of the observations made above. The lower Court has necessarily to apply its mind with respect to the various principles of law that have been

argued by both the sides in this Court, and consider the issues, after giving opportunity to both sides to adduce fresh evidence, both oral and

documentary and come to a conclusion after considering the entire evidence available on record. An order is passed accordingly.

49. The suit is remanded to the lower Court for fresh disposal in accordance with law and in the light of the observations made above. The judgment and decree of the lower Court are set aside. The Court fee paid on the memorandum of grounds of appeal will be refunded to the appellant. The lower Court is directed to post the suit in the special list and dispose of the same within three months from the receipt of the records from this Court. Mr. S. Govindaswamy, learned Government Pleader for Pondicherry State is entitled to a sum of Rs. 1,000 as fees for the assistance he had rendered in this case to this Court, and this fee has to be necessarily paid by the Government of Pondicherry.