

(1993) 03 KL CK 0053

In the High Court Of Kerala

Case No : S.A. No. 472 of 1981-A

Keepattel Bappu alias Moidunni and Others

APPELLANT

Vs

Mugharikutty's son Kizhakke Valappil Muhammad and
Another

RESPONDENT

Date of Decision : 26-03-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 11, 96
Evidence Act, 1872 — Section 40, 41, 42, 44

Citation : AIR 1993 Ker 273

Hon'ble Judges : Varghese Kalliath, J;P.K. Shamsuddin, J

Bench : Division Bench

Advocate : T.R.G. Warriar and Sebastian Davis, H. Sivaraman and P.V. Jyothiprasad, for the Appellant; C.R. Natarajan, M.K. Ananthakrishnan, R. Bhaskaran and M. Vijayakumar, for the Respondent

Final Decision : Dismissed

Judgement

Varghese Kalliath, J.—This case was referred to a Full Bench along with S.A. 364/81 by a Division Bench of this Court. The Division Bench thought that the decision in Parameswaran Thampi v. Podi- van Thomas 1984 Ker LT 397 : AIR 1984 Ker 135), required reconsideration by a Full Bench. The Full Bench, after hearing S.A. 364/81 in extenso, was of the opinion that S.A. 364/81 can be disposed of without deciding the correctness of the question of lis pendens decided in Parameswaran Thampi's case. In considering S.A. 472/81 the Full Bench observed that since the Full Bench has decided not to reconsider the question decided in Parameswaran Thampi's case since that question was not arising for the disposal of the case, S.A. 364/81, there is no necessity to dispose of this appeal (S.A. 472/81) by the Full Bench. It is observed in the order of the Full Bench that the respondent in this appeal contended that the question of lis pendens does not arise in this case and therefore that question need not be decided in this case by the Full Bench. In view of these circumstances, the Full Bench thought that this case can be decided by a Division Bench of this Court.

Thus, this case comes up for decision by us. Now, we shall straightway state the relevant facts necessary for the disposal of this appeal.

2. Appellant before us is the first defendant. Suit is one for partition of the half share in the suit property. The property originally belonged to the first defendant and his sister, Beepathumma. Beepathumma's share was assigned to one Aminumma, the 2nd defendant, under Ext. A3 dt. 20-5-1967. Aminumma, the 2nd defendant, entered into an agreement, Ext. A4, with the plaintiff to sell her half share of property and received an advance amount of Rs. 1100/-. Ext. A4 is dated 16-5-1969. Plaintiff issued Ext. A7 notice, requesting Aminumma, the 2nd defendant, the performance of the contract of sale after partitioning her share. Ext. A8 is the reply by Aminumma. It is dated 17-6-1969. In the reply it is stated that she has asked the 1st defendant for partition of the property, but the 1st defendant did not comply with that request. It is also stated that she, as not entered into any agreement for the sale of the property and that she has not received the advance amount. In substance she says that when it was found difficult to get the property partitioned, she has approached certain persons by name Ramunni Nair and Valayudhan and they promised to mediate the matter. Her case is that she has agreed to abide by their decision and entrusted the assignment deed in her favour executed by Beevathu to the mediators and also entrusted some signed papers. She has indicated that by using the signed papers, the mediators with ulterior motives may have made some agreements to deprive her of the property. In the reply notice it is also stated that the plaintiff in this case has no right to get the sale deed executed in favour of him in regard to her share of the property.

3. The present plaintiff instituted the suit, O.S. 364/69, and attached the property. Obviously the attachment was the share of the property held by Aminumma. Ext. A9 is the judgment in that suit. It is dated 17-3-1971. In the suit no specific performance was allowed, but the court held that the plaintiff in that suit, who is the plaintiff in the suit from which this appeal arises, is entitled to recover the amount of Rs. 1,100/- paid as advance from the defendant Aminumma with interest at the rate of 6% per annum from the date of the agreement viz. 16-5-1969. In spite of the decree the amount was not given and so the plaintiff filed an execution petition and brought the property to sale and it was sold on 24-1-1972. Plaintiff purchased the property and he got the sale certificate Ext. A6. It is dated 13-3-1972. From Ext. A6, it is clear that the property was sold on 24-1-1972. It is also seen from Ext. A6 that this property was under attachment pending the suit. Pursuant to the sale, a sale certificate was obtained and the property was delivered. Of course, the delivery was a symbolic delivery. It is possible to say that it was a symbolic delivery, since the property was only an undivided share which belonged to the judgment-debtor. The delivery account is Ext. A9. It is dated 15-4-1972. From Ext. A9 it is seen that the delivery was effected on 11th April, 1972.

4. After obtaining the delivery of the property as stated above, plaintiff issued a

notice on 27-6-1972 to the 1st defendant asking for partition. Ext. A10 is the notice. First defendant replied Ext.A10 by Ext. A11. Thereafter, plaintiff filed the present suit on 4-8-1972. The 1st defendant alone filed a written statement. The 2nd defendant, Aminumma, remained ex parte. The 1st defendant has contended that he has got tenancy right over the half share of his sister and so the suit for partition has to be dismissed on the basis of his tenancy right. This written statement filed on 30-9-1972. In the written statement the 1st defendant has admitted that the share of his sister Beevathu was assigned to Aminumma as per a document No. 852/67. But he contended that Aminumma did not get actual possession of the property. He also contended that there was no joint possession of the property with him by the plaintiff or the 2nd defendant. As to the suit O.S. 364/69, the decree in the suit, execution of the decree and the sale of the property, the 1st defendant said that he had no knowledge. According to the 1st defendant, he got varam right in regard to the half share of the property belonged to Beeva-thumma in the year 1962. He further stated that he has filed O.A. 441/71 before the tribunal for the purchase certificate after determining the rent of the property. In short, the main contention of the 1st defendant is that he has got a varam right which after the Kerala Land Reform Act transformed into a leasehold interest and so he got the entitlement to purchase the right, title and interest of the landlord in the property vested with the Government and that the plaintiff has no right in the property at all after 1-1-1970.

5. The court below referred the matter to the Land Tribunal concerned for adjudication and for a finding regarding the tenancy right claimed by the 1st defendant. The tribunal, after an elaborate discussion of the question, came to the conclusion that the tenancy right claimed by the 1st defendant over the suit property is false and such a finding was returned to the Munsiffs Court,

6. The learned Munsiff, accepting the finding of the tribunal, passed a preliminary decree for dividing the suit property into equal shares. The court also decreed the mesne profits for the share of the plaintiff from the date of the suit and costs of the suit. The 1st defendant filed an appeal before the Subordinate Judge's Court, Tirur. The Subordinate Judge also, after re-appraisal of the facts and circumstances of the case, held that the 2nd defendant cannot claim the right as a tenant and dismissed the appeal. Hence this second appeal.

7. From the narration of facts, it is clear and plain that the only question that has to be considered in this casdis the correctness of the finding that the 1st defendant is not a tenant in respect of the suit property. Of course, this is a finding of fact and particularly in second appeal where the decisions of the courts are concurrent, the question as to whether the defendant is a tenant or not can never be considered as a substantial question of law.

8. In this case, counsel the appellant sub-mited that the issue as to whether the 1st defendant actually a tenant or not, can be decided exclusively on a question of law viz. that the tribunal's finding which has become the finding of the trial court and which has been confirmed by the appellate court, is plainly erroneous

since that finding is hit by res judicata on account of an earlier finding of the tribunal. When once the tribunal has found that the 1st defendant is a tenant, of course in a separate proceedings viz. u/s 72 of the Kerala Land Reforms Act, the tribunal cannot find otherwise in a reference made in a suit in respect of the same property. This question was argued very elaborately and we feel that we are obliged to consider it in detail. It has to be noted that at the time when the suit was instituted, no order was passed by the tribunal holding that the 1st defendant is a tenant of the property in question. It has to be remembered that the suit was filed on 4-8-1972. Of course, the application (Ext. B2) for purchase certificate was filed by the defendant before the tribunal on 20-9-1971. During the pendency of the suit an order was passed on Ext.B2 application. It is dated 6-1-1973. In Ext.B2 application Aminumma alone was a party. Against Aminumma there was a suit, O.S. 364/69, and other proceedings which resulted in the court sale and delivery of the property. Aminumma lost all her interest in the property after the court sale on 24-1-1972 and after the court delivery. In Ext. B2 application, though Aminumma lost all her right, title and interest in the property and the plaintiff has obtained the right, title and interest of Aminumma in the property, plaintiff was not a party when the application for purchase was disposed of. The application was disposed of by passing an order on 6-1-73 holding that the 1st defendant is entitled to a purchase certificate. Thus the proceedings u/s 72 of the Kerala Land Reforms Act in respect of the property was culminated on 6-1-1973. Of course, in the order it is stated that the notices in forms D and E were properly published and served on all persons believed to be interested in the land, calling upon them to prefer claims and objections, if any, to the proposed assignment and to appear before the Land Tribunal with all relevant records to prove their respective claims and objections. It is stated that no objections were received and that a preliminary finding under Rule 10 of the Kerala Land Reforms (Vesting and Assignment) Rules, 1970 were thereafter prepared, police of the preliminary finding was issued to the land owner, intermediaries and other interested persons and thereafter also no objections were received. Ultimately the tribunal passed an order allowing the 1st defendant to purchase the right, title and interest of the land owner vested in the Government.

9. According to the appellant, the said order operates as res judicata in regard to the adjudication of the tribunal on a reference by a civil court u/s 125 of the Kerala Land Reforms Act with respect to the same property. From the records, it is seen that the reference was made in the suit on 20-11-1972 and the order on reference is dated 25th October 1976. True, when this order was passed i.e. on 25-10-1976, the tribunal has passed a final order on 6-1-1973 on Ext. B2. At the time when the reference was made the application was pending and the reference was made in the present suit wherein the plaintiff has claimed ownership of the property. Admittedly, the tribunal passed the order when the reference was pending u/s 125 of the Land Reforms Act to determine the question of tenancy. If we apply the ratio of the decision reported in

Parameswaran Thampi Vs. Padiyan Thomas and Others,), the order passed on Ext. B2 is of no consequence, since this court has held in 1984 KLT 397 : AIR 1984 Kcr 135) that at page 138 :

"The final decision of the civil court on the question of tenancy has to prevail. When the question of tenancy is in issue in a civil court, a party to that proceeding cannot by-pass the court, and seek to obtain redress from a Tribunal by filing a petition u/s 72 of the Act. An attempt thus made to invite a decision on the question of tenancy by the Tribunal during the pendency of the suit cannot be encouraged or supported. The tribunal shall either wait till the civil court renders its decision, or if the Tribunal proceeds to enter any finding, on the tenancy, it will only be a tentative decision subject to the final decision of the civil court. Section 72 postulates a decision on the status of the applicant as a cultivating tenant and a consequent order for transfer of the landlord's rights. The first aspect is subject to the decision of a civil court which is already seised of the matter in the pending suit. The second aspect which is consequential and directing transfer of the landlord's rights is the prerogative of the Land Tribunal. The application of the doctrine of *lis pendens* in such a case therefore is not inconsistent with any provision of the Act".

Of course, the correctness of this decision was questioned on a reference made to the Full Bench in this case itself. It is seen stated in the order of the Full Bench that the respondent's counsel contended before the Full Bench that the question of *lis pendens* does not arise in this case and therefore the question referred viz. the correctness of the decision reported in Parameswaran Thampi Vs. Padiyan Thomas and Others, need not be decided in this case. Counsel for the appellant submitted that it may not be appropriate for this court to decide this case on the basis of the decision reported in 1984 KLT 397, for the simple reason that the correctness of the above decision was questioned and when questioned before the Full Bench counsel for the respondent submitted that the correctness of the question decided in the decision reported in 1984 K LT 397 need not be decided by the Full Bench. It is seen from the order of the Full Bench that the Full Bench had accepted this submission made by counsel for the respondent. There is much force in this submission.

10. Counsel for the appellant submitted that the principle of *res judicata* is applicable to the decision of the tribunal and cited the decisions reported in Govindan Gopalan Vs. Raman Gopalan, ; Govindan Gopalan v. Raman Gopalan and E. Keshava Bhat Vs. K.S. Subraya Bhat,); Kesava Bhat v. Subraya Bhat.

11. Counsel for the respondent wanted to rely on the fact of attachment before judgment in O.S. 364/69. It is seen that in Ext. A6 sale certificate there is a statement that the property was under attachment before judgment. The judgment was on 17-3-1971. So, naturally the attachment was before the judgment. By virtue of the attachment, it is contended by the respondent that the plaintiff has obtained interest in the property and the order passed by the tribunal without the plaintiff on the party array is not binding on the plaintiff and

cannot operate as *res judicata*. On principle, it is difficult to accept this contention. The effect of the attachment is clearly stated in Section 64 of the Code of Civil Procedure. The object of the section is to prevent fraud on decree-holders and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienation pending attachment. It is contended that there is no private alienation in this case and that the attachment will be of no consequence in the matter of deciding the validity of the order of the tribunal dt. 6-1-1973 passed on Ext. B2. But it has to be noted that the order was passed at a time when there was an attachment. The general object of attachment is to prevent fraud by the judgment-debtors. In this case, it has to be noted that Aminumma who was the only party before the tribunal did not contest the matter and the tribunal passed the order without any resistance by the opposite party, who on the relevant date had absolutely no interest in the property. Appellant was aware of the fact that Aminumma had no right in the property at the time of passing the order by the tribunal and that the respondent herein has acquired the right of Aminumma. Of course, it is a point to be noted that the appellant has stated in his written statement about the pendency of the application for purchase u/s 72 of the Kerala Land Reforms Act. In that context, counsel submits that there is no question of purposeful prevention by the appellant herein of a person who is interested in the property participating in the proceedings pending before the tribunal. The ratio of the decision reported in *Parameswaran Thampi Vs. Padiyan Thomas and Others*, is that in a case where the question of tenancy is pending before a civil court, if the tribunal proceeds to enter any finding of the tenancy in a separate proceedings, it will only be a tentative decision subject to the final decision of the civil court. Of course, the above statement of law, which is the ratio of the decision, we cannot adopt in this case, since Counsel for the respondent himself submitted that the correctness of that proposition need not be enquired into by the Division Bench. But the observation that when the question of tenancy is in issue in a civil court, a party to that proceeding cannot bypass the court, and seek to obtain redress from a tribunal by filing a petition u/s 72 of the Kerala Land Reforms Act is an observation of great significance. Further it is said that an attempt made to invite a decision on the question of tenancy by the tribunal during the pendency of the suit cannot be encouraged or supported. The above said principle has to be born in mind, according to us, in dealing with the question of fraud and collusion in respect of an order chained from the tribunal. In this case the 1st defendant, at any rate, did not bring to the notice of the court these facts, viz. (i) as regards the question of tenancy a suit is pending and (ii) in that suit, a reference has been made to the tribunal for a finding regarding tenancy.

12. An understanding of the doctrine of *lis pendens* it is incidentally necessary to resolve the question in this case. The principle of the maxim *pendente lite nihil innovetur* is the principle behind Section 52 of the Transfer of Property Act. The section simply provides that during the pendency of any suit in which the right to Immovable property is in question, neither party to the litigation can transfer or

otherwise deal with such property so as to affect the rights of the opponent. The ingredients that are necessary to attract Section 52 of the T.P. Act are (i) the suit is pending in one of the courts as envisaged in Section 52, (ii) suit is not collusive, (iii) the suit should be one in which any right to Immovable property is directly and specifically in question, and (iv) property is transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be made therein. Lord Turner in *Bellamy v. Sabine* (44 ER 842) said :

"It is, as I think, a doctrine common to the court both of law and equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that an action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail."

Of course, the question of *lis pendens* does not depend upon the fact of notice. The Privy Council in *Faizaz Hussain Khan v. Prag Narain* ILR 29 All 339 quoted *Bellamy v. Sabine*. It is difficult for us to hold particularly in view of the fact that counsel for the respondent submitted before the Full Bench that the question of *lis pendens* is not relevant in this case, that the order dated 6-I-1973 on Ext. B2 is directly hit by the principles of *lis pendens* in view of the pendency of the suit.

13. Incidentally counsel for the appellant referred us the supremacy of *res judicata* over *lis pendens*. In AIR 1949 Bombay 367 *Digambarrao Hanmantrao Deshpande v. Rangrao Raghunathrao Desai, Bhagawati J.* speaking for a Division Bench said that the rule of *res judicata* prevails over the doctrine of *lis pendens* and once a judgment is duly pronounced by a competent court in regard to the subject-matter of the suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees pendente lite from them. As we said earlier, referring to *Benamy v. Saibine* that *lis pendens* is an action pending and the doctrine of *lis pendens* is that an alienee pendente lite is bound by the result of the litigation. In Story's *Equity Jurisprudence*, Vol. I, Section 406 this doctrine is explained thus :

"Ordinarily, it is true, that the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, *pendente lite, nihil innovetur*; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties, the conveyance is treated as if it never had any existence; and it does not vary them".

14. Counsel for the respondent submitted that in order to attract the principles of *res judicata* the order relied on must have obtained by the party relying on that order or the judgment from a proper court or tribunal and that that order

or judgment is unimpeachable on the ground of fraud or collusion. Counsel submitted that the order relied on by the appellant viz. the order dt. 6-1-73 on Ext.B2 is an order which can be successfully impeached as one obtained under fraud and or collusion. Further, counsel submitted that on a reading of the finding of the tribunal in this case regarding the question of tenancy would impliedly indicate that the tribunal has declined to accept the defence of res judicata on the ground that the order relied on is the result of collusion and fraud and that is a finding which has now become the finding of the trial court and that finding has been confirmed by the appellate court. It was further contended that the question as to whether an order has been obtained under fraud or collusion is always a question of fact and if there is a concurrent finding that the order has been obtained under fraud and/or collusion, it is not open to this Court to interfere with the finding in a second appeal, because that finding is essentially a finding of fact. On the submission made by counsel for the respondent, we think that we have to consider it on two heads :

I. (a) We have to examine whether the order dt. 6-1-1973 has been obtained by the first defendant exerting fraud and/or

(b) obtained by the 1st defendant in collusion with Aminumma.

II. Whether it is permissible for us to differ from the finding of the tribunal which has become a finding of the trial court and has been confirmed by the appellate court in this second appeal.

15. We may at once say that the question of res judicata is a mixed question of law and fact. That question of law when depends upon certain facts and if there is a finding regarding those facts recorded by the courts below, we feel that we have to proceed to consider the decision on the question of res judicata on the basis that, that finding of fact which formed the foundation of the decision which has been held out for challenging the finding of the tribunal on the ground of res judicata is not to be interfered with by this court in second appeal.

16. There is no dispute that if a decision is put forth to canvass a plea of res judicata, the opposite party has got a right to say that the decision relied on for the purpose of res judicata is a decision obtained under fraud and if he can establish that fact, the decision cannot be used for the purpose of invoking the doctrine of res judicata. Counsel for the respondent submitted that the question of fraud vitiating the decision and the decision is the result of a collusion has to be considered separately.

17. Before considering this question, it is advantageous to consider the confines and limit of collateral attack of a decision of a court or tribunal on the ground of fraud or collusion. It is indisputable that a decree can be attached successfully otherwise than by filing an appeal on the ground that it was procured by the successful party by exerting fraud or collusion.

18. We may now deal with the question as to what would amount to fraud which

would give ground for a defeated litigant to get the decree vacated. It has to be borne in mind that the decree is challenged not in appeal, but by a separate independent proceedings and perhaps in a collateral proceedings. It is plainly that clear that an unsuccessful party will not be allowed to off-set the rule of res judicata by proving that the judgment given by the court was wrong, because it came to a wrong conclusion on the evidence placed before it. The findings of the court on all matters which came for decision whether it is a decision on construction of some documents or evidence placed before it and the inference drawn from such evidence or the trustworthiness of the evidence, is final. In these matters if the court acts wrongly, the only remedy open to the defeated litigant is filing an appeal or a review. In such cases, the defeated party has no right to institute a fresh suit to get the judgment vacated. The ground of fraud for vacating a judgment therefore must be extraneous to everything which has been adjudicated on by the court and not any fraud which has already been dealt with by the court. The rule permitting to impeach a judgment on the ground of fraud is not an exception of the rule of res judicata. But it is really a defence or rather independent and outside the scope of that principle, since the judgment to be relied on as foundation of a plea of res judicata should have the quality that it has not been obtained by fraud.

19. In *Dughase of Kingston's case* (1776) 2 Sm LC 11 th Edn., 731) Sir William Degrey, Lord Chief Justice observed with regard to the judgment of a competent court:--

"But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Court of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal".

This great dictum is followed by all Indian Courts including the Supreme Court. In short, what is emphasised is that the correctness of the judgment of a court of competent jurisdiction cannot be impeached, but it may be shown that the value of the judgment, assuming it to be correct, is nullified set at naught by collateral or extrinsic fraud in the obtaining of it. It is possible to envisage that a judgment of a court normally includes the decision of the questions whether the testimony of any witnesses is true or false and whether a document produced in evidence is genuine or not. These are questions not extraneous or collateral to the judgment, but are steps which lead to the final adjudication of the court, quite as much as its opinion as to the effect of the evidence adduced and the inference to be drawn from it. So, it is legitimate that the unsuccessful party should not be permitted to resort to a fresh suit and if it is allowed, it will be allowing afresh attempt to demonstrate that the evidence which was insisted by his opponent as true was, in reality, false and to characterise such insistence as fraud in obtaining

the judgment. Same is the position of allowing to adduce fresh evidence for the simple reason that it was his duty to place all his evidence before court at the former trial.

20. In *Patch v. Ward* (1867) 3 Ch App 203, Lord Cairns, L.J. observed :

"Now it is necessary to bear in mind what is meant and what must be meant by fraud when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject. The *Dutchess of Kingston's case*".

Lord Cairns explained the dictum laid down in *Dutchess of Kingston's case*, thus :

"The fraud, there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him".

It is true that the parties to a litigation should not be permitted to let in false evidence and certainly it is highly improper and immoral to do so, but it is the function of the court to decide whether the evidence is true or false. It is not possible for us to say that adducing of false evidence can be considered as a fraud, which will give a ground to attack the judgment collaterally. It is because of the fact that in deciding the case, it should presume that the court has adjudged whether the evidence given is false or not and impliedly the court has decided, by adducing false evidence whether any fraud has been played before the court and what once adjudged by a court, it cannot be called upon to decide it again for correcting its judgment otherwise than by filing an appeal or review. So, the test to be applied is : "Is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it?" Where two parties fight at arm's length a litigation, it is the duty of each to question the allegations made by the other and to adduce all available evidence to establish their respective cases. If one neglects his duty and complains that the allegation of his opponent was false, no court will listen to his complaint, because, "Assuming that he could prove the charge, that would not amount to proving fraud on the part of his opponent, because the Court has already decided that his opponent's allegation was true and not false".

21. Black, in his article on "Judgments" in 23, *Cyclopaedia of American Law and Procedure*, enumerates the following acts of fraud which would vacate the judgment, "Misrepresentation or tricks practised upon defendant, keeping him away from the trial, preventing him from claiming his rights in the premises or setting up an available defence, acting contrary to an agreement between the parties that the case should not be continued or that defendant's time to answer should be extended or that the action should be dismissed as the result of compromise or settlement, or that the case would not be pressed to a judgment.

Black, in his treatise on "Judgments", Volume I, Section 321, observed thus :

"There may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit where the Courts would not withhold relief on motion; as, where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defence, and could not have discovered it by due diligence or where he was fraudulently prevented from setting it up at the proper time".

On the basis of the these propositions, we have to decide the question whether the order on Ext. B2 is liable to be attacked collaterally on the ground of fraud.

22. It is in evidence that Aminumma is related to the first defendant. It is also a fact that at the time when the application was filed Aminumma has suffered a judgment whereby Aminumma has to pay substantial amount under that judgment and for that there was an attachment of the property in question. It is probable that knowing these circumstances, the first defendant has filed Ext. B2 application. It has to be remembered that Aminumma is related to the appellant herein, they are first cousins. Further counsel for the respondent submitted that before disposing of the application, the first defendant came to know about the court sale of all the interests of Aminumma and that the right of the plaintiff to claim partition of the property on the basis that Aminumma's right has been obtained by the plaintiff. Counsel also submitted that Beevathu who sold the property to Aminumma never said about the varam right of the first defendant when she sold her right to Aminumma in the year 1967. It is to be noted that the varam right has been claimed by the first defendant under Ext. B1 dated 18-7-1962. Counsel for the respondent also emphasised the fact that it is not at all possible for the first defendant to defend the case on the basis of Ext. B1 varam agreement and in fact no argument was advanced on the basis that even if he tribunal's order will not operate as res judicata on merits the first defendant can defend the suit on the basis of varam. Such a case was not rightly pressed before this Court, for two reasons, (1) on merit it was found that the document relied on viz. B1 is a fabricated document, (2) the merits of the case of varam is a finding of fact which cannot be assailed before this Court in second appeal. The appellant took the stand that he can establish his case of tenancy on the plea of res judicata.

23. The appellante court has said that Ext. B1 which is claimed to be the varam agreement executed by the first defendant and Beevathumma (the brother and sister), from a mere glance of it would go to show that it is fabricated document. Further it is highly improbable for a brother to take the undivided share of the property of his sister on a varam agreement. As said earlier that the tribunal also found that the document Ext. B1 is a fabricated document. So, in effect counsel submitted that the decision of the tribunal dated 6-1-1973 is really an erroneous decision. Of course, even if it is an erroneous decision, it can form the stereobate for raising a plea of res judicata. Nevertheless counsel submits that the order dated 6-1-1973 on a fresh look if permissible would convince any court

that the order is absolutely against the facts and circumstance and unsustainable. It was also emphasised that the order was obtained without contest. Counsel submitted that these aspects should constitute a background bearing, in appreciating the contention that the order now sought to be used for the purpose of res judicata is one obtained by fraud and/or collusion.

24. Counsel for the appellant submitted that fraud essentially depends upon a wrong representation or a misrepresentation by a party knowingly and with ulterior motive to obtain a benefit from the party to whom the representation is made. In this case, counsel submitted that there is no concealment or hiding of any important essential fact. In the written statement itself the appellant submitted that he had filed an application u/s 72 of the Kerala Land Reforms Act before the Tribunal and the same was pending. The written statement was filed on 30-9-1972 and the order was obtained only on 6-1-1973. It would have been possible for the respondent herein to get himself impleaded before the tribunal and defend the case on the basis that he is the rightful owner of the property. He has not done it and so he has no right to say that the order has been obtained by the first defendant by fraud. Further counsel submitted that when impeaching an order of a tribunal collaterally on the ground of fraud, it must be on the ground of something which is extrinsic in the sense that in prosecuting the proceedings before the court there must be some mis-representation hiding or concealing, to cause prejudice to the opposite side and thereby taking an undue advantage resulting in getting an order from the court or tribunal.

25. In *Patch v. Ward* (1867) 3 Ch. A 203 Sir John Rolt, LJ observed, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. In *Bishen Singh v. Wasawa Singh* AIR 1926 Lah 177 it has been said that in order to obtain a reversal of the judgment given in the former case, it is not sufficient for the plaintiffs to prove constructive fraud, but they must prove actual positive fraud. In AIR 1941 93 (Privy Council), it was held by their Lordships of the Privy Council, that the party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Lord Atkin in AIR 1941 93 (Privy Council) observed that at Page 95 fraud like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. Mere want of good faith cannot establish fraud.

26. Before the tribunal when the question was referred u/s 125 of the Kerala Land Reforms Act, the first defendant contended that he was a lessee in so far as Beevathu has executed Ext. B1 Varam Chit. The first defendant also contended that he has purchased the right of the landlord over the property by the orders passed by the land tribunal, Ponnani in O.A. No.441/71, viz., Ext. B2. The tribunal first considered the question on merits and found that Ext. B1 is a very unreliable document, since it was a fabricated document and on the basis of Ext. B1, it is not at all possible to hold that the first defendant is a tenant. Thereafter,

the tribunal considered the effect of the order dated 6-1-1973 passed on Ext. B2. Though the tribunal said that the order is not binding on the plaintiff, on a reading of the order, it is possible to hold that the tribunal has found that the order on Ext. B2 has been obtained under doubtful circumstance and without due notice contemplated u/s 72F of the Kerala Land Reforms Act. However, the tribunal found that Ext. B2 will not stand against the contentions raised by the plaintiff that the first defendant cannot claim tenancy right on the basis of Ext. B1 or the order on Ext. B2. The appellate court also considered * the contention based on the order on Ext. B2. The appellate court found that it was not proved in the case that individual notice on the plaintiff or other persons interested in the property was impracticable and so the notice contemplated u/s 72F(3) of the Kerala Land Reforms Act was served. Further the appellate court found that Ext. B2 order cannot be held to be binding on the plaintiff and that order will not operate as res judicata against the plaintiff. It was contended that the appellate court said that there was no proper issue of notice and it is an extrinsic factor in respect of the process of passing the order by the tribunal. This fact obviously will affect the order and in the circumstances constitute fraud for impeaching the order collaterally. When the final fact finding forum has found that there were extrinsic facts enabling the plaintiff to impeach the order put forth to find a plea or res judicata it is not open to the court to further investigate those matters in second appeal. It has to be remembered that the land tribunal has not said very clearly that the order on Ext. B2 will not operate as res judicata on account of the fact that the order on Ext. B2 has been obtained without giving proper notice to interested persons u/s 72F (3) of the Kerala Land Reforms Act and the order shows that all notices required have been sent before passing the order. In these circumstances we do not think that the order on Ext. B2 can be successfully impeached on the ground of fraud.

27. Now, we turn to consider whether the order on Ext. B2 is impeachable on the ground of collusion. We shall first examine what exactly is the nature of the collusion that is required to impeach an order collaterally Which forms the foundation for a plea of res judicaia.

28. "Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose". It comes under two heads; (1) "when the facts put forward as the foundation of the sentence of the Court do not exist" (2) "when they exist, but have been corrupt preconcerted the sentence". In either case the judgment obtained by such collusion is a nullity - see The Duchess of Kingston's Case (1776) 2 Sm. L. C. This description of collusion given in . Duchess of Kingston's Case has been adopted as the definition of the word "collusion" in judicial proceedings in Wharton's Law Lexicon.

29. In this case, we have to apply this provision on an analysis and assessment of the circumstances and evidence in the case. The order has been obtained on

6-1-1973 on Ext. B2. The party in Ext. B2 is Aminumma. She is a close relative of the first defendant who filed the application, Aminumma purchased half share in the property under Ext. A3 dated 20-5-1967. In this document, there is no indication that the first defendant has got vafam right from Aminumma's assignor. It has also to be remembered that Aminumma's assignor was none other than the sister of the first defendant. Further we have to remember that Aminumma executed an agreement to sell half share under Ext. A4 dated 16-5-1969 receiving an advance of Rs. 1,100/-. But she was unwilling to perform that agreement and that resulted in filing of a suit and that suit was decreed directing payment of the advance amount received by Aminumma from the plaintiff. It is also significant to note that there was an attachment before judgment. Under these circumstances, there is every probability of the first defendant who is a close relative of Aminumma, persuading Aminumma to have a secret agreement between them for the sinister purpose of defeating the legitimate right of the plaintiff over the property. Aminumma did not contest the application Ext. B2. It has got great relevance in this context. Collusion in judicial proceedings also requires another element to be proved, viz. the facts put forward which formed the foundation of the order of the court should not exist. In this case, the courts below found that the facts put forward by the first defendant to establish the varam right do not exist. We have no hesitation to agree with this finding of the courts below. We are of opinion that there is strong balance of probability to hold that the order dated 6-1-1973 on Ext. B2 has been obtained in collusion with Aminumma and so it can successfully be attacked collaterally for the purpose of defending the plea of res judicata.

30. Counsel for the appellant submitted that there was no clear case of collusion or fraud pleaded by the plaintiff in this case to attack the order on Ext. B2. It has to be remembered that Ext. B2 has been put forward only when the suit was on trial and the order was passed obviously when the suit was pending. In fact, in answer to the suit, the first defendant has not taken the plea of res judicata. In the circumstances, the plaintiff cannot say that the question of res judicata was not raised in the written statement and for the plaintiff it is not possible to give the details of the grounds of attack on the order in Ext. B2 in the pleadings. Nevertheless, the court can consider all the aspects of the evidence given by the parties in the suit.

31. Counsel for the appellant also contended that the case of collusion cannot be raised here by the plaintiff/ respondent, since it has not been raised before the courts below. Though it has not been specifically stated, there is indication of arguments put forward before the court below on the basis of collusion. It is stated in the tribunal's order thus: "It appears to me that the first defendant did not include the plaintiff as a party to Ext. B2 case with ulterior motive". The appellate Court finds that the order on Ext. B2 cannot be held to be binding on the plaintiff and that order will not operate as res judicata against the plaintiff. When the appellate court has said that the order in question will not operate as res judicata against the plaintiff, plaintiff can support before this Court that

finding, on valid grounds on facts proved but not considered by the Courts below.

32. Section 44 of the Evidence Act makes it clear that any party to a suit or other proceedings can establish that any judgment, order or decree which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The provision in the Evidence Act allows a party in a case where the opposite party to a suit tenders or has put in evidence, a judgment, order or decree to avoid its effect on any of the three grounds: (i) want of jurisdiction in the court which delivered the judgment, (ii) that the judgment was obtained through fraud, or (iii) through collusion.

33. We feel that on an overall consideration of the facts and circumstances of the case, a collateral attack that the order on Ext. B2 is a nullity on the basis that it has been obtained under collusion, is sustainable. If the order on Ext. B2 is nullity it cannot be accepted for the purpose of raising a plea of res judicata.

34. The question whether the concurrent finding of facts to reject the plea of res judicata is reviewable in this Second Appeal need not be answered in view of our finding that the order on Ext. B2 is a nullity to found a plea of res judicata. We have no doubt that the 1st defendant/appellant has no right of tenancy and so the plaintiff has the right and title to get a decree for half share of the property. We were vexed with the troubled thought that if the plea of res judicata is upheld in favour of the appellant it would give an undue and unjust gain to the appellant, but on a careful analysis, we found in law that plea is unsustainable. We here reassure that in examining the elaborate arguments in this case, we kept in mind as we do always that a just solution for a particular case is the crucial factor, in the decision process and we always try to remember that equitable rule of decision that considerations of justice are directly relevant to the justification of any decision and that it should be considerations of justice according to law and not according to the institution and discretion of the Judge.

We see no merit in the appeal. Appeal is only to be dismissed. We do so.