

(2000) 10 MAD CK 0012

In the Madras High Court

Case No : C.R.P. No. 935 of 1996

Sri Nallalagu Polytechnic Managing Committee, Kamaraj
Education and Research Foundation Trust, Madras

APPELLANT

Vs

D. Sivakumar

RESPONDENT

Date of Decision : 23-10-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 103, Order 21
Rule 35, Order 21 Rule 5, Order 21 Rule 8
Evidence Act, 1872 — Section 18, 31
Transfer of Property Act, 1882 — Section 52

Citation : (2000) 10 MAD CK 0012

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : V. Shanmugam, for the Appellant; P. Gopalan, for the Respondent

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—This Civil Revision Petition is directed against the fair and decrrial order dated 18.8.1994 made in E.A. No. 999 of 1989

in E.P. No. 2 of 1989 by the Court of District Munsif; Ponneri thereby dismissing an application filed by the petitioner u/s 47 of the Code of Civil

Procedure, 1908. Petitioner Trust has filed the petition before the lower Court u/s 47 of the Code of Civil Procedure, 1908 contending that it

purchased an extent of 7.72 acres of land in various survey numbers at Thandalkalani village and established therein Sri Nallalagu Polytechnic

Institution; that subsequent to the execution of Kamaraj Education and Research Foundation Trust Deed, the administration of the Polytechnic

came to be vested in the present Trust Board and the petitioners carry on the administration of the said Polytechnic as on today and that the

properties including the sale deeds stand in the name of the Board of Management of Polytechnic.

2. The further contentions of the petitioner are that on 1.3.1989 at 10.00 a.m., the respondent came to the Polytechnic with 20 persons and

informed that he had come with the Bailiff to take delivery of the properties mentioned in the decree made in C.S. No. 130 of 1979; that on

protest, recording to the effect of the execution having been carried out they left the place; that in fact, the petitioners have filed E.A. No. 361 of

1989 against the respondent for redelivery of the entire property covered under the present Execution Petition under Order 21 Rules 99 and 100,

but the present application is more appropriate ; that the Execution Petition itself is not maintainable u/s 39 of the CPC since the Court of District

Munsif, Ponneri has no jurisdiction to entertain it; that the decree-holder has chosen a wrong forum and hence the proceedings are void ab initio

that the petitioners are not parties to the suit in spite of being the representatives in respect of the purchase of the property in 1979 and on such

grounds would pray for holding an enquiry into the aspect of jurisdiction and on the question of alleged delivery and dismiss the Execution Petition.

3. In the lengthy counter filed, the respondent would allege that the suit in C.S. No. 130 of 1979 for partition and separate possession of his share

in his ancestral property had been filed by him through his mother and next friend on 28.2.1979 along with an application in A. No. 892 of 1979

for injunction restraining the first defendant in the suit, viz. his father, from alienating any of the suit property and that the injunction was granted; that

the third defendant in the suit viz. Chennaivazh Nadargal Sangam, T.V.A. Nallalagu Nadar School Managing Board, represented by its Manager

A.G. Srinivasaga Nadar were served with suit summons on 30.8.1979. but he did not choose to appear before the High Court and hence a

preliminary decree was passed on 4.1.1984; that on 18.9.1987, he filed an application in A. No. 4414 of 1987 for declaring him a major and to

discharge his mother from guardianship and the said application was ordered on 29.10.1987; that he also filed Application No. 4329 of 1987 for

amending the decree and that application was ordered on 12.11.1987; that on 14.11.1987, he filed an application in Application No. 5870 of

1987 for appointment of Advocate-Commissioner for dividing. "B" and "D" schedules of the suit properties by metes and bounds and to allot him

half share and that application was also ordered on 21.12.1987 and the Advocate-Commissioner visited "B" and "D" schedule properties and submitted his report on 29.3.1988; that then he filed an application in Application No. 1892 of 1983 on 14.4.1988 for passing a final decree in terms of the Commissioner's Report and final decree was passed as regards the landed properties on 26.8.1988; that he filed E.P.68 of 1988 on the file of the High Court of Judicature at Madras seeking possession of his half share and since the properties are situated in Thandalkalani Village, Red Hills, he got the said Execution petition transferred from High Court to the sub Court, Poonamallee, who in turn, transferred the Execution Petition to the Court of District Munsif, Ponneri, wherein it got renumbered as E.P. No. 2 of 1989; that the third defendant to the suit i.e. the petitioner herein in spite of being served with notice in the Execution Petition on 6.1.1989, did not choose to appear before the Execution Court whenever the Execution Petition was taken up for hearing on many occasions and ultimately on 24.2.1989, since none of the respondents appeared before the Court of District Munsif. Ponneri, the said Execution Petition was ordered resulting in the respondent taking possession of the landed properties allotted to his share on 1.3.1989.

4. The further contentions of the counter filed by the respondent are that the petitioner calling himself a third party filed E.A. No. 361 of 1989 in E.P. No. 2 of 1989 for redelivery of the entire property contending that possession had been taken from third party; that the Polytechnic was not the owner of the land and possession ought not to have been taken from the said Polytechnic; that he filed detailed counter in E.A. No. 361 of 1989 in E.P.2 of 1989 contending that the petitioner herein is none other than the 3rd defendant to the suit in C.S. No. 130 of 1979; that one A.N Srinivasaga Nadar purchased the properties in the name of Chennaivaz Nadargal Sangam for the purpose of starting an educational institution in the name of his father T.V.A. Nallalagu Nadar; that the sale deed does not stand in the name of the Board of Management of the Polytechnic since it was started in the year 1983 only; that neither the Polytechnic nor the present Trust was in existence at the time of the sale; that the sale deed obtained by Srinivasaga Nadar from the father of the respondent was after the institution of the suit in C.S. No. 130 of 1979 and hence it is hit by

the doctrine of lis pendens; that since the petitioner was not able to give any satisfactory explanation for the contention of transferee pendente lite,

he has taken the defence that the Court has no pecuniary jurisdiction; that knowing full well that he cannot succeed in the proceeding instituted

under Order 21, Rule 99 of the Code of Civil Procedure, the present application u/s 47 of the CPC has been filed and it is not maintainable.

4.1 The further contentions of the counter are that the properties have been purchased by Chennaivazh Nadargal Sangam and the purpose of

purchase as mentioned in the sale deed is for starting a College in the name of T.V.A. Nallalagu Nadar and hence it is false to allege that the

properties were purchased by the Managing Board of the Polytechnic; that since most of the sale deeds have come into existence during the

pendency of the suit, they were hit by the doctrine of lis pendens; that in the Project Report submitted to the Government of Tamil Nadu, only an

extent of 2.56 acres of the land comprised in Survey No. 10/2 is said to have been conveyed to the Polytechnic; that the other properties are with

the third defendant viz. Chennaivazh Nadargal Sangam and hence the Polytechnic has no say in the matter; that he has taken possession of 7.99

acres of land validly: that the petitioner under the garb of Trust cannot have any right to defend the case of the third defendant; that having failed to

appear in the Execution Petition and having filed application under Order 21, Rule 99 of the C.P.C, it is not at all open to the petitioner to file an

application u/s 47 of the C.P.C, and hence this petition is barred by the doctrine of constructive res judicata and by limitation; that a third party

cannot maintain an application u/s 47 of the C.P.C, and this application is only to delay the ends of justice.

4.2 Regarding jurisdiction, the respondent would contend that the Court of District Munsif, Ponneri, has got jurisdiction since the suit properties

situate within the territorial jurisdiction of that court and hence the Sub Court, Poonamallee rightly transferred the matter to that Court for

execution; that for the purpose of delivery of immovable property, pecuniary jurisdiction is not a bar nor relevant that the petitioner is not still sure

whether he is direct party to the proceedings or the representative of the judgment-debtor, so by filing two different applications under different

provisions of law, without alleging the specific stand, the petitioner is attempting to confuse the issue; that the respondent has taken possession of

the properties through the Court under a valid decree passed in the suit; that no injustice is caused to the petitioner by the delivery effected in his

favour; that the petitioner cannot agitate the correctness of the execution proceedings at this belated stage; that there is absolutely no merit in the petition and would pray for dismissing the same.

4.3 The Court of District Munsif, Ponneri, wherein the application has been made, having framed two points for determination viz. (1) whether the

petition is to be allowed for the reasons assigned in the petition? and (2) what relief's, the petitioner is entitled to? has allowed the parties to let in

evidence, wherein one witness has been examined on the part of the petitioner as P.W. 1 and two documents as Exs.A.1 and A.2. have been

marked Ex. A.1 dated 5.12.1975 being the sale deed and Ex. A.2 dated 28.9.1979 being another sale deed. On the part of the respondent, no

oral or documentary evidence has been adduced. Yet another witness has been examined as court witness C.W.1 and three documents have been

marked as Exs.C.1 to C.3, Ex. C.1 dated 27.2.1989 being the delivery warrant, Ex. C.2 dated 26.8.1988 being the copy of the decree made in

C.S. No. 130 of 1979 on the file of the High Court of Judicature at Madras and Ex. C.3 dated 1.3.1989 being the delivery receipt.

4.4 On the above evidence placed on record, the learned District Munsif, Ponneri, having heard the arguments of the Learned Counsel for both

and appreciating the evidence in his own way, has ultimately dismissed the petition without costs. Aggrieved, the petitioner therein has come

forward to file the above Civil Revision Petition on grounds such as (i) the lower Court has erred in holding that the petitioner is not a

representative of the judgment debtor and hence not entitled to maintain the application u/s 47 of the C.P.C; (ii) that the lower Court failed to note

that if the petitioner is not entitled to maintain the application u/s 47 of the C.P.C, it amounts to the lower Court having no jurisdiction to make an

adjudication of the disputes raised therein; (iii) that the lower court has erred in holding that the transfer of properties is hit by the provisions of the

Section 52 of the Transfer of Property Act; (iv) that the Court below erred in holding that the proceedings are barred by res judicata; (v) that the

lower Court further erred in appreciating the scope of Sections 39 and 41 of the C.P.C in their proper perspective ; (vi) that the lower Court failed

to note that it is mandatory that the transferee court "must have both pecuniary and territorial jurisdiction to try the suit in which the decree was passed; (vii) that the decision reported in A.I.R.1981 Delhi 114 cited before the lower court also reiterates this mandatory requirement; (viii) that the court below failed to note that the value of the suit in which the decree was passed is more than Rs. 1,00,000/- and hence the Munsif Court, which is the transferee court had no pecuniary jurisdiction (ix) that the lower court had also no jurisdiction to entertain the Execution Petition and all the orders made by it in the E.P. No. 2 of 1989 are null and void since it is bereft of jurisdiction; (x) that the lower court though admits that there were certain defects in the delivery of possession, it has erred in holding that it cannot be concluded that the delivery was not effected; (xi) that in view of the manner in which the Amin had effected the actual delivery of possession, the lower court ought to have held that the delivery was not at all effected; (xii) that the lower court failed to note that the decree-holder did not even examine himself; (xiii) that the lower court further failed to note that the entire proceedings held by it are all wholly void, since it has no jurisdiction to entertain the Execution Petition and make any order.

5. During arguments, the learned senior counsel Sri. V. Shanmugam appearing for the revision petitioner would contend that this revision petition has arisen out of dismissal of the application filed u/s 47 of the C.P.C, by the revision petitioner herein praying thereby to dismiss the E.P. No. 2 of, 1989 filed by the respondent/decreed-holder; that the decree has been transferred to the wrong court for execution; that the Execution Petition is null and void for lack of jurisdiction; that to the said petition filed by the petitioner u/s 47 of the C.P.C, the respondent herein filed a counter affidavit objecting the petition on various grounds, the first objection was that the petitioner is not the representative of the judgment-debtor and. therefore, he is not entitled to file an application u/s 47 of the C.P.C, questioning the validity of the execution. The second objection was that the present respondent filed E.A.361 of 1989 in the said E.P. No. 2 of 1989 for delivery of possession and the delivery was recorded; that the Learned Counsel would call the said delivery as paper delivery since it is the petitioner, who is in physical possession from 1979 onwards, running a college therein; that the ground on which the petitioner, filed earlier application was that he was a third party to the decree and he could not be

dispossessed in execution of the decree as per E.A. No. 361/1989 under Order 21, Rule 99 of the C.P.C; that it has been averred in that

application that the property has been purchased by Chennaivazh Nadargal Sangam for the purpose of establishing Nallalagu Polytechnic and the

present petitioner is the Nallalagu Polytechnic Managing Committee represented by the secretary; that the petitioner constructed the building and

established the college and is in possession and management of the same; that in the application, the decree-holder stated that Nallalagu

Polytechnic is the judgment-debtor and hence as per E.A.No361 of 1989, they are bound by the decree, in which they were set ex parte; that it is

the contention of the other side that since the petitioner filed E.A. No. 361 of 1989 earlier and withdrew the same, it is constructive res judicata

and therefore, the petitioner is not entitled to maintain the present application filed u/s 47 of the Code of Civil Procedure.

6. The learned senior counsel for the revision petitioner would further contend that the third objection raised by the decree holder is that the

petitioner purchased the property during the pendency of the suit in C.S. No. 130 of 1979 and, therefore, he is not entitled to challenge the

execution and that he is bound by it; that the fourth objection raised by the decree-holder is that in the delivery effected by the Court Amin, there

are no legal infirmities. At this juncture, the learned senior counsel would lament that the learned District Munsif sustained all the four objections

raised by the decree holder and dismissed the application filed by the petitioner.

7. Continuing to argue, the learned senior counsel for the petitioner would contend that so far as the first objection raised by the other side i.e. the

question of jurisdiction u/s 39. C.P.C, is concerned, the transferee court must have both territorial and pecuniary jurisdiction and would cite a

judgment, delivered in Manganse Ore (India) Ltd. Nagpur v. M/s. Mangilal Rungta, Calcutta reported in AIR 1981 Delhi 114, wherein in Para

No. 4, imposing conditions under which a decree can be sent, as laid down u/s 39 of the C.P.C, particular mention is made for Section 39(3) of

the C.P.C, which reads:

For the purposes of this section, a Court shall be deemed to be a court of competent jurisdiction if, at the time of making the application for the

transfer of decree to it, such court would have jurisdiction to try the suit in Which

such decree was passed.

Citing the above judgment, the learned senior counsel would lay emphasis that both territorial and pecuniary jurisdictions must be there for the

Court of District Munsif, which is executing the decree, but in fact, the Court of District Munsif, Ponneri, did not have such jurisdiction at all. At

this juncture, the learned senior counsel would cite another judgment delivered in Jagat Kishore Prasad Narain Singh v. Surendra Kumar Bhadani

and others reported in AIR 1963 Patna 461 wherein in Para No. 6 it is held:

When a decree is transferred by a Court which passed it for execution by a Court situate in another district, the procedure prescribed by Rules 5

and 8 of Order 21 of the code has got to be followed. The jurisdiction to transfer a decree for execution from one Court to another however arises

not under order 21, Rule 5 but u/s 39, Civil P.C. and Order 21, Rules 5 and 8 merely prescribe the procedure by which the transfer is to be

carried out. Therefore, failure to observe the provisions of order 21 Rule 5 or R.8 amounts to a mere irregularity and does not affect the

jurisdiction of the Court to which the decree is transferred to execute the decree.

Citing the above judgment, the learned senior counsel would clarify that Order 21, Rule 5 is the procedure but the power is conferred u/s 39 of the

C.P.C.

8. Coming to the next objection that the petitioner is not the representative of the Judgment-debtor, the Learned Counsel would cite Para No. 5 of

the counter affidavit filed by the respondent, wherein it is admitted that the petitioner herein is none other than the third defendant in the suit in C.S.

No. 130 of 1979 that A.N. Srinivasaga Nadar purchased the properties in the name of Chennaivazh Nadargal Sangam for the purpose of starting

an educational institution in the name of his father T.V.A. Nallalagu Nadar; that the sale deed did not stand in the name of the Board of

Management of the Polytechnic because the Polytechnic was started only in the year 1983 and since neither the Polytechnic nor the present Trust

was in existence at the time of the above sale deed and hence naturally, they could not be shown; that for the next contention that the sale deed

obtained by Srinivasaga Nadar from the father of the respondent herein was after the institution of the suit in C.S. No. 130 of 1979 and that it was

hit by the doctrine of lis pendens and hence the petitioner cannot have any say

in the matter, the learned senior counsel would answer that the main contention of the respondent is that the petitioner was the representative of the judgment-debtor, and since the entire transaction is hit by the doctrine of lis pendens, the petitioner could not have any defence and the petition filed under Order 21, Rule 99 was not maintainable.

9. Citing the above passage from the counter of the respondent, the learned senior counsel for the petitioner would contend that even if it is hit by the doctrine of lis pendens, the petitioner is entitled to maintain another application u/s 47 of the C.P.C, and would cite yet another judgment delivered in Gangabai Gopaldas Mohata Vs. Fulchand and others, wherein in Para No. 8, it is held as follows:

Section 47 of the Code is couched in very wide language. The very object is to avert another suit concerning the decree under execution. Sub-

section (1) of Section 47 of the Code says that-

47.(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Perhaps Sub-section (1) would not have made it clear that a dispute between a party to the suit and another claiming to be his representative could

have been resolved in execution proceedings. But that doubt no longer subsists in view of sub-section (3) which reads:

47(3) where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court,

Even a transferee pendente lite is a representative of his transferor within the meaning of sub-section (3) of Section 47. One who Claims to be a

transferee by operation of law would as well be a representative and if his claim to be a representative is disputed either by the opposite party or

by the party under whom he claims, such dispute must also be resolved by the executing court itself. The word ""representative"" used in Section 47

is obviously much wider than the words ""legal representative"" as used in Section 50 of the Code

10. Reading out Para No. 6 of the order of the lower court, the learned senior counsel for the petitioner would contend that the petitioner is not

challenging the validity of the decree so as to conclude that it is hit by the doctrine of lis pendens but only the execution of the decree. Regarding

the question of res judicata u/s 11 of the C.P.C, the learned senior counsel would cite another judgment delivered in Ameena Amma (Dead)

through Lrs. and Others Vs. Sundaram Pillai and Others, wherein it is held:.

...the application under order 21 Rule 35 of the CPC was dismissed on September 24, 1958 solely on the ground that the execution petition was

not maintainable against defendant 3 as there was no decree against him. There was no adjudication on merits or investigation into the claim of

defendant 3 in that execution petition. Once this position becomes clear it is obvious that the order dated September 24, 1958- merely held that

the execution petition in the earlier suit could not be filed against defendant 3 directly. There was no need to challenge that order in appeal or

otherwise as that was the correct order. It was only when the second Execution Petition No. 819 of 1960 was filed against the original judgment-

debtor (defendant 2) and the defendant 3 in suit i.e. sub-lessee obstructed the "Amin", that the present suit was filed under the provisions of Order

21 Rule 103 of the CPC and there was no legal bar to it either of res judicata or otherwise. It is settled law that the general principles of Section

11 of the CPC apply to execution proceedings as well but the basic criteria for applying the principles of res judicata is that the order must be

between the same parties and that the matter should have been heard and decided by such court....

Citing the above judgment, the learned senior counsel would lay emphasis on the terms that ""the matter must be heard and decided"" and would

contend that since there is no adjudication on the application filed by the petitioner, there is no bar u/s 11 of the C.P.C, for filing another

application of this sort.

11. Dealing with the last objection raised by the respondent, that is, the infirmity that is caused to the execution, the Learned Counsel for the

petitioner would cite from the order passed by the lower court to the effect that he had withdrawn the earlier application made in E.A. No. 361 of

1989 filed for redelivery of the property, wherein the learned District Munsif arrives at the conclusion that the delivery had been effected, but the

learned senior counsel would call it paper delivery and not a physical one. He

would point out that the learned District Munsif himself says that though there are infirmities in the execution, it cannot be concluded that the delivery was not effected. The learned senior counsel would contend that the lower court dismissed the petitioner's application on all the objections raised by the other side and that on any case, he is entitled to be reheard.

12. In reply, Mr. P. Gopalan, the Learned Counsel appearing for the respondent would contend that the respondent in the above Civil Revision

Petition filed the suit in C.S. No. 130 of 1979 before the High Court of Judicature at Madras partition and separate possession against his father

and the purchasers and along with the suit, he also filed Application No. 892 of 1979 for injunction restraining the first defendant in the suit i.e. his

father from alienating any of the suit properties and the same was granted; that so far as the first item in the schedule is concerned, it had been

purchased in the year 1975; that Items No. 2 and 3 were purchased after the suit in the year 1979; that all these properties were purchased by

Srinivasaga Nadar, who is the third defendant in the suit and the present petitioner came along after; that the application filed under Order 21 Rule

99 had been withdrawn by the petitioner and the reason for withdrawing the said application, as given in the petition, is that they filed E.A. No.

361 of 1989 for redelivery of the entire property covered under the present Execution Petition under Order 21 Rules 99 and 100 and that

application was filed without verifying the actual sale deeds and the nature of rights and the present petition is more proper and comprehensive to

hold an enquiry into the whole matter.

13. Continuing to argue, the Learned Counsel for the respondent would contend that the petitioner relies on Section 47(3) of the C.P.C, claiming

to be the representative of the original third defendant Chennaivazh Nadargal Sangam, T.V.A. Nallathambi Nadar College Management Board by

President A.N. Srinivasaga Nadar; that there is no indication as to how the petitioner become the representative of the original third defendant; that

even according to the petitioner, no document has been filed before the Court below to show his connection with the third defendant in the suit;

that before the Court below, in the present application, the petitioner shows two sale deeds executed in favour of Chennaivazh Nadargal Sangam,

as seen in Para No. 3 of the petition i.e., and extent of 3.76 acres of land in S. No. 31 and another extent of 1.40 acres in S. No. 43/1 were

purchased from one M.G. Devaraj under sale deed dated 5.12.1975; that likewise, another extent of 2.56 acres in S. No. 10/2 had also been

purchased from the said Devaraj on 28.9.1979 and that the petitioners are in possession and enjoyment of the same by putting up various

constructions; that admittedly, the polytechnic need not purchase any property nor any transfer of interest took place. At this juncture, the Learned

Counsel would cite the judgment delivered in K. Mariappan and Others Vs. Chennaivazh Nadargal Sangam and Others, and would say that in the

context of the said orders passed in O.S.A. Nos. 305 to 307 of 1995, dated 1.12.1995 by the Division Bench of this Court, the other side also

filed C.S. Nos. 1565 and 1566 of 1994 and obtained interim injunction stating that they were in possession; that on appeal filed by the respondent,

in the above cited case, all the appeals were allowed. He would further contend that the delivery authority put the respondent in possession and

that when once they suffered a decree in C.S. No. 130 of 1979, they cannot say that they have not been given notice and added to that all are

vacant lands and it is the law that possession follows title.

14. The Learned Counsel for the respondent would further contend that the Apex Court confirmed the above order of the Division Bench in SLP

Nos. 27930 and 27931 of 1995 and in spite of such assertion, the petitioners say that they continue to be in possession of the property.,

15. Answering the averments of the petition to the effect that in any event, the petitioner as representative of the party in respect of the property

purchased in 1979, can question the execution as it is a question arising between the parties in the suit of the representative as it goes to the very

root of the maintainability of the Execution petition, the Learned Counsel for the respondent would point out from the Commissioner's Report in

the C.S. No. 130 of 1979 wherein it is clearly stated that after giving notice again to the 3rd defendant/ respondent and to the college authorities,

on 21st February 1988 I have duly inspected the suit land at 16, Thandal Kalani Village, Saidapet Taluk, Chengelpet District, Counsel for the

plaintiff/ applicant, 1st defendant/respondent were present on that day. With the service of the Surveyor, Village Administrative Officer and three

of his men I inspected and measured the entire land mentioned in the plaint B and D schedules"". Then, the Learned Counsel for the respondent

would cite para No. 5 of the counter, wherein it is stated that the very same petitioner, calling himself a third party filed E.A. No. 361 of 1989 in

E.P. No. 2 of 1989 for redelivery of the entire property contending that he was a third party and the possession had been taken from the third

party and, therefore, the application under Order 21, Rule 99 was maintainable. The Learned Counsel for the respondent would further argue that

since the petitioner is claiming to be the legal representative of the third defendant to the suit in C.S. No. 130 of 1979, he has to file the document

to the effect that the Polytechnic was started only in the year 1983 and he has to show as to what independent document is there to show that he

was the successor of the third defendant to the suit.

16. So far as the transfer of the decree u/s 39 of the C.P.C, the Learned Counsel would contend that the answer lies in Section 42 of the C.P.C.

Citing Section 21(1) of the C.P.C, which reads;

No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first

instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a

consequent failure of justice"" the Learned Counsel for the respondent would contend that no such objections could be raised to the local limits of

the Executing Court. He would cite a judgment delivered in Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, . wherein Section

21(1) of the C.P.C, regarding the objection as to the place of suing has been dealt with and since the party was unable to put forward any reason

for having chosen a particular place for suing, the Apex Court observed that the provisions of Sub-Section (1) to Section 21 of the C.P.C, made it

imperative for the District Court and the High Court not to entertain the objection whether or not it was otherwise well founded, thus refraining

from going into the question of the correctness of the finding arrived at by the High Court.

17. The Learned Counsel for the respondent would then cite Section 99A of C.P.C, which contemplates:

99-A.No Order u/s 47 to be reversed or modified unless decision of the case is

prejudicially affected-

Without prejudice to the generality of the provisions of Section 99, no order u/s 47 shall be reversed or substantially varied, on account of any

error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision

of the case"".

18. The Learned Counsel for the respondent would then cite a judgment delivered in Patel Jayantilal Sendhidas v. Ambalal Maganlal Kothari

reported in AIR 1982 Gujarat 315 wherein reference has been made to the decision delivered in Vasant Rao Laxman Rao Sahane v. Sanghvi

Amrittal Becharlal reported in (1966) 7 Gujarat L.R.840, in which it has been held:

The High Court is not bound to interfere in revision under S.115 Civil P.C. in all cases in which it is found that the subordinate Court has acted

without jurisdiction or failed to exercise jurisdiction or acted illegally or with material irregularity in the exercise of jurisdiction. The High Court will

exercise its revisional powers only in aid of justice and not merely to give effect to a technicality which would not further the ends of justice. Where

the High Court finds that substantial justice has been done between the parties by the order of the subordinate Court, the High Court will not

interfere with such order merely because the case comes within any of the three clauses of Sec. 15.

19. The Learned Counsel for the respondent would cite yet another judgment delivered in Smt. Pushpa v. Ganpatsingh and others reported in AIR

1977 Rajasthan 216 wherein it is held:

The judgment-debtor having not taken objection, at the earliest in his first objection petition, he is precluded from taking such objection on the

principle of constructive res judicata inasmuch as it was incumbent upon him to raise all the objections which were available to him when the first

objection was filed"".

20. The Learned Counsel for the respondent would contend that for all the 8.72 acres of land, which includes many properties, the first defendant

in the suit is not the purchaser and if he has not raised all the points, the petitioner cannot file the petition u/s 47 of the C.P.C, since constructive res

judicata will become operative. At this juncture, the Learned Counsel for the

respondent would refer the judgment reported in A.I.R.1981 Delhi

114 (cited supra) wherein the competent jurisdiction" is dealt with.

21. The Learned Counsel for the respondent would then cite a judgment delivered in Narain Kumar Vs. Neki Ram and Others, wherein it is held:

No objection was raised by the petitioner regarding the pecuniary jurisdiction of the learned Subordinate Judge before filing the objection petition

under S.47 of the Civil P.C. in the execution proceedings initiated by the decree-holder to execute the decree. The observations made by the

Supreme Court in Kiran Singh and Others Vs. Chaman Paswan and Others, are squarely applicable to the facts of the instant case. No foundation

has been laid by the petitioner to warrant a finding that the lack of pecuniary jurisdiction on the part of the learned Subordinate Judge has

prejudiced the case of the petitioner on merits. The ratio of the decisions in Kiran Singh's case (supra) and Mahadeo Vs. Hanumanmal and

Others, also support the case of Neki Ram decree holder that the objection regarding the lack of pecuniary jurisdiction of the learned Subordinate

Judge cannot be raised in execution proceedings by the petitioner in the absence of any prejudice on merits"".

22. Laying emphases on the fact that the petitioner has not filed any document to show that he is the representative of the third defendant to the

suit, the Learned Counsel for the respondent would contend that the petitioner cannot rely on the counter filed by the respondent, but he has to

prove his case independently. He would further contend that when the third defendant to the suit did not raise the question of jurisdiction, the

present petitioner has no right to raise the same; that since the said question has not been raised before the Executing Court, the same cannot be

raised now and would say that there is no consequential failure of justice in delivering possession of the properties to the decree holder,

23. The Learned Counsel for the respondent would then cite two judgments viz. (1) Smt. N. Pariyakkal and others v. The Cooperative Tourist

and Transport Society Ltd. and another reported in AIR 1980 Karnataka 75 and (2) Gosto Behari Pramanik v. Smt. Malati Sen and others

reported in AIR 1985 Calcutta 379. In the first judgment cited above (A.I.R. 1980 Karnataka 75) wherein it is held:

Where a court does not lack of inherent jurisdiction, but has irregularly assumed

jurisdiction, it is well settled that the proceedings before it are not vitiated. Where the court of Munsif thinking that in view of the amended law he is not competent to execute eviction decree passed by him and thus transfers it to the Court of Civil Judge in absence of an application by the decree holder, there is, at the highest irregular assumption of jurisdiction by the transferee court and there was no inherent lack of jurisdiction for the transferee court to execute the decree. The exercise of jurisdiction by the transferee court, in such circumstances, therefore, is not vitiated."''

In the second judgment cited above (A.I.R. 1985 Calcutta 379) it has been held: The principle of waiver regarding territorial jurisdiction had statutory recognition in old S. No. 21, Civil P.C., and such recognition has now been extended to pecuniary jurisdiction as well by insertion of new sub section (2) to Section 21 by Amendment Act 104 of 1976. Even before such amendment it was held by different High Courts that pecuniary jurisdiction stood on the same footing as territorial jurisdiction. Therefore, want of territorial or pecuniary jurisdiction, if any, is an irregularity and does not make a decree a nullity. A decree based on compromise between the parties to a suit is not void or a nullity merely because it involves an amount which exceeds the pecuniary limits of jurisdiction of the Court that passed it.

Citing the above two judgments, the Learned Counsel for the respondent would contend that the question of pecuniary jurisdiction does not at all arise at this stage and would repeat that since the third defendant had not raised the question of jurisdiction in the Execution Court, the same cannot be raised now.

24. The Learned Counsel for the respondent would then cite another judgment delivered in Ram Dayal and others v. Smt. Kusturi and others reported in AIR 1970 Rajasthan 246, wherein it is held:

The record of the previous execution application is here and it is clear from it that the judgment-debtors did not object to the jurisdiction of Munsif Court at Shahpura to execute the decree in the first instance when notice of the application was served on them. It is only during the course of the second execution application that this objection has been raised. But since they have failed to raise this objection in the first instance it will be taken

that they have waived it and, therefore, it is not open to them to raise it in the second execution application....

25. The other judgment cited by the Learned Counsel for the respondent is one delivered in *Marriddi Janikamma and others v. Hanumantha*

Vajjual Paradesi Sarma and others reported in AIR 1980 Andhra Pradesh 209, wherein, it is thus:

The transmission of the decree by the Court which passed the decree directly to the executing Court which is in a different district without routing

the same through the District Judge is only an irregularity and not \an illegality. Even otherwise, if objection to the decree is not taken in the first

instance, it must be deemed to have been waived and cannot be raised at a later stage"".

26. The other judgment cited by the Learned Counsel for the respondent is one delivered in *Maharaj Kishore Khanna v. Raja Ram Singh and*

another reported in AIR 1954 Patna 164, wherein it is held:

...The jurisdiction to transfer a decree for execution from one court to another arises not under Order 21 Rule 5 but under 10 Section 39, Civil

P.C. Order 21, Rules 5 and 8 merely prescribe the procedure by which the transfer is to be carried out. It is clear that failure to observe the

provisions of Order 21, Rule 5 or Rule 8 is a mere irregularity and does not affect the jurisdiction of the subordinate Judge of purnea to execute the

decree.

27. The other judgment cited by the Learned Counsel for the respondent is one delivered in *Firm Shivalomal Gopaldas v. Firm Bholashan*

Lakshmichand reported in A.I.R.(33) 1946 Sind 103, wherein, it is held:

It was not necessary that a court to which a decree was transferred for execution should be a court having the same pecuniary jurisdiction as the

court which transferred the decree.

Citing the above judgments, the Learned Counsel for the respondent would exhort that in the present case, the District Munsif, Ponneri has got

territorial jurisdiction and also got jurisdiction to the extent that the decree has to be executed and there is no consequential failure of justice; that it

is a revision filed u/s 115 of the C.P.C, and since no miscarriage or failure of justice has taken place, the order of the lower court has to be

confirmed.

28. Focusing his attention on the revisional powers of this Court u/s 115 of the C.P.C, Learned Counsel for the respondent would cite two

judgments. The first one is delivered in Chennichi Alias Parikkal Goundar Vs. D.A. Srinivasan Chettiar, wherein it is held: ""The exercise of the

revisional powers of the High Court u/s 115 Civil Procedure Code, is purely discretionary. The High Court will not take a technical view and

necessarily interfere in every case, where an order is wrong and even improper, if such interference will produce hardship or injustice. The

revisional jurisdiction of the Court is intended to secure and sub-serve the ends of justice and not to deny or defeat it. If interference in a particular

case will result in hardship or injustice to a party, the High Court will be justified in refusing to interfere in the exercise of its revisional jurisdiction,

even if the order is found to be one without jurisdiction.

The second judgment cited by the Learned Counsel for the respondent is one delivered in S.N. Kuba v. P.P.I. Vaithyanathan reported in 1988 (I)

T.L.N.J. 1 wherein, the Division Bench of this Court, having considered the observations of the learned single Judge of this Court made in the

judgment first cited above ((1970) I.M.L.J.234=83 L.W.366) has concluded that ""We agree with the above observations of Ismail, J.

In the result, we do not find any warrant for interfering with the order of the executing Court directing delivery of possession to the respondent. The

revision petition fails and is dismissed.

With the above arguments advanced, the Learned Counsel for the respondent would conclude praying to dismiss the Civil Revision Petition with

costs.

29. In clarification of certain ambiguities, the Learned Counsel for the revision petitioner would contend that the objection of the other side is that

the application filed by the petitioner before the lower court is barred by constructive res judicata and would contend that as per Section 11 of the

C.P.C, the point that whether the issue is heard and finally decided by the court is to be given importance and that in the case hand, the judgment-

debtor remained ex parte and, therefore it is not open to the respondent to raise objection to the effect that the petitioner was estopped by

constructive res judicata. The Learned Counsel for the petitioner would relay on a judgment delivered in Shivashankar Prasad Shah and Others

Vs. Baikunth Nath Singh and Others, , wherein it is held:

Even the dismissal for default of objections raised u/s 47, CPC does not operate as res judicata when the same objections are raised again in the course of the execution.

30. The Learned Counsel for the petitioner would cite another judgment delivered in Kewal Singh Vs. Smt. Lajwanti, wherein it is held:

...as regards the question of constructive res judicata it has no application whatsoever in the instant case. It is well settled that one of the essential

conditions of res judicata is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally

decided between the parties. Here also at a time when the plaintiff relinquished her first cause of action the defendant was nowhere in the picture,

and there being no adjudication between the parties the doctrine of res judicata does not apply....

30. Making a mention of Section 21 of the C.P.C, the Learned Counsel for the petitioner would point out that Section 21(3) C.P.C, is an

amendment of the year 1976 and sub-Sections (1) and (2) of Section 21 refer to territorial and pecuniary jurisdictions relating to the suit, that so

far as execution is concerned, the embargo is restricted only to territorial jurisdiction and does not extend to pecuniary jurisdiction; that u/s 39 of

the C.P.C, the court of competent jurisdiction both territorial and pecuniary could entertain the transferred decree for execution; that the objection

is regarding the competence of the District Munsif in entertaining the Execution Petition regarding the pecuniary jurisdiction, but the learned District

Munsif relied on the judgment reported in Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, cited by the other side, which is a

case of suit, which falls under Sections 21(1) and 21(2) but the case in hand is falling u/s 21(3).

31. For the objection raised by the respondent that the petitioner has not filed any document nor proved that he is the representative of the third

defendant in the suit, the Learned Counsel for the Petitioner would refer to the categorical admission made by the respondent not only in this

petition but in the earlier E.A.361 of 1989 filed under Order 21, Rule 99 of the C.P.C, for redelivery of possession of the suit properties.

32. Admitting that the petitioner filed the earlier petition in E.A. No. 361 of 1989

for redelivery of the properties as third party, the Learned

Counsel for the petitioner would submit that in die said petition, the respondent filed a counter-affidavit contending that the petitioner is not a third

party but a representative of the third defendant in the suit. He would further contend that the property does not stand in the name of individual but

has been purchased in the name of the institution; that on the admission of the respondent that the petitioner is the representative of the third

defendant, it is Ex. A. 1, which stands proof of the admitted fact. At this juncture, the Learned Counsel for the petitioner would cite two judgments

the first one delivered in Avadh Kishore Das Vs. Ram Gopal and Others, and the second one delivered in Sitaramacharya (dead) through L.Rs.

Vs. Gururajacharya (dead) through L.Rs., . In the first judgment cited above, it is held:

Evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do raise an estoppel

and shift the burden of proof on to the person making them or his representative-in-interest. Unless shown or explained to be wrong, they are an

efficacious proof of the facts admitted.

In the second judgment cited above, it is held:

The appellate Court has not explained any of the circumstances much less compelling ones under which he came to make such an admission. u/s

18 of the Evidence Act, the admission made by the party would be relevant evidence. Section 31 provides that ""admissions are not conclusive

proof of the matters admitted but they may operate as estoppel under the provisions hereinafter contained"". In view of the admissions referred to

earlier they appear to be unequivocal and the finding recorded by the appellate court is cryptic. On the other hand, the trial court has gone into the

evidence on issues in extenso and considered the evidence and the appellate court has not adverted to any of those valid and relevant

considerations made by the trial Court. The High Court has dismissed the Second Appeal holding that they are findings of fact recorded by the

appellate court on appreciation of evidence. We think that the view taken by the High Court is not correct in law. The admissions in the written

statement in the earlier proceedings, though not conclusive, in the absence of any reasonable and acceptable explanation, it is a telling evidence

heavily loaded against the respondent.

Citing the above propositions of law, the Learned Counsel for the petitioner would claim that till date, the respondent has not come forward to

claim that the admission was on a mistake. Referring to the judgment reported in AIR 1963 Patna 461 (cited supra), the learned senior counsel for

the petitioner would further contend that power to transfer the decree is derived at present u/s 39 of the C.P.C, which was earlier only the

procedure. The learned senior counsel would clarify that prior to amendment of Order 21, Rule 5 of the C.P.C, the decree should be sent to

another court by the court which passed it, for execution through the District Court concerned but subsequent to the amendment, the court which

passed the decree can send it to any court direct for execution. Commenting on the judgments cited by the Learned Counsel for the respondents

reported in (1) AIR 1980 Kar 75 (2) AIR 1982 Guj 315 and (3) AIR 1970 Raj 246 (cited supra), the Learned Counsel for the petitioner would

contend that in the judgment first cited above wherein it is held that ""the court which does not lack inherent jurisdiction but has irregularly assumed

jurisdiction, it is well settled that the proceedings are not vitiated""; that in the second judgment it is held that ""the High Court is not bound to

interfere in revision u/s 115 C.P.C, in all cases in which it is found that the Subordinate Court has acted without jurisdiction or failed to exercise

jurisdiction or acted illegally or with material illegality in the exercise of jurisdiction and in the third judgment it is held that ""on notice served,

judgment debtor raised no objection and the petition getting dismissed for non-prosecution and in a consequent execution application, he cannot

raise objection of jurisdiction of Court"" and would say that as the representative is bound by the decree, he has come u/s 47 of the C.P.C. Citing

the already quoted judgment reported in Gangabai Gopaldas Mohata Vs. Fulchand and others, the learned senior counsel would say that even the

transferor is a pendente lite. The learned senior counsel for the petitioner would end up his argument contending that the Division Bench judgment

referred to by the other side (AIR 1980 Kar 75) was subsequent to the proceeding; that the petitioner filed the petition based on the decision of

the Executing Court challenging as nullity and without jurisdiction; that he is the representative of the third defendant and it is admitted by the other

side and that he has also proved independently; that two items of the properties have been annexed subsequent to the suit; that he could very well

maintain an application u/s 47 of the C.P.C; that regarding jurisdiction, the Executing Court is not competent to execute; that Section 21(3),

C.P.C, does not put" an embargo on his raising the objection and therefore, unless the dispute is resolved, consequent failure of justice will be met with.

33. After the conclusion of the clarification, the learned senior counsel for the petitioner would submit two more judgments. The first one delivered

in Rameshwar Das Gupta Vs. State of U.P. and Another, and would lay emphasis on the remarks to the effect that

An Executing Court cannot travel beyond the order or decree under execution. It gets jurisdiction only to execute the order in accordance with

the procedure laid down under Order 21 C.P.C....

Though the High Court normally exercises its revisional jurisdiction u/s 115, C.P.C, but once it is held under that the Executing Court has

exceeded its jurisdiction, it is but the duty of the High Court to correct the same....

The second judgment is one delivered in State of Punjab and another v. Buta Singh, 1995 Supp. (3) SCC648 wherein it is held:

It is obvious that the Executing Court had no jurisdiction to direct the recovery of any amount which was not granted by the decree under

execution since the decree was for a mere declaration. The order of the Executing Court being without jurisdiction, it was the duty of the High

Court to have corrected that error of jurisdiction.

34. Prior to assessing the merit of the case in hand, this Court is fully conscious of the position of law so far as Section 115 of the C.P.C., under

which the revision petition has been filed and further the legal propositions arrived at by different High Courts and the Apex Court and regarding

the exercise of power by this Court within the sphere and bounds of law relating to the facts and circumstances as pleaded and argued by both

parties so as to arrive at a valid conclusion especially in view of the fact that many a legal question has been raised on both sides.

35. To sum up the facts, the entity viz. Chennaivazh Nadargal Sangam T.V.A. Nallalagu Nadar school Managing Board, represented by its

Manager A.G. Srinivasaga Nadar purchased the property totally measuring 8.14 acres in Thandalkalani village of Saidapet Taluk under two registered sale deeds respectively dated 5.12.1975 and 28.09.1979 thus purchasing 5.16 acres as per the former and 2.98 acres as per the latter, both from one M..G. Devaraj of Old Washermanpet, Madras. The revision petitioner would contend that the said Sangam effected the purchase of the said lands with intent to establish a polytechnic viz. Sri Nallalagu Polytechnic and put up various buildings"- and structures and subsequently with the execution of a Trust Deed viz. Kamaraj Education and Research Foundation Trust Deed, the administration of the Polytechnic came to be vested in the present petitioner and that on 1.3.1989, the respondent accompanied by the Court, Bailiff came to the premises of the Polytechnic and informing the principal that they have come to take delivery of the property as per the decree passed in C.S. No. 130 of 1979 and recording the delivery of possession, left the place.

36. The further case of the petitioner is that they filed E.A. No. 361 of, 1989 under Order 21, Rules 99 and 100 of the C.P.C, for redelivery of the entire property covered under the Execution Petition in haste and on certain clarifications, under the impression that it would be more appropriate, they filed the present application u/s 47 of the C.P.C; that the very execution petition is not maintainable u/s 39 of the C.P.C, that the court of District Munsif, Ponneri, which executed the E.P. in the manner aforementioned had no jurisdiction to execute since the High Court, Madras, which passed the decree had sent the decree for execution only to the sub court, Poonamallee, which in turn has chosen a wrong forum in having sent the same to the court of District Munsif, Ponneri and hence the petitioner would submit that the Execution proceedings are void ab-initio.

37. On the contrary, the case of the respondent is that he filed the suit in CS. No. 130 of 1979 on the file of the High Court, Madras for petition and separate possession along with A. No. 892/79 for injunction against alienation, which was granted pending disposal of the suit; that the first defendant in the suit is his father and the third defendant is none else than the petitioner herein and that they were served with suit summons on 30.8.1979; that they did not choose to appear, resulting in a preliminary decree

having been passed on 4.1.1984 and filing another application to get him declared as the major and to relieve him from the guardianship of his mother, the same was allowed on 29.10.1987; that another application for appointment of a commission for the division of the suit scheduled properties and for allotment of his share as per the preliminary decree was also ordered on 21.12.1987 and the commissioner, issuing notice to the third defendant twice, surveyed the land with the assistance of the surveyor and the village Administrative Officer, thus measuring the entire land contained in plaint "B" and "D" schedules and submitted his report on 29.3.1988 and on an application to pass a final decree in terms of the report of the Commissioner, the final decree had been passed by the High Court.

38. The further case of the respondent is that the E.P. No. 68 of 1988 filed in the High Court, Madras for delivery of possession of his half share, as per the final decree, had been transferred to the court of subordinate Judge, Poonamallee within the jurisdiction of which the property is located and the said subordinate Judge, in turn having transferred the E.P. to the court of District Munsif, Ponneri, the same got renumbered as E.P.2 of 1989 and serving notice on all the respondents, particularly on the third defendant on 6.1.1989, the E.P. was allowed on 24.2.1989 resulting in the delivery of possession having been effected on 1.3.1989; that after all these legal exercises were over, the petitioner filed E.A. No. 361 of 1989 under Order 21, Rules 99 and 100 C.P.C, praying redelivery of the entire property covered under the Execution proceeding and later filed the present application u/s 47 of the C.P.C, questioning the maintainability of the E.P. as ordered by the Court of District Munsif; that the first application was hit by the doctrine of lis pendens and the second one barred by the res judicata; that the respondent having taken possession of the properties. the present application is further barred by the doctrine of constructive res judicata; that the petitioner having, admittedly, come out as a third party in the earlier proceeding, cannot now maintain the present application u/s 47 of the C.P.C., that he cannot deviate the ends of justice, invoking Section 39 C.P.C; that the petitioner has no right to agitate the correctness of the execution proceeding at this belated stage and would ultimately pray to dismiss the application.

39. During arguments, the Learned Counsel for the petitioner and the respondent dealing with the legal questions involved would advance their

arguments citing various decisions. On the part of the Learned Counsel for the petitioner, two judgments would be cited, the first one delivered by

the Delhi High Court reported in AIR 1981 Del 114, wherein it is emphasized that "the transferee court" must have both territorial and pecuniary

jurisdiction". The second judgment cited by the Learned Counsel for the petitioner is one delivered by the Patna High Court reported in Jagat

Kishore Prasad Narain Singh Vs. Surendra Kumar Bhadani and Others, wherein it is held that "the transferor Court must follow O.21, Rules 5 and

8. But failure to observe the same amounts to a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred

for execution. The next area surveyed by the Learned Counsel for the petitioner is that of the res judicata since Section 11 of the C.P.C, was the

focal point of the arguments of the Learned Counsel for the respondent. The Learned Counsel would cite two judgments for the res judicata and

one for constructive res judicata. The first one being a judgment of the Apex Court reported in Ameena Amma (Dead) through Lrs. and Others

Vs. Sundaram Pillai and Others, wherein it is held that "the principle of res judicata" is that the order passed earlier must be between the same

parties and it should have been heard and decided by such Court". The second judgment cited by the Learned Counsel for the petitioner is one

reported in Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, wherein it is held that "even the dismissal for default of

objections raised u/s 47 of the C.P.C, does not operate res judicata when they were raised again during execution". The third judgment is also one

delivered by the Apex Court reported in Kewal Singh Vs. Smt. Lajwanti, wherein it is held that "the matter must be finally decided between the

parties else the question of constructive res judicata has no application".

For Lis pendens also, the Learned Counsel for the appellant would cite a judgment of the Apex Court reported in Gangabai Gopaldas Mohata Vs.

Fulchand and others, wherein it is held that "if the claim of the representative is disputed by the other party, it must be resolved by the Executing

Court itself. The word "representative" used in Section 47 is obviously much wider than the words "legal representative" as used in Section 50 of

the Code" The other judgment is also one supporting the case of the petitioner delivered by the Apex Court reported in Avadh Kishore Das Vs.

Ram Gopal and Others, wherein it is held "evidentiary admissions are not conclusive proof of the facts admitted". The other judgment cited by the

Learned Counsel for the petitioner is one reported in Sitaramacharya (dead) through L.Rs. Vs. Gururajacharya (dead) through L.Rs., , wherein

also it is held that "evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong but they do

raise an estoppel and shift the burden of proof to the person making them or his representative-in-interest."

40. On the part of the Learned Counsel for the respondent, he too would cite a number of decided cases for various points. The first one being for

notice reported in 1996 (I) C.T.C. 148, wherein it is held "when the other side suffered a decree, they cannot say that they have not been given

notice". The other decision which has been cited by the Learned Counsel for the respondent is one delivered by- the Apex Court reported in

Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, wherein, it is held "the provisions of, sub-section (1) of Section 21 C.P.C,

made it imperative for the District Court and the High Court not to entertain the objection whether or not it was otherwise well founded". The next

judgment is in emphasize of the powers of the High Court u/s 115 of the C.P.C, reported in AIR 1981 Guj 315. The second judgment regarding

the same proposition is one reported in (1970) I. M.L.J.234. The next judgment cited by the Learned Counsel for the respondent is regarding

constructive res judicata reported AIR 1977 Raj 216 wherein it is held that "when the judgment debtor having not taken objection, at the earliest in

his first objection petition, he is precluded from taking such objection on the principles of constructive res judicata for pecuniary jurisdiction, the

Learned Counsel for the respondent would cite a judgment of the Punjab and Haryana High Court reported in Narain Kumar Vs. Neki Ram and

Others, wherein, it is held that "objection regarding lack of pecuniary jurisdiction cannot be raised in E.P. by the petitioner in the absence of any

prejudice on merits". The other judgment cited for pecuniary jurisdiction is one reported in AIR 1980 Kar 75 wherein it is held that "where a court

does not lack inherent jurisdiction, but has irregularly assumed jurisdiction the proceedings before it are not vitiated". The next judgment is one

reported in Gosto Behari Pramanik Vs. Sm. Malati Sen and Others, wherein it is held that "want of territorial or pecuniary jurisdiction is an irregularity and does not make a decree a nullity". The other judgment cited by the Learned Counsel for the respondent is one reported in Ram Dayal and Others Vs. Smt. Kisturi and Others, wherein it is held that "since the judgment debtors did not raise the question of jurisdiction at the first instance, it is not open to them to raise it in the second E.P." For non-routing of the decree through the District Court, the Learned Counsel would cite two judgments the first one by the Andhra Pradesh High Court reported in Marriddi Janikamma and Others Vs. Hanumantha Vajjula Paradesi Sarma and Others, and the second one delivered by the Patna High Court reported in State Vs. Alakh Narain Singh and Others, . In the former judgment it has been held that "non-routing of the decree through the District Court to the Executing Court is only an irregularity and not an illegality. Even otherwise, if objection to the decree is not taken in the first instance, it must be deemed to have been waived and cannot be raised at a later stage. In the latter decision, it has been held that "the jurisdiction to transfer a decree for execution from one Court to another arises not under Order 21 Rule 5 but u/s 39 Civil P.C. Order 21 Rules 5 and 8 merely prescribe the procedure by which the transfer is to be carried out. It is clear that failure to observe the provisions of Order 21 Rule 5 or Rule 8 is a mere irregularity and does not affect the jurisdiction of the Subordinate Judge of Purnea to execute the decree". Yet another judgment cited by the Learned Counsel on the pecuniary jurisdiction of the Court is one reported in AIR (33) 1946 Sind 103 wherein it is held that "it was not necessary that a Court to which a decree was transferred for execution should be a Court having the same pecuniary jurisdiction".

41. With the above facts and circumstances pleaded and the arguments heard on both sides and in consideration of the decided cases cited, the following points arise for determination. They are:

1. Whether the petition is barred u/s 11 of the C.P.C, and not maintainable in law in view of the earlier petition filed under Order 21 Rules 99 and 100 C.P.C.?
2. Whether the petitioner could maintain the present petition as the representative of the third defendant to the suit?

3. Whether the application is hit by lis pendens?

4. Whether the lower Court is not competent to execute the decree for want of monetary jurisdiction?

Point No. 1.- 43. Regarding this point, the respondent would strongly contend that the petitioner had already filed a petition under Order 21, Rules

99 and 100 C.P.C, seeking redelivery of the properties and on coming to know that he could not withstand the contention raised by the

respondent regarding transferee pendente lite, now shifting the stance, the petitioner has come forward to file the present application u/s 47 of the

C.P.C. questioning the jurisdiction of the Court and the petitioner having admitted that he was a third party to the proceeding, as per written

submission in the earlier petition, cannot maintain this application u/s 47 of the C.P.C, with this strong contention, the respondent would put up the

plea of res judicata as defined u/s 11 of the C.P.C. Citing the judgment reported in AIR 1977 Raj 216 (cited supra), the respondent would

contend that the judgment debtor having not taken the objection at the earliest, in his first petition, he is precluded from taking such objection on

the principles of constructive res judicata.

43. On the part of the petitioner, it would be contended that in the present case, the principles of res judicata cannot be applied. Citing the

judgment reported in Ameena Amma (Dead) through Lrs. and Others Vs. Sundaram Pillai and Others, the Learned Counsel for the petitioner

would argue that the order passed earlier must be between the same parties and the same should have been heard and decided by such Court.

Citing another judgment reported in Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, the Learned Counsel for the

petitioner would point out that "even the dismissal for default of objections raised u/s 47 C.P.C, does not operate as res judicata when they were

raised again during execution". Dealing with the constructive res judicata on the part of the respondent, such argument would be countered by, the

petitioner citing the judgment reported in Kewal Singh Vs. Smt. Lajwanti, wherein it is held that "the matter must be finally decided between the

parties," else, the question of constructive res judicata has no application".

44. On facts, it is the admitted case of the petitioner that earlier an application under Order 21, Rules 99 and 100, C.P.C, was filed by the

petitioner before the lower Court seeking redelivery of the properties mentioned in the petition and after clarification in the context of certain

documents, they thought it would be more appropriate to file an application u/s 47 of the C.P.C, as a result of which, the earlier application was

withdrawn by the petitioner and the present application u/s 47 of the C.P.C, was filed thereafter and it is not a case falling u/s 11 of the C.P.C,

since it is not the issue which was directly and substantially in issue in the former proceeding between the same parties and was heard and finally

decided by the Court. It would be clarified by the petitioner that the earlier application filed by him was as a third party to the E.P. proceeding but

the present application has been filed in its capacity as the representative of the third defendant in the suit and hence the matter cannot be said to be

between the same parties nor was the earlier application heard and finally decided but it was only withdrawn and hence Section 11 of the C.P.C,

has no application to the case in hand and the present application is not at all barred u/s 11 of the C.P.C, nor hit by the principles of constructive

res judicata. It is not the case of the respondent that in the earlier application, either parties were heard or any argument advanced or any order

passed deciding the issues raised in the earlier application, finally, but only a general argument would be advanced on the part of the respondent to

the effect that the earlier application filed by the petitioner would not give" way for another application to be filed u/s 47 of the C.P.C. and hence it

is hit by Section 11 of the C.P.C.

45. Having regard to the letter and spirit of the Section and the legal propositions arrived at by the upper forums of law, since the ingredients of

Section 11 C.P.C, are not satisfied and further having regard to the fact that the earlier application filed under Order 21, Rules 99 and 100 C.P.C,

had only been withdrawn, the issues raised therein without being finally heard and decided, it cannot in any manner be concluded that the present

application filed u/s 47 of the C.P.C, by the petitioner would be barred by Section 11 of the C.P.C. Hence, for this point, it is hereby answered

that the present application filed by the petitioner is not-barred either by res judicata or by constructive res judicata, thus deciding this point in

favour of the petitioner.

Point No. 2:- 47. Prior to assessing this point, it is relevant to consider Section

47 of C.P.C. under which the very petition has been filed before the lower Court by the petitioner, with which this Civil Revision Petition is concerned:

47. Questions to be determined by the Court executing decree:-(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.(2) Omitted by Amendment Act, 1976, (3) Where a question arises as to whether any person is or is not the representative of a party, such question, shall, for the purposes of this Section, be determined by the Court".

The other legal provision falls for consideration is Order 21 Rules 99 and 100 C.P.C. Hence, I extract them as under:

Order 21, Rule 99: Dispossession by decree-holder or purchaser.- (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

HIGH COURT AMENDMENT (MADRAS): For the words (other than the judgment-debtor"" in brackets substitute the words ""other than those mentioned in Rule 98

Order 21. Rule 100:- Order to be passed upon application complaining of dispossession: -

Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination,- (a) make an order

allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit

47. A simple dissection of the above provisions of law would indicate that under Order 21, Rule 99, an application could be filed by anyone other

than the judgment debtor, who is dispossessed of any immovable property by the

holder of the decree for the possession of such property and in such event if an application is made by the said person, the Court shall adjudicate upon it. So far as Order 21, Rule 100 is concerned, it would contemplate that on all such questions referred to in Rule 101 C.P.C., the Court shall make an order either allowing the application or directing the applicant to be put in possession of the property or even dismissing the same as it is required in the circumstances of the case.

48. But an application u/s 47(1) C.P.C, unlike by a third party as contemplated under Order 21, Rule 99, could be made only by the parties to the suit or their representative connecting the decree passed or relating to the execution, discharge or satisfaction of the decree and it shall be determined by the Court executing the decree Section 47(3) would contemplate that the question whether any person is a representative of a party or not shall be determined by the Court. Apart from these, Explanations 1 and 2 would further contemplate who are all right parties to the suit or proceeding.

49. From the above, it could be ascertained that an application under Order 21, Rule 99 could be filed only by a person other than a judgment-debtor. The earlier petition in E.A.361 of 1989 had been filed by the present petitioner as a third party and the same petitioner has now filed this petition u/s 47 of the C.P.C, which could be filed only between the parties to the suit or execution proceeding, calling himself the representative of the third defendant to the suit. Needless to point out that the petitioner has had a somersault having taken a quite contradictory stand. The only reason assigned on the part of the petitioner for shifting of his stance in the aforesaid manner is that on the part of the petitioner it was thought more appropriate to file an application u/s 47 of the C.P.C, rather than to prosecute the earlier application filed under Order 21, Rules 99 and 100 C.P.C. This reason assigned on the part of the petitioner does not commensurate the contradictory stand taken on the part of the petitioner, having already taken a stand as a third party and unconnected person to the whole of the suit proceeding and that of the execution proceeding and withdrawing the same, filing the present application u/s 47 of the C.P.C, posing to be the representative of the third defendant in the suit is not that much a simple affair as it is termed on the part of the petitioner that since he

thought it more appropriate to proceed u/s 47 than to prosecute the earlier petition filed under Order 21, Rules 99 and 100 C.P.C. Absolutely there cannot be any nexus or proximity between these two provisions of law, which stand apart as opposite poles quite opposed to each other. A person calling himself to be entitled to file an application in a suit or proceeding under Order 21, Rules 99 and 100 C.P.C, cannot in any manner even imagine to go near Section 47; C.P.C, since it is confined to the different set of persons, who are necessarily to be parties to the proceedings and hence from the contradictory stand taken on the part of the petitioner itself, it could be presumed that the petitioner has not come to the Court either with clean hands or for proper remedy. Moreover, the Civil Suit in this regard had been filed as early as on 28.2.1979 certain extent had been purchased on 5.12.1975 and the other after filing of the suit one in March, 1979 and the other in September, 1979. Hence, it would be argued on the part of the respondent that pertaining to that portion of the suit properties which are purchased after filing of the suit, it is hit by lis pendens.

50. Be that as it may, now, the main point for consideration being whether the petitioner could maintain the present petition as the representative of the third defendant to the suit and the third defendant to the suit being a party right from the very inception of the suit on 28.2.1979 for ten years, he does not seem to have taken any interest in genuinely prosecuting the case and only after the delivery of possession having been effected in favour of the respondent as on 1.3.1989 i.e. exactly after 10 years of filing of the suit, the petitioner had awoken from its long slumber and in the name of the representative of the third defendant to the suit; has come forward to file this petition that too having filed a different application under Order 21 Rules 99 and 100 C.P.C, and withdrawing the same for reasons best known to itself. Though the earlier application filed in E.A. 361 of 1989 ""had been withdrawn prior to passing any order after due hearing, though it cannot be said to be barred u/s 11 of the C.P.C, by application of the principle of res judicata, still one thing that cannot be denied on the part of the petitioner himself that has been revealed firmly from their, field application is that physical possession had been taken by the respondent. Hence, seeking redelivery, the earlier application had been made which

fact cannot so easily be denied by the petitioner himself and as though the possession taken by the respondent herein as per the delivery of possession recorded under Ex. C.3. is a proper possession and that possession is still in the hands of the petitioner, now the petitioner has come forward to project a totally different case which is unbelievable and the petitioner is also estopped from denying the earlier stand taken on his part accepting the delivery of possession including physical possession and seeking on his part redelivery of possession of the properties in the earlier application. Moreover, the petitioner is not at all questioning the very decree passed much less on ground that it had been passed without his knowledge or without opportunity but only the manner in which the decree had been executed i.e. the mode of execution, Exs. C.1 to C.3 marked through C.W.1, especially from that of Ex. C.3 "it is quite evident that delivery of possession had been effected and handed over in favour of the respondent by the Court Amin in the presence of witnesses and in delivery of possession, there cannot be anything more than what has been recorded in Ex. C.3 and it has to be relied upon and accepted by all.

51. Coming to the stand of the petitioner that he is the representative of the third defendant even at the time the earlier petition E.A.461 of 1989 had been filed by the petitioner, the position of the third defendant and that of the petitioner did not change. The same petitioner in the name of a third party and without showing any nexus to the third defendant had filed the petition. However, the petitioner would come forward to say that the management then and now are different and by the execution of Kamarajar Education Research Foundation Trust Deed, the administration of the Polytechnic came to be vested in the present Trust Board and the petitioner can carry on with the administration of the said polytechnic as on today including the properties. Neither the position of the present administration nor the representative character of the petitioner to that of the third defendant having come to be established, even for argument's sake taking for granted that those facts have been established, the commitments of the third defendant cannot be forsaken by the petitioner and the third defendant having miserably failed in the suit and other proceedings and the petitioner having stepped into the shoes of the third defendant, it is not for the petitioner now in the name of the third defendant's representative

that too at this belated stage to raise such questions since the representative of the third defendant cannot acquire a novel right more than what the third defendant himself did have and if at all the petitioner as the representative of the third defendant could claim what rights had enjoined the third defendant and commitments made by it. For all the above discussions held, the only conclusion that could be arrived at so far as this point is concerned is that the petitioner cannot maintain the present petition as it had been filed before the lower Court u/s 47 of the C.P.C. and this point is answered against the petitioner and in favour of respondent.

Points No. 3 and 4:

52. In view of the decision arrived at for Point No. 2 to the effect that the revision petitioner cannot maintain the present petition as it had been filed before the lower Court u/s 47 of the C.P.C, there is no need or necessity to go into the question pertaining to Points No. 3 and 4, which are unwarranted.

In result, the above Civil Revision Petition fails and the same is dismissed.

The fair and decial order dated 18.8.1994 made in E.A. No. 999 of 1989 in E.P. No. 2 of 1989 by the Court of District Munsif, Ponneri is hereby upheld and confirmed.

However, in the circumstances of the case, there shall be no order as to costs.