



## IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 5<sup>TH</sup> DAY OF JANUARY 2024 / 15TH POUSHA, 1945EX.SA NO. 3 OF 2023AGAINST THE DECREE AND JUDGMENT DATED 11.01.2023 IN AS 150/2020 OF  
DISTRICT COURT, PALAKKADAGAINST THE ORDER DATED 05.10.2020 IN EA 351/2019 IN EP 237/2013  
IN OS NO.326/1979 OF PRINCIPAL MUNSIFF COURT, PALAKKADAPPELLANT/APPELLANT/CLAIM PETITIONER IN EA/3RD PARTY IN EP:

A.V. VIMALKUMAR  
AGED 48 YEARS  
S/O U.V. RAMANATHAN,  
RESIDING AT 'AARATHI', MANKURISSI P.O.,  
MANKARA VILLAGE, PALAKKAD TALUK,  
PALAKKAD DISTRICT, PIN - 678613

BY ADVS.  
MANU VYASAN PETER  
P.B.KRISHNAN  
P.B.SUBRAMANYAN  
SABU GEORGE  
B.ANUSREE

RESPONDENTS/RESPONDENT NOS.1 TO 5 & 7 TO 28 IN A.S./RESPONDENT  
NOS.1 TO 5 & 7 TO 24 IN E.A./DECREE HOLDER AND JUDGMENT DEBTORS IN  
EP:

1 RAHMATH  
W/O. LATE ABDUL RAHIMAN,  
CHANDANAPURAM, KALAVANGODE,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

2 SHAMILA  
D/O. LATE ABDUL RAHIMAN,  
CHANDANAPURAM, KALAVANGODE,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642



## 3 SHAMEERA

D/O. LATE ABDUL RAHIMAN, CHANDANAPURAM,  
KALAVANGODE, NAGARIPURAM P.O,  
MANNUR VILLAGE, PALAKKAD DISTRICT,  
PIN - 678642

## 4 SHERINA

D/O. LATE ABDUL RAHIMAN,  
CHANDANAPURAM, KALAVANGODE,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

## 5 SHAMNAS

D/O. LATE ABDUL RAHIMAN,  
CHANDANAPURAM, KALAVANGODE,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

## 6 MARIYA

D/O. LATE SYED MUHAMMED RAWTHER & W/O. YUSUF,  
ZEENATH MANZIL, KALLADIPATTA,  
ONGALLUR THERUVU, PATTAMBI,  
PALAKKAD DISTRICT, PIN - 679313

## 7 FATHIMA

D/O. LATE SYED MUHAMMED RAWTHER & W/O. USSANAR,  
FATHIMA MANZIL, KOTTEKKAD,  
PALAKKAD, PIN - 678732

## 8 SULAIKA

D/O. LATE SYED MUHAMMED RAWTHER & W/O. ALI  
AHAMMED, VALLIKKAD HOUSE, KAMBA,  
VALLIKODE, PALAKKAD, PIN - 678594

## 9 SARA

D/O. LATE SYED MUHAMMED RAWTHER & W/O. UMMER,  
PARAKKAL HOUSE, PARASSERY, KONGAD,  
PALAKKAD, PIN - 678631

## 10 VELAN

S/O. LATE CHAMI, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,

**PALAKKAD DISTRICT**

\* 11 CHATHAN ALIAS CHANDRAN, (DIED)  
S/O. LATE CHAMI, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT - 678642.  
\*\* (THE APPELLANT IS EXEMPTED FROM IMPLEADING  
THE LEGAL REPRESENTATIVES OF THE DECEASED R11  
SUBJECT TO THE CONDITION THAT THE NON-  
IMPLEADMENT IF ANY, SHALL BE AT THE RISK OF THE  
APPELLANT ON MIERITS AS PER ORDER DATED  
27.10.2023 IN IA.2/2023 IN EXSA.3/2023),  
PIN - 678642

12 PARU  
D/O. LATE CHAMI, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

13 SUBHADRA  
W/O. LATE KANDAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

14 ARULDAS  
S/O. LATE KANDAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

15 ARUL JYOTHI  
D/O. LATE KANDAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

16 AMBILI  
D/O. LATE KANDAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

17 MEENAKSHI  
W/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,



## PALAKKAD DISTRICT, PIN - 678642

18 MANOJ. C.C  
S/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

19 KRISHNANKUTTY.C.C  
S/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

20 BINDHU.C.C  
D/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

21 SURESH C.C  
S/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

22 SURENDRAN.C.C  
S/O. LATE RAMAN, CHANDANAPURAM,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

23 KUTTAPPAN  
S/O. LATE VELLACHI, PANDANTHARA HOUSE,  
NAGARIPURAM P.O, MANNUR VILLAGE,  
PALAKKAD DISTRICT, PIN - 678642

24 MARIA  
W/O. ASSANAR, CHETTANPULLAKKAL HOUSE,  
MANNUR P.O, PALAKKAD, PIN - 678642

25 ABUTHAHIR  
S/O. ASSANAR, CHETTANPULLAKKAL HOUSE,  
MANNUR POST, PALAKKAD, PIN - 678642

26 ABDUL SALAM



EX.SA NO. 3 OF 2023

5

S/O. ASSANAR, CHETTANPULLAKKAL HOUSE,  
MANNUR P.O, PALAKKAD, PIN - 678642

27 ASHARAF ALI  
S/O. ASSANAR, CHETTANPULLAKKAL HOUSE,  
MANNUR P.O, PALAKKAD, PIN - 678642

BY ADVS.  
DEEPA NARAYANAN  
K.SUJAI SATHIAN  
PREETHI. P.V.  
M.V.BALAGOPAL  
MARY LIYA SABU  
GOURI MEEMPAT  
SANGEETHA SREEKUMAR  
T.SETHUMADHAVAN (SR.)

FOR R1, R2, R4, R6 TO R9 AND R24 TO R26

THIS EXECUTION SECOND APPEAL HAVING COME UP FOR  
HEARING ON 18.12.2023, THE COURT ON 05.01.2024 DELIVERED  
THE FOLLOWING:

**CR****JUDGMENT**

Dated this the 5<sup>th</sup> day of January, 2024

This Execution Second Appeal has been filed under Section 100 read with Order XLII Rule 1 and Order XXI Rule 103 of the Code of Civil Procedure, 1908, (hereinafter referred to as 'CPC' for convenience) by Sri.A.V.Vimalkumar, a third party to the decree, who alleged to have purchased property, including property covered by the decree schedule, as per sale deed No.1697/2017 dated 27.10.2017 of SRO, Parali. The respondents herein are the decree holders as well as the judgment debtors in the execution petition.

2. Heard the learned counsel for the claim petitioner as well as the decree holders in detail. Perused the lower court records.

3. E.A.No.351/2019 is the petition filed under Sections 47 & 151 and Order XXI Rules 97, 99 and 101 of CPC. The sum and substance of the contentions raised in the execution petition could be read out from paragraph Nos. 6, 7, 8 and 10 of the claim petition and they are



extracted as under:

*"6. The petition schedule property along with other properties originally belonged to one Chemban, who was holding and possessing the same on verum pattom (tenancy) right under an oral lease from the Jenmi of the property, Polpakkara Mana. On the demise of the said Chemban, the said properties devolved on his legal heirs, Chami, Velan, Karappan and Kotha. Thereafter, the said Velan, Karappan and Kotha, released their rights over the said properties in favour of their brother, Chami, by executing a Release Deed No.694/1984, Parli SRO. On the demise of the said Chami, the said properties devolved on his legal heirs, wife, Neeli, and their progeny, Kandan, Raman, Chandran, Velayudhan, Kunji, Vellachi and Paru. Subsequently, the said Raman acquired exclusive right over 10 cents of land in Sy.No.52/5C (petition schedule property) by virtue of two registered documents of transfer, Release Deeds 1492/1991, Parli SRO, executed by Neeli, Kandan, Chandran, Velayudhan and Kunji and Release Deed No.3979/2007, Parli SRO, executed by Vellachi and Paru, and the transferee, Raman, was holding exclusive right, title, possession and enjoyment of the property conveyed, and accordingly mutation*



*was also effected in the revenue records, and was paying land tax for the property and building tax for the house in the property.*

7. *The said Raman assigned the schedule property in favour of A.V.Vimalkumar, the claim petitioner herein, by executing a Sale Deed No.1697/2017, Parli SRO, dated 27/10/2017, for valid, valuable consideration full paid, thereby deriving valid title and possession of the petition schedule property. Thereafter, petitioner is in exclusive possession and enjoyment of the petition schedule property, and is also paying tax for the property after effecting necessary mutation in the revenue records.*
8. *Subsequently, the petitioner also derived jenm right over the property purchased by him, by virtue of a Certificate of Purchase No.398/2018 issued to him by the Special Tahasildar, Land Tribunal, Palakkad, dated 25/07/2018, in the S.M. proceedings No.1327/2012.*
9. xxxx
10. *The respondents herein, who are the petitioners in the Execution petition or their predecessors-in-interest never held any right, title or possession of the scheduled property. The petitioners / decree holders are now attempting to execute the decree passed in the matter, which action is nothing but*



*illegal and is done with ulterior motives to defeat the legal and valid rights of the petitioner herein, by withholding material information from Court and under a mistaken identity of the decree schedule property, which is invalid and not sustainable, as far as the petition schedule property is concerned.”*

4. Resisting the claim petition, respondents 1 to 10/decree holders filed detailed objection. Paragraph No.10 of the order of the execution court would depict the contentions of the decree holders as under:

*“10. Claim petitioner contended that the Advocate Commissioner in the E.P. has filed her report and plan without properly identifying the decree schedule property. In this context, it is very relevant to note that judgment debtor No. 1 Raman, who is the transferor of claim petitioner, is a party to the proceedings of the E.P. It is true that an Advocate Commissioner was appointed in the E.P. for identifying the decree schedule property as per the direction in the judgment dated 15-01-2016 in O.P.(C) No. 2939/2015 (O) of the Hon'ble High Court. The Advocate Commissioner inspected the property and measured and located the decree schedule property with the assistance of Taluk*



*Surveyor and Private Surveyor and filed commission report with survey sketch on 08-10-2018. In the meantime two close relatives of judgment debtor filed E.A. No. 14/2015 as a claim petition in the E.P. by asserting that they have right over the decree schedule property. That claim petition was dismissed on merits on 17-11-2015 and those third parties preferred A.S. No. 38/2016 before the Hon'ble District Court. The Hon'ble District Court has dismissed A.S. No. 38/2016 on merits as per judgment dated 20-08-2019 with a finding that there is no ambiguity regarding the identity of the property sought to be recovered from the possession of judgment debtors in this execution petition. It is pertinent to note that the judgment debtors including the transferor of claim petitioner herein are also parties to A.S. No. 38/2016 and they have not challenged the said judgment of the Hon'ble District Court. Since claim petitioner herein is claiming right over the petition schedule property or the portion of decree schedule property consists of 15 cents through a party to that Appeal, he is also bound by the above finding in the judgment of the Hon'ble District Court in A.S. No. 38/2016 and he is estopped from contending otherwise as agitated in this claim petition. It is a relevant fact that judgment debtor No. 7 filed E.A. No. 255/2018 in the E.P. to set aside the survey commission report and plan and it*



*was dismissed on merits on 21-12-2019. Judgment debtor No.7 has raised the very same contention in that E.A. No. 255/2018 that the decree schedule property was not property identified by the Advocate Commissioner. As per order dated 21-12-2019 in that E.A., it was found that the decree schedule property was property identified by the Advocate Commissioner. The transferor of claim petitioner, who is the 1<sup>st</sup> judgment debtor in the E.P., was well aware of these proceedings in the E.P. The above order in E.A. No. 255/2018 in the E.P. was not challenged by any of the judgment debtors. It is a fact that claim petitioner is claiming right over the property only through the judgment debtor No.1 in the E.P. Therefore the very same contention raised by claim petitioner with regard to the identity of the decree schedule property is devoid of any merit. The contentions in the argument note of claim petitioner with respect to these facts will not help him to improve his case. For all these discussions and reasons, it is found that the claim petition is not maintainable since it is barred by the principles of doctrine of resjudicata and lis-pendens."*

5. It is discernible that in view of the objection raised by the decree holders, specifically contending that the claim



petition is barred by *resjudicata* and also under Section 52 of the Transfer of Property Act (hereinafter referred to as 'TP Act' for short), the execution court raised three issues for determination and the same are as under:

- 1) *Whether this claim petition is maintainable?*
- 2) *Whether claim petitioner is bound by the decree sought to be executed in this Execution Petition?*
- 3) *What is the proper order?"*

6. In paragraph No.7 of the order, the execution court observed that "*Claim petitioner and respondents 1 to 10/decree holders not adduced oral or documentary evidence. Claim petitioner filed an argument note and it was perused.*" Thereafter, the execution court answered point Nos.1 and 2 in paragraph No.8 of the order, which is extracted as under:

*"8. Point Nos. 1 and 2 :- Considering the peculiar nature of the legal aspects to be determined in this claim petition, these two points can be discussed together for the sake of convenience. The main case of claim petitioner is that he obtained title and*



*possession over the petition schedule property consists of 10 cents in Old Sy.No. 52/5C by virtue of sale deed No.1697/2017 dated 27-10-2017 of the S.R.O., Parali for valuable consideration and the decree holders are attempting to effect the delivery of said property through the proceedings in the E.P. to their favour. According to claim petitioner, the petition schedule property not forming part of the decree schedule property in the E.P. and the Advocate Commissioner in the E.P. has wrongly identified the decree schedule property. If the petition schedule property is not forming part of the decree schedule property as contended by claim petitioner, he has no right to file this sort of a claim petition. The claim petition and the photocopy of sale deed No.1697/2017 produced by the claim petitioner clearly indicate that he is claiming right over the petition schedule property through one Raman, who is the 3<sup>rd</sup> defendant/2<sup>nd</sup> appellant in S.A. No. 186/2002 (E), wherein the proceedings of the suit of the E.P. was finally determined by the Hon'ble High Court of Kerala. The judgment dated 18-06-2013 in S.A. No. 186/2002 (E) of the Hon'ble High Court is clear that the six appellants therein including the transferor in the above sale deed of the claim petitioner is having no right over the 15 cents of property in Old*



*Sy. No.52/2C, which is the decree schedule property in the E.P. Therefore the claim petitioner/subsequent purchaser of property from Raman, who was the 3<sup>rd</sup> defendant/2<sup>nd</sup> appellant in S.A.No. 186/2002 (E) of the suit of the E.P., is not entitled to raise the contentions against the decree as agitated in his claim petition. Since the transferor of claim petitioner was a party to the proceedings of the suit in which the decree was passed, he is bound by the findings in the suit which was finally disposed as per the judgment and decree in the above Second Appeal. Hence it is found that claim petitioner is bound by the decree sought to be executed in this Execution Petition. Therefore the present contentions of claim petitioner against the decree sought to be executed by respondents 1 to 10/decree holders are perfectly barred by the principles of doctrine of resjudicata.*

7. Regarding the challenge insofar as to lis-pendens, the execution court found that the judgment debtors had no case, either in the proceedings of the suit or in S.A.No.186/2002 which was dismissed by this Court on 18.06.2013, that Raman had right to assign 10 cents of



property in the very same survey number of the decree schedule property or within the decree schedule property to the claim petitioner through sale deed No.1697/2017. It was found by the execution court further that release deed No.3979/2007 executed by the judgment debtors 3 and 5 in favour of the judgment debtor No.1, Raman, who is the transferor of the petition schedule property herein to the claim petitioner, is hit by the doctrine of lis-pendens.

8. Regarding the identification of the decree schedule property based on Ext.C1 report and Ext.C2 plan obtained during the execution stage, in paragraph No.10, the execution court recorded as above and finally, answering point Nos.1 and 2 against the claim petitioner, the claim petition was dismissed.

9. Although A.S.150/2020 was filed before the District Court, Palakkad, the same was also dismissed, concurring the finding of the execution court.



10. At the time of admission, as per order dated 29.03.2023, my learned predecessor, formulated the following substantial questions of law. Accordingly, the appeal got admitted.

- “1) *Whether the court below went wrong in disposing the claim petition filed by the appellant on the ground of resjudicata, lis pendens etc. as a preliminary issue?*
- 2) *When the appellant holds 10 cents in sy.no.52/5C and the decree schedule property comprises of only 2 cents out of 1.33 acres in sy.no.52/5C is it legal and proper to hold that the Appellant has no right or title over the property in possession?*
- 3) *Are the Commission reports, plans secured and orders issued before the filing of the claim petition binding on the Appellant?*
- 4) *Is not the judgment under Appeal vitiated for non compliance with the directions in OP 2939 of 2015?*
- 5) *Whether the disposal of claim petition by the court below without giving an opportunity to the petitioner to prove the claim is legal?”*



11. The main grievance advanced by the learned counsel for the claim petitioner/appellant is that, even though the petition is one filed under Order XXI Rule 97, for which an adjudication under Rules 99 and 101 is mandatory, the execution court dismissed the claim petition, on raising preliminary issues, without giving an opportunity to the claim petitioner to adduce evidence in support of his contentions. It is submitted by the learned counsel further that the proceedings under Order XXI Rule 97 is nothing, but in the nature of a suit and Order XIV would apply in the matter of disposal of the matter on raising preliminary issues. In this connection, the learned counsel placed decisions of the Apex Court in ***Ramesh B Desai and Others v. Bipin Vadilal Mehta and Others***, reported in **2006 KHC 837** and also in ***Sathyanath v. Sarojamani*** reported in **2022 KHC 6511**. In paragraph No.13 of **Ramesh B Desai's** case (*supra*), the



Apex Court dealt with the impact of sub-Rule (2) of Order XIV

Rule 2 and held as under:

*"13. Sub-r. (2) of O.14 R.2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S. S. Khanna v. Brig. F. J. Dillon (AIR 1964 SC 497) and it was held as under: (SCR p. 421)*

*"Under O.14 R.2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on*



*mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."*

*Though there has been a slight amendment in the language of 0.14 R.2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."*

12. Similarly, in **Sathyanath's** case (*Supra*), in paragraph 31, the Apex Court concluded as under:

*"31. We find that the order of the High Court to direct the learned trial court to frame preliminary issue on the issue of res judicata is not desirable to ensure speedy disposal of the lis between the parties. Order XIV R.2 of the Code had salutary object in mind that mandates the Court to pronounce judgments on all issues subject to the provisions of sub-Rule (2). However, in case where the issues of both law and*



*fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that suit first, if it relates to jurisdiction of the Court or a bar to the suit created by any law for the time being in force. It is only in those circumstances that the findings on other issues can be deferred. It is not disputed that res judicata is a mixed question of law and fact depending upon the pleadings of the parties, the parties to the suit etc. It is not a plea in law alone or which bars the jurisdiction of the Court or is a statutory bar under clause (b) of sub-Rule (2)."*

13. The learned counsel also placed two more decisions, viz., **Babulal v. Kumar and Others**, reported in **1996 KHC 761** and **Usha Sinha v. Dina Ram and Others** reported in **2008 KHC 4505**, highlighting the necessity of adjudication of a petition filed under Order XXI Rule 97. Paragraph Nos.5, 6 and 7 of **Babulal's** case (*Supra*) are relevant in this context. The same are also extracted hereunder:



*"5. In the execution application filed under O.21, R.32 of the CPC the appellant filed an objection on the ground that he could not be dispossessed. It is not in dispute that the appellant was not a party to the decree for specific performance. His objection was overruled by the executing Court holding that since he had not been dispossessed, application under O.21, R.97 is not maintainable. That view was affirmed by the High Court in the impugned order dated May, 9, 1995 in CRP No. 656/94 by the High Court of Rajasthan at Jaipur Bench. Thus, this appeal by special leave.*

*6. The controversy is no longer res integra. This Court in Bhanwar Lal v. Satyanarain, 1995 (1) SCC 6 : (1994 AIR SCW 4549), considered the controversy and had held that even an application filed under O.21, R.35 (3) or one filed under S.47 would be treated as an application under O.21, R.97 and an adjudication is required to be conducted under R.98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in O.21, Rules 98, 101, 102 enjoin conduct of a regular adjudication, finding recorded thereon would be a decree and bind the parties. In Para 7 (of SCC ): (Para 6 of AIR) thereof it was held thus :*



*"In the above view we have taken, the High Court has committed grievous error of jurisdiction and also patent illegality in treating the application filed by the appellant as barred by limitation and the third one on res judicata. Once the application, dated 25-5-1979 was made, the Court should have treated it to be one filed under O.21, R.97 (1), C. P. C. The question of res judicata for filing the second and third applications does on arise. Under these circumstances, the appellate Court, though for different reasons was justified in directing an enquiry to be conducted for removal of the obstruction of resistance caused by Satyanarain under O.21, R.35 (3) and O.21, Rules 101 and 102 of CPC".*

*7. It would, therefore, be clear that an adjudication is required to be conducted under O.21, R.98 before removal of the obstruction caused by the object or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under O.21, R.103 and it shall be subject to an appeal. Prior to 1976, the order was subject to suit under 1976 Amendment to CPC that may be pending on the date of the commencement of the amended provisions of CPC was secured. Thereafter, under the amended Code, right of suit under O.21, R.63 of old Code has been taken away. The determination of the question of the right, title or interest of the objector in the*



*immovable property under execution needs to be adjudicated under O.21, R.98 which is an order and is a decree under O.21, R.103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance.”*

14. Per contra, the learned counsel appearing for the decree holders, resisted the contentions, after narrating the derivation of title, whereby the decree holders asserted title to get delivery of possession of the property on the strength of title, which culminated in SA No.186/2002 of this Court. He also pointed out that even though a petition under Order XXI Rule 97 would not lie in the facts of the given case, the settled law as stated in **Babulal's case (Supra)**, the facts of the given case would lie in a petition under Order XXI Rule 97.



15. According to the learned counsel for the decree holders, the claim petition filed by the claim petitioner, who purchased property from Raman, who claimed title in relation to the decree schedule properties, could not put up an independent claim over the decree schedule property and therefore, his claim shall be hit by Order XXI Rule 102 of CPC, wherein it has been provided as under:

***“102. Rules not applicable to transferee pendente lite.-Nothing in Rule 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossess of any such person.***

***Explanation.-In this rule, “transfer” includes a transfer by operation of law.”***

16. The learned counsel for the decree holders also pointed out the fact that, mainly, the claim petitioner asserts title on the strength of sale deed No.1697/2017 executed by



Raman in the year 2017. In paragraph No.8 of the claim petition, the claim petitioner raised contention that he obtained purchase certificate in relation to the property covered by the sale deed on the strength of SM proceedings initiated in the year 2012, i.e., 5 years before the assignment of property by Raman in favour of the claim petitioner. Accordingly, it is pointed out that the title deed in the name of the claim petitioner itself is contrary and he, being a subsequent purchaser, cannot agitate right on the decree schedule property in view of the specific bar under Rule 102 of CPC.

17. Per contra, it is submitted by the learned counsel for the claim petitioner that the property covered by the sale deed and the purchase certificate relied upon by the claim petitioner is 10 cents of property in Sy.No.52/5C. Whereas, the decree schedule would include only 2 cents of property in Sy.No.52/5C. According to the learned counsel, under the



guise of the decree, the decree holders are attempting to recover possession of the properties covered by the sale deed and patta in relation to the claim petitioner and therefore, the grievance of the claim petitioner should have been adjudicated by the execution court, as provided under Order XXI Rules 97 and 98 read with 101 of CPC.

18. Coming to the substantial questions of law, the execution court raised issue Nos.1 to 3, as I have already extracted herein above, and found that the claim petition is barred by *res judicata* and also hit by the doctrine of *lispendens* embodied under Section 52 of the TP Act. At the same time, the execution court discussed the documents available and passed an order on merits.

19. Whereas much trust was given by the learned counsel for the decree holders to the observation of the execution court in paragraph No.7 of the order, "*Claim petitioner and respondents 1 to 10/decree holders not adduced oral or documentary evidence. Claim petitioner filed an*



*argument note and it was perused.*" to contend that the claim petitioner did not opt to adduce evidence though argument notes filed. The execution court adjudicated the claim based on the available materials in the manner known to law and finally, negatived the same, taking note of the fact that the present claim petition was filed on 20.11.2019 in anticipation of dismissal of the 2nd claim petition filed by the legal representatives of the decree holders and the last one was dismissed on 20.12.2019.

20. The legal question arose for consideration is; whether the court below, in any way, went wrong in finding resjudicata as well as lis-pendens, without giving an opportunity to the claim petitioner to adduce evidence, or else the claim petitioner was satisfied with filing of argument notes in substitution of evidence. Similarly, the other question poses for consideration is; whether the claim petitioner, who admittedly got property from Raman, who is



the third defendant in the suit, could put up an independent claim over the decree schedule property on the guise that he obtained 10 cents of property in Sy.No.52/5C, though the decree schedule property insofar as Sy.No.52/5C is only 2 cents. Admittedly, the title relied upon by the claim petitioner is a document of the year 2017, generated during the pendency of this suit originally filed in the year 1979. The pattah relied on by the claim petitioner also is the outcome of the proceedings started in the year 2012. It is true that on perusal of the second appeal judgment in RSA 856/2002, this Court addressed the contention insofar as property having an extent of 15 cents in 2C and no reference as to 2 cents of property in 5C seen discussed in the second appellate judgment. However, the trial court as well as the first appellate court found that defendants did not have any title or tenancy right insofar as the decree schedule properties are concerned, after years of litigation and the



said finding was confirmed in RSA No.856/2002. It is relevant to note that before dismissal of this claim petition, two more claim petitions, at the instance of the legal representatives of the two relatives of the judgment debtor, as E.A.Nos.14/2015 and 255/2018 also were dismissed though the said dismissal was challenged in appeal vide AS No.38/16 before the appellate court, the same also was dismissed.

21. This Court raised the first and fifth substantial questions of law on the premise that the execution court disposed of the claim petition filed by the appellant herein on the grounds of resjudicata, lis-pendens, etc. as preliminary issues. However, as already discussed, the execution court provided opportunity to adduce evidence to the claim petitioner and the respondents. Thereafter, the execution court recorded that "*Claim petitioner and respondents 1 to 10/decree holders not adduced oral or documentary*



evidence. *Claim petitioner filed an argument note and it was perused.*”, as reproduced in paragraph No.7 of the impugned order. At this juncture, it is relevant to note that there was no attempt on the part of the claim petitioner or the respondents to adduce oral or documentary evidence and the claim petitioner filed an argument notes to substantiate his contentions. It is true that when petitions under Order XXI Rules 97 and 99 of CPC being filed, an adjudication of the same are necessary and an order under Order XXI Rule 98 shall be passed after the adjudication, on determining all questions arising between the parties to the proceedings, as provided under Rule 101 of CPC. In this case, even though the claim petitioner/appellant is much aggrieved in the matter of not providing opportunity, the order impugned would depict that the claim petitioner/appellant did not opt to adduce evidence, though the claim petitioner/appellant was eager to file an argument notes in tune with his contentions.



Therefore, this is not a case where no opportunity was given by the court. But this is a case where the claim petitioner did not opt to adduce evidence. Therefore, answering the first and fifth substantial questions of law in the negative, it is held that the court below raised three points for determination and dismissed the claim petition on merits based on available materials and the execution court did not dismiss the claim petition merely deciding the question of resjudicata as well as lis-pendens as preliminary issues.

22. Coming to the second question of law, as to *when the appellant holds 10 cents in Sy.No.52/5C and the decree schedule property comprises of only 2 cents out of 1.33 acres in Sy.no.52/5C is it legal and proper to hold that the Appellant has no right or title over the property in possession*, herein, the claim petitioner is a person, who alleged to have purchased property from party to a suit, during pendency of the suit. The legislature, in its wisdom,



incorporated Order XXI Rule 102 of CPC to specifically exclude the application of Rules 98 and 100 of CPC. It has been provided therein that nothing in Rule 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossess of any such person. If so, it has to be held that the claim petitioner/appellant herein, who is a transferee pendente lite, cannot establish an independent right apart from the right of the parties to the suit and in view of the matter, the claim petition is barred under Order XXI Rule 102 of CPC.

23. In this matter, during the pendency of execution proceedings, OP(C) No.2939/2015 (O) was filed before this Court and in consideration of the direction issued by this Court, the Advocate Commissioner identified the decree



schedule property with the assistance of the Taluk Surveyor and private Surveyor. The property so identified is in no way included any other property other than the decree schedule property. Therefore, it appears that the execution court appointed the commissioner and Surveyor to identify the decree schedule properties fully in compliance with the directions issued by this Court in OP(C) No.2939/2015(O) and there is no non-compliance.

24. In the case at hand, the claim petition was adjudicated based on the relevant materials before the execution court in case where the claim petitioner failed to adduce evidence and limited his right to contest the claim petition by filing argument notes. In fact, as I have already pointed out, the claim petitioner, at the instance of a transferee pendente lite, is hit by Order XXI Rule 102 of CPC, the claim petition is not maintainable even otherwise. Holding so, it is held that the execution court rightly



dismissed the claim petition and the same was upheld by the appellate court. Therefore, the concurrent verdicts under challenge do not require any interference at the hands of this Court. Therefore, this execution second appeal must fail.

25. In the result, this execution second appeal stands dismissed.

All interlocutory orders stand vacated and all interlocutory applications pending in this execution second appeal stand dismissed with direction to the execution court to expedite the delivery of the property at any rate within one week from the date of the production of a copy of this judgment, taking specific note of the fact that the litigation started in the year 1979.

Registry shall inform this matter to the trial court as well as the appellate court forthwith.

Sd/-  
**A. BADHARUDEEN**  
**JUDGE**