

**(Kolangarethath) Pachan Vs. Kunhandi**

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**Court :** Chennai

**Decided On :** Dec-06-1929

**Reported in :** AIR1930Mad539

**Appellant :** (Kolangarethath) Pachan

**Respondent :** Kunhandi

**Judgement :**

Venkatasubba Rao, J.

1. The lower Court has held that the suit is not barred as res judicata by reason of certain two previous decisions and the defendant questions the correctness of this view.

2. The plaintiff before us is Kunhandi, who sues Pachan, the defendant, for specific performance of a contract of sale in respect of two properties. The facts may be briefly stated. Pachan agreed to sell Kunhandi the suit items. At that time, the latter was already in possession of item 1 as mortgagee. He subsequently obtained possession of item 2 also and his case was that he paid the purchase money and was thereupon put in possession. Pachan filed the two previous suits against Kunhandi; one of them was to redeem the mortgage in respect of item 1 and the other related to item 2 and was brought on the footing of trespass. Kunhandi pleaded in those two suits the outstanding agreement to sell in his favour, but the Court passed decrees, remarking, in each suit, that Kunhandi's right would not be affected by the decision.

3. On these facts, Pachan, the defendant, maintains that the present suit is barred under the rule of res judicata, on the ground that Kunhandi should have resisted the former suits by pleading and proving the agreement now relied on by him. His contention is, that in the previous suits, Kunhandi could have relied upon this agreement as a complete defence and it is not now open to him to raise the question afresh by a separate suit. It seems to us that this contention is untenable. As already mentioned, one of the two previous suits was filed to redeem the mortgage in respect of item 1. Was Kundandi then bound to plead, that he was entitled to specific performance of the contract of sale in respect of that item? Similarly, in the suit based on trespass, was he bound to raise a like defence? The question we have to decide is not, whether he might have raised the plea, but whether it was obligatory upon him to raise it. The defendant relies upon Vizagapatam Sugar Development Co. v. Muthurama Reddi A.I.R. 1924 Mad. 271. We are not prepared to construe the decision as meaning that it is incumbent upon a party to put forward the defence that he is entitled to specific performance. It does no more than give liberty to raise a plea of that kind, and we are not prepared to read the decision as compelling him to bring that forward, Section 11, Expl. 4, Civil P.C., refers to a matter which might and ought

to have been made a ground of defence. Under the Full Bench decision, the right to specific performance, is a matter that might have been made a ground of defence. That is all; but it is very different from saying that it is not only might, but ought to have been pleaded. The appellant's contention in effect ignores the force of the word 'ought' in the section. The objection of res judicata therefore fails.

4. In this view, it is unnecessary to decide the further point taken by the respondent, that, in any event, the rule of res judicata does not apply on the facts of this case, as his rights were expressly reserved under the two former judgments. The result is, the appeal fails and is dismissed with costs.

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