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30th May, 2020

RES JUDICATA

1. Nanda Lal Roy vs. Pramatha Nath Roy, 28.02.1928, AIR 1933 Cal 222, Relevant Paras 21

- The rule of res judicata does not depend on the identity of subject-matter but on the identity of issue.
- Matter in issue thus is distinct from the subject-matter and the object of the suit and also from the relief that may be asked for in the suit and the cause of action on which the suit is based and therefore, even if in a case where a subject-matter, the object, the relief claimed and the cause of action are different, the rule of res judicata can apply.

A copy of the judgment attached hereto at **page no. 3 to 15.**

2. Daryao vs. State of UP, 27.03.1961, AIR 1961 SC 1457, Relevant Paras 9-10

- The principles of res judicata is founded on public policy that the parties cannot be permitted to have controversy directly or substantially in issue between the same parties or those claiming under the parties in the subsequent suit cannot be raised once over.
- It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts' of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.

A copy of the judgment attached hereto at **page no. 16 to 26.**

3. Sheodan Singh vs. Daryao Kanwar, 14.01.1966, AIR 1966 SC 1332, Relevant Paras 9-11

The principles of Res Judicata are as follows:

- The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit (Explanation I). (Explanation VII is to be read with this condition).
- The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. (Explanation VI is to be read with this condition).
- Such parties must have been litigating under the same title in the former suit.
- The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised. (Explanations II and VIII are to be read with this condition).
- The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit. (Explanation V is to be read with this condition).

A copy of the judgment attached hereto at **page no. 27 to 35.**

4. Mathura Prasad vs. Dossibai NB Jeejeebhoy, 26.02.1970, (1970)1 SCC 613, Relevant Paras 4-6, 11

Matter in issue

- The rights litigated between the parties, i.e., the facts on which the right is claimed and the law applicable to the determination of that issue.
- Such issue may be an issue of fact, issue of law or mixed issue of law and fact.
- The matter directly and substantially in issue may be so either actually or constructively.
- According to Explanation III, a matter is actually in issue when it is alleged by one party and denied or admitted by the other expressly or impliedly.
- As per Explanation IV, it is constructively in issue when it might or ought to have been made a ground of attack or defence in the former suit. The word 'might' presuppose the party affected had knowledge of the ground of attack or defence at the time of the previous suit. A party is bound to bring forward his whole case in respect of the matter in issue and cannot abstain from relying or giving up any ground which is in controversy and for consideration before a Court and afterwards make it a cause of action for a fresh suit. Constructive res judicata is an 'artificial form of res judicata'.

A copy of the judgment attached hereto at **page no. 36 to 42.**

5. Avtar Singh vs. Jagjit Singh, 27.07.1979, (1979)4SCC 83, Relevant Paras 5

- If defendant does not appear and the Court on its own returns the plaint on the ground of lack of jurisdiction the order in a subsequent suit may not operate as res judicata.
- But if the defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as res judicata in a subsequent suit although the reasons for its decisions may not be so.

A copy of the judgment attached hereto at **page no. 43 to 44.**

6. Mahboon Sahab vs. Syed Ismail, 23.03.1995, (1995)3 SCC 693, Relevant Paras 9-10

Parties in Res Judicata

The Supreme Court held the doctrine of Res Judicata is applicable to both necessary and proper parties:

- If, a previous decision can operate as res judicata between the Co-defendants under certain conditions, there is no reason why a previous decision should not operate as res judicata between the co-Plaintiffs if the same conditions are mutatis mutandis satisfied.

- It is not necessary to attract the doctrine of res judicata that there should be relief sought against each of such Defendant. Even a proforma Defendant if he was a proper party, is bound by the principle of res judicata in subsequent proceedings.

A copy of the judgment attached hereto at **page no. 45 to 52.**

7. Deva Ram v Ishwar Chand, 16.10.1995, (1995) 6 SCC 733, Relevant Paras 20-23

- It was held if the parties in two suits are the same and the subject matter is also the same. But the issues and cause of action are different.

- In such a case, in the absence of pleadings issues and finding on those issues, the rule of res judicata cannot be invoked.

A copy of the judgment attached hereto at **page no. 53 to 62.**

8. M. Nagabhushana vs. State of Karnataka, 02.02.2011, (2011) 3 SCC 408, Relevant Paras 12-19

- The doctrine of res judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the question litigated and should ever set the controversy at rest.

A copy of the judgment attached hereto at **page no. 63 to 77.**

9. State of Rajasthan vs. Jeev Raj, 11.08.2011, (2011)12 SCC 252, Relevant Paras 14-17

- The Supreme Court held that subject-matter of the two suits may be different, the object of the suits, the reliefs asked and the causes of action may also be different; but if the matter in issue in them is identical (i.e. if same title had been litigated before) res judicata will apply.

A copy of the judgment attached hereto at **page no. 78 to 83.**

10. Sardar Satpal Singh v. Saroj Shukla 03.08.2015, AIR 2015 Chh 166, Relevant Paras 7, 8

- The question of res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, it cannot be held that the defendant has established the plea of res judicata by raising appropriate pleading.

A copy of the judgment attached hereto at **page no. 84 to 88.**

11. Canara Bank vs. N.G. Subbaraya Setty, 20.04.2018, (2018) 16 SCC 228, Relevant Paras 32-33

Former Suit

- The expression "former suit" means a previously decided suit, and the same interpretation applies to appeals.

- It does not matter that the previously decided suit was instituted subsequently or decided during the pendency of an appeal or tried as a revisional application in the subsequent suit.

- It follows that if a decree has become final (there being no appeal), the matter decided cannot be raised again in another proceeding, even if that proceeding was taken first.

A copy of the judgment attached hereto at **page no. 89 to 126.**

1932 SCC OnLine Cal 167 : AIR 1933 Cal 222

Calcutta High Court

(BEFORE MITTER AND S.K. GHOSE, JJ.)

Nanda Lal Roy and others ... Appellants;

Versus

Pramatha Nath Roy and others ... Respondents.

Appeals Nos. 332 and 370 of 1928

Decided on February 28, 1928 and March 14, 1932

The Judgment of the Court was delivered by

MITTER, J.:— Pour main questions fall for determination in this appeal by the plaintiffs: (1) whether the plaintiffs have established their title to the fishery known as the Bikrampur Jalkar in the tidal and navigable river Pudma; (2) what is the boundary between their jalkar and the respondents' (defendants 1 to 5) fishery known as the Mukundia Jalkar; (3) whether the plaintiffs have lost their title by adverse possession of the defendants to the portion of the fishery now in dispute and (4) what is the legal effect of the proceedings of 1816, 1843 and of the award of the arbitrator in certain suits instituted in 1909. The principal contestants to the appeal are Raja Janaki Nath Roy, a gentleman possessed of considerable wealth and his nephews.

2. In this action plaintiffs claimed a decree for recovery of joint possession with their cosharers to the extent of their three annas two gandas one kara one kranti one danti shares in that portion of the fishery which is described in Sch. 2 to the plaint after declaration of their title as proprietors to the fishery described in Sch. 1 to the plaint of which the property in Sch. 2 is claimed as forming a part. The plaintiffs also rested their claim to the disputed portion of the fishery on the ground of adverse possession for more than the statutory period of 12 years. In the alternative they claimed that if the right to the disputed fishery (jalkar) be not established on the ground of their title as proprietors or on the ground of adverse possession they may be given a declaration that they have acquired

> "a right of casement and prescriptive right on the ground that they have been holding possession of the said right in succession to their predecessors for upwards of 60 years openly, peaceably, uninterruptedly and as of right."

3. They also claimed a decree for the sum of Rs. 536-10-3 as their share of the profits of the disputed jalkar during the pendency of the proceedings under Section 145 of the Cr PC, which had been withdrawn by the defendants and also claimed tentatively the sum of Rs. 1,600 as mesne profits. The plaintiffs failed before the Subordinate Judge of Dacca. Hence this appeal to this Court. The case as stated in the plaint is that there is a jalkar mehal described in Sch. 1 to the plaint known by the names of Nadi Padmabati, Balabanta Narhi Korha and others, that this jalkar mehal was in very ancient times an independent jalkar, that it was subsequently incorporated in zamindari 1 of the touzi of the Collect crate of Dacca and the Sadar jama of the said zamindari was fixed at Rs. 1,222-8-4 that the boundaries of the jalkar portion now in

dispute is given in Sch. 2 of the plaint; that one-third of the jalkar formed the howla of Shamdas Pal within the said zamindari and the remaining two-thirds of the jalkar remained in the khas possession of the maliks; that the zamindari stood in the name of Raj Krishna Eoy; that it was sold for arrears of Government revenue on 24th August 1832 (Bhadra 1239 B.S.) and was purchased in the name of Prem Chand Roy, father of Raja Sreenath Roy, defendant 1, who died pending this action and Raja Janaki Nath Roy (defendant 2) and grandfather of defendants 3 and 4, Jadu Nath Roy and Priya Nath Roy and Iswar Chand Desmukhya in equal shares; that the eight annas purchased by Prem Chand was for the benefit of himself and his three uterine brothers Guru Prosad Roy, Hari Prosad Boy and Chaitanya Das Roy, that Iswar Chandra sold his eight annas share of the zamindari to Trilochan Chatter jee who in turn sold the eight annas to the Pal Choudhurys of Lohajung; that the Pal Choudhurys and others dispossessed the Roy Choudhurys from a portion of the jalkar described in Sch. 1 and a suit was instituted by Prem Chand Roy for recovery of joint possession of the disputed portion of the jalkar and was fought up to the Saddar Dewany Adawlut and was decreed with mesne profits; that the plaintiffs as well as defendants 1 to 5 are descendants of the Roy Chowdhurys and plaintiffs have got certain shares in the jalkar which are detailed in paras. 13, 14 and 15 of the plaint.

4. The plaint proceeds to refer to several proceedings in support of their title and possession, viz., Suit No. 22 of 1851, in the Court of the Principal Sudder Amin of Dacca, the resumption proceedings of

1861, Suit No. 374 of 1864 in the Court of the Munsif of Narayangunge against the Government and the ijaradars of the Government, and rely on the principle of equitable estoppel against defendants 1 to 5 on the basis of what transpired in the course of these suits and proceedings. It is not necessary to refer to the history of these suits and proceedings now, as they will have to be referred to in detail hereafter. In para. 7 of the plaint the plaintiffs refer to certain demarcation proceedings under Act 5 of 1875 and refer to important admissions alleged to have been made by the principal defendants or their predecessors in the petition of objection as to the description of the upstream limit of the plaintiffs' jalkar now in dispute. The plaintiffs then proceed to state that with regard to a portion of the jalkar described in Sch. 1, to the plaint which is marked as A, B, C, D in the sketch map attached to the plaint and which lay within the district of Faridpur proceedings under Section 145 of the Cr PC, were started and the first party to the said proceedings were the principal defendants 1 and 2 and Roy Sitanath Roy father of defendants 3 and 4 and the principal defendant 6 and some other persons and plaintiff 7 and the predecessor of some of the plaintiffs and some cosharer pro forma defendants were the second party to the said proceedings and the jalkar was attached under Section 146 of the Cr PC.

5. The plaint farther states that in those proceedings the first party described the portion marked A, B, C, D in the annexed map as included in mehal char Mukundia bearing Touzi No. 4,000 of the Faridpore Collectorate and the second party described the said portion of the jalkar as included in Sch. 1, and appertaining to Zamindary No. 1, Raj Krishna Roy; that aggrieved by the order of attachment three title suits were instituted, one by some of the principal defendants (which includes some of their predecessors), the second by some of the present plaintiffs (which term includes their predecessors as well) and the third by the Pal defendants in different Courts in Faridpur and all these were referred to the arbitration of Mr. Sarada Charan Mitra, formerly a Judge of the High Court of Calcutta, who after taking evidence given an

award, that by the said award he decided that the ujan (upstream) simana (limit) of the jalkar described in Sch. 1, of this plaint was the ujan simana and was represented by the line of as in the map annexed to the plaint and held that the plaintiffs and the cosharer defendants were entitled to the portion of the jalkar marked A, B, C, D in the annexed map and the Court ordered a decree to be made on the said award and the appeal against the said award was dismissed, that the principal defendants are bound by the decision in the title suits and are estopped from questioning the findings in the said suit by reason of the rule of res judicata. The plaint next alleges that in the year 1917 another proceeding was started under Section 145 of the Cr PC, in respect of the jalkar now in dispute in which the plaintiffs pro forma defendants 15 to 94 were the first party and the principal defendants were the second party and the Magistrate decided that the second party were entitled to the possession of the same by his order dated 31st October 1918, that during the pendency of the 145 case the disputed jalkar was attached and Rs. 2750 was collected from the said Mehal by making settlement by auction and this sum was deposited in the Dacca criminal Court and was unjustly withdrawn by the defendants.

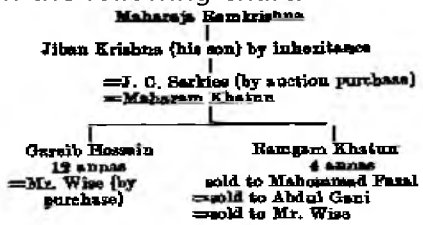
6. The order of the criminal Court has given rise to the cause of action for the suit which was brought on 30th September 1921 within three years from the date of the order under S. 145 of the Code. In para 10 of the plaint the plaintiffs say that they and their predecessors in interest have been in adverse possession of the jalkar for upwards of 70 years and have also acquired a right by adverse possession. In para 11 of the plaint the plaintiffs alleged that plaintiffs and their predecessors have continued to hold possession of the jalkar as of right, peacefully, unobstructedly without any interruption for 70 years on receiving rents, kabuliats and fish from the dealers in fish, by granting ijara settlements for a term fixed to them, and by holding the same in khas possession and they have acquired a prescriptive right and right by casement therein. On these allegations plaintiffs ask for the reliefs mentioned in the beginning of the judgment. Nothing further need be said about plaintiffs' claim based on prescriptive right and

light by casement as the claim on this basis has been abandoned in this Court. Several of the defendants filed their written defences but as they generally follow the same lines it is sufficient to set forth the defence raised in the written statement of the principal defendants 1 to 4.

7. These defendants contend (1) that the suit is barred by limitation; (2) they admit that the plaintiffs, defendants 1 to 5, the defendant 15 and defendants 16 to 35 have got Zamindary right in Zamindary 1, Raj Krishna Roy and defendants 16 to 94 have got howla right in one-third share of the Howla Shamdas Pal but they deny that the jalkar (fishery) described as lying within the boundaries mentioned in Sch. 1, in its entirety and the jalkar described in Sch. 2 are included in the said Zamindary 1 on the Howla Shyamdas Pal; (3) they deny all knowledge of the revenue sale of the Zamindary 1, Raj Krishna Roy in the month of Bhadra 1239 B.S. They deny the possession of Prem Chand and Desmukhya in the disputed jalkar, on the other hand they say that the Zamindar of Char Mukundia had been in possession of the disputed jalkar even from before the permanent settlement and the maliks of Zamindary 1 had not been in possession; (4) they contend that they are not bound by the decision in Suit No. 22 of 1851, by the resumption proceedings of 1861 as the proprietors of Char Mukundia (their predecessors) were no party to the said two decisions; (5) they contend that they are not bound by the decision in the suit brought by their ancestor

Prem Chand Roy against Pal Babus and Gopi Mohan Sen inasmuch as the owner of char Mukundia, the predecessor-in-interest of the defendants were no parties to the suit and this decision is no evidence against them; (6) they contend that neither the decision in Suit No. 22 of 1851 nor the statements of the plaintiffs in the said suit can be used as evidence against them as the owner of Char Mukundia was not party to the said suit; (7) they contend that the statements of plaintiffs predecessors cannot be used in their favour; (8) they say that in the demarcation proceedings of 1903 neither defendants 1 and 2 nor the father of defendants 3 and 4 made any statements or sign any papers and that the statements were made by the ijmali officers who acted under the direction of the plaintiffs; (9) they do not admit the accuracy of the map filed with the plaint; (10) they say that the arbitrator did not decide the question of the boundary between the two jalkars and allege that the subject matter of the dispute in respect of which the award was given became dry chur immediately after the decision of the proceedings under S. 145 which gave rise to the three title suits which culminated in the award; they contend that the award cannot operate as res judicata on the question of boundary.

(11) They contend further that neither the maliks of zamindary No. 1 nor those of Howla Shamdas Pal ever acquired any indefeasible right by adverse possession to the disputed jalkar. They next raise the defence that the plaintiffs the proforma defendants and the principal defendants 1 to 5 jointly own and possess the jalkar as lying within the boundaries of Sch. 1 excluding therefrom the boundaries of the Sch. 2 and the jalkar lying to the south thereof. These defendants then proceed to set forth their own title to the jalkar of Char Mukundia. There was a zamindari Char Mukundia and others Sarkar Fyzabad and others and there was a several fishery called Nadi Balabanta Bil Baor in the public tidal navigable river Padma, Padmabati or Ganges. These two separate mehals carried separate jamas; afterwards they were incorporated into one Touzi, viz., 110 at the time of the permanent settlement which has become touzi 4000 of the Faridpur Collectorate. It carries a Sadar jama of Rs. 3,142-10-3. The devolution of the zamindary from Maharaja Ram Krishna Roy to Mr. J.P. Wise is shown in the following chart.



8. Mr. Wise on whom the zamindary devolved eventually granted a Patni settlement in respect of the jalkar mehal to Girish Chandra Guha in 1279 B.S.—

1872 A.D. Girisk Chandra had 10 annas 8 pies share in the patni. Bepin had the remaining 5 annas 4 pies in the same. Girish mortgaged his 10 annas 8 pies share of the patni to Raja Sreenath Roy, Raja Janaki Nath Roy and Bai Sita Nath Roy Bahadur, father of defendants 3 and 4, and in execution of the mortgage decree the mortgagees purchsed the 10 annas 8 pies share of Girish in the patni in the year 1882 and took possession of the same in the same year and the remaining 5 annas 4 pies share are in ownership and possession of defendants 5 to 9. Mr. Wise sold the zamindary interest and the jalkar right to one Mr. David and defendants 1 and 2 and father of defendants 3 and 4 purchased the same from the Administrator General when David's

estate had been in his hands in the year 1301 B.S. : 1894 A.D.

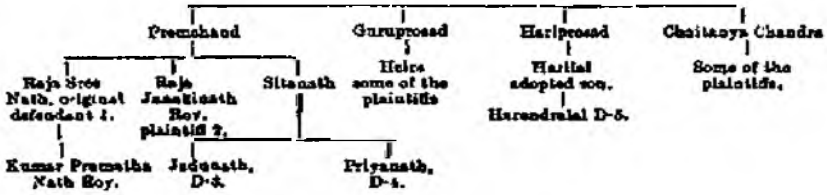
9. Defendants 1 and 4 give in a schedule attached to the written statement the boundaries of their jalkar which is known as Nadi Balawanta a local name for river Padma. They contend that the allegation that upstream of the jalkar claimed by the plaintiffs was Bangabaria and Narikelberia is false. They refer to a case under Regn. 49 of 1793 between plaintiffs' and defendants' predecessor by which it was decided that the downstream limit of their jalkar extended upto the south of Char Sahebdi, they contend that decree of 1816 inter partes operates as res judicata on the question of boundaries between the two jalkars. The upstream limit of the Bikrampur Jalkar they say has never been on the upstream side of the southern boundary of the said Char Sahebdi. They contend that they are not bound by the proceedings in the suit between Prem Chand Roy, their ancestor, as owner of the Bikrampur Jalkar and his cosharer the Pal Babus and Gopi Mohan Sen. They insist that the plaintiffs have no right to the jalkar claimed by them on the upstream side of the mouth of river Satar. They contend that they have been in adverse possession of the jalkar described in Sch. 2 to the plaint for more than hundred years and have acquired a title by adverse possession. They say that the father of the defendants 1 and 2 or the grandfather of defendants 3 and 4 had no right to the Mukundia Jalkar before their purchase of the patni right and whatever right they had to the jalkar mentioned in Sch. 2 of the plaint as cosharers of the plaintiffs in the Bikrampore Jalkar have been extinguished by adverse possession for 100 years and knowing this these defendants purchased on 17th Aswin 1289 B.S. (1882 A.D.) 10 annas and 8 pies share of the patni right of Girish Guha under the owner of Char Mukundia and subsequently purchased the entire maliki right in 1301 : 1894 and have been in adverse possession in both the said patni and zamindari rights for upwards of 12 years against the owners of the Bikrampore Jalkar. Defendants 6 to 9 take the same line of defence except that they deny the title of the plaintiffs to the Bikrampore Jalkar. On these pleadings several issues were framed.

10. They are to be found at p. 161, B.K.A. It will not be necessary to refer in detail to all the issues as the controversy has been considerably narrowed down before the Court. I will deal first with the question of the title of the plaintiffs to the Bikrampore Jalkar. The first part of issue 20 is as follows: Have the plaintiffs any independent or several fishery in the Padma? On this issue the Subordinate Judge decided against the plaintiffs and he seems to be of opinion that the plaintiffs must fail as they have not produced a grant from the Crown or have proved a lost grant. The burden is undoubtedly on the plaintiffs to show that the Bikrampore fishery has come to them under a valid and effectual grant from the Crown which has been sustained by the continuous use and employment of themselves, and their cosharers and their predecessors. It is now well settled that title to an exclusive fishery in a tidal, navigable river can be established by proving an express grant or by giving evidence that a grant though not capable of being produced will be presumed. Bearing this in mind we proceed to discuss whether plaintiffs have established the title to the fishery which they describe in their plaint. They say, as has been stated already, that their jalkar was an independent jalkar and was included in zamindari of touzi No. 1 of the Collectorate of the district of Dacca and the Sudder jama of the said zamindari No. 1 along with the said jalkar was fixed at Rs. 1,222-8-4. A one-third share of the jalkar formed the Howla Shamdus Pal for which a fixed jama was

payable to the maliks of the said zamindari and the remaining two-thirds share was held in khas possession by the maliks who used to enjoy the same by granting leases

to fishermen. This is not now disputed by the defendants-respondents.

11. This zamindari, the plaintiff's allege, was sold at auction for arrears of Government revenue in Bhadra 1239 B.S. 1832, when it was purchased in the names of Prem Chand Roy Choudhury and Iswar Chandra Das Mukhya in equal shares. The purchase is not disputed but what is disputed is that the purchase was not at a revenue sale, a matter to which we shall return hereafter. The purchase by Premchand in respect of the eight annas share is not disputed. It is not disputed that the purchase was for the benefit of Premchand and his three brothers, the predecessor of the plaintiffs and defendant 5. The following genealogical tree shows the relationship between plaintiffs and defendants 1 to 5.



12. It appears that plaintiffs and defendants 1 to 5 jointly owned the 8 annas share of the jalkar which was settled with touzi No. 1. There is no dispute as to shares of the plaintiff's in the jalkar whatever the limits of the jalkar are determined to be and therefore we have not thought it necessary to detail the shares of the plaintiffs and defendants respectively in the said jalkar. In this case it is true that no grants from the Government in the shape of pattas have been produced. But that fact will not affect plaintiffs' title if circumstances exist from which such a grant can be inferred. In dealing with this question it is important to remember what has been said by their Lordships of the Judicial Committee of the Privy Council in the case of *Sreenath Roy* v. *Dinabandhu Sen*[1], where the title of the defendants in the Mukundia Jalkar was challenged by the Sens. At p. 227 (*of* 41. *I.A.*) their Lordships said this: "Although, on the other hand, when Government has created a separate estate of jalkar at the period in question it is usual to find some entry of it in the decennial settlement papers, no evidence was forthcoming to show that jalkar grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of pattas or some other muniments which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user: Garth, C.J., in *Haridas Hal* v. *Mahommad Jaki*[2]."

13. In the case before us such secondary evidence exists and it is of such a character that we have no hesitation in saying that such a grant should be inferred. Indeed such a grant was recognized by the Government. In a proceeding between the Government and the proprietors of the Bikrampore Jalkar Government recognized that the Bikrampore Jalkar whose upstream limit was Deokhali belonged to the predecessors of the present plaintiffs and had been in existence from before 1195 B.S., prior to the date of the permanent settlement of 1793. It appears that in the year 1861 the Government assessed rent in respect of that portion of the Bikrampore jalkar from Bagra to Khaliya Bagra, a portion downstream of the portion of the jalkar now in dispute and Premchand Roy, predecessor of defendants 1 to 4 and Haralal Roy predecessor of defendant 5, as well as the plaintiffs' predecessors objected to the assessment and claimed that their jalkar whose upstream limit

was the peepul tree or aswatha tree in the house of Kaimuddi Chakladar of Jonojat on the northern bank of the river and the house of Sadananda Guha of Deokhali on the southern bank and the downstream limit was Dadpur and Matibhanga, etc., was their jalkar from before the date of the permanent settlement and should be released from assessment and their objection was allowed. The Deputy Collector was satisfied from the papers which consisted of decrees of Courts and a certain kobala of the year 1195 B.S., that Nadi Padmabati of defendants 1 to 9 which included Premchand Roy was not excluded in the decennial settlement from the Bikrampore zamindary No. 1 Raj Krishna Roy which admittedly belong to the plaintiffs and defendants 1 to 5: see B.K. B/188 Rubakari Ex. 17(c). This decision was affirmed by the Commissioner on 24th April 1862.

14. Apart from this there was dispute between the proprietors of Bikrampore Jalkar and the Mukundia Jalkar regarding the boundaries between the two jalkars so far back as the year 1197 B.S., as will appear from the Rubakari of civil Court of District Jalalpur, Ex. HBKB, p. 54 and this is undoubted evidence that the right of the proprietors of the Bikrampore zamindari was recognized by the proprietors of Char Mukundia zamindari and the dispute was as to the boundaries: see BLB, p. 551 to 10. Indeed it is admitted before us by Mr. Dwarkanath Chakravarty who appears for the Raja defendants that the Bikrampore zamindars had a jalkar downsteam of the Mukundia Jalkar and the same admission is made before us by Mr. Gunada Charan Sen who appears for defendants 5 to 9. Plaintiff's predecessor as well as the brothers of Premchand the predecessor of defendants 1 to 4 purchased the Bikrampore fishery at a revenue sale in the year 1832 : 1239 B.S. The defendants while admitting the purchase of the Bikrampore Jalkar by Premchand for himself and his brothers deny that the purchase was made at a sale for arrears of Government Revenue. Indeed it is too late now to raise the contention, for it appears from a decision of the year 1852 of the Principal Sudder Amin of Dacca in which Premchand Roy was the plaintiff and the Collector of Dacca on behalf of the Government was the defendant it was asserted by Premchand Roy that he had along with Desmukhya defendant purchased the Bikrampore zamindari at a revenue sale in the month of Bhadra 1239 B.S., corresponding to 1832: see Ex. 16 dated 15th June 1852 Book B-87 (bottom) and that position was accepted by the Court and the plaintiff obtained a decree against the Government. It is certain that this is good evidence of the assertion by Premchand of his purchase at a revenue sale. If Premchand was not a revenue sale purchaser the fact would at once have been challenged by the Government. Indeed the denial of defendants 1 to 4 in this behalf is very evasive for they say in para. 4 of the written statement that they are not aware of the revenue purchase. It is difficult indeed for defendants 1 to 4 to say that their ancestor Premchand was making an untrue assertion in this respect in 1852, and the written statement is therefore put in that evasive form. The Subordinate Judge says that the decree Ex. 16 of 1852 where there is recital about the revenue purchase by Premchand Roy is not admissible in evidence against the owners of Mukundia Jalkar as they were no parties to the said suit. That decree Ex. 16 although not inter partes is admissible in evidence as evidence of a transaction within the meaning of Section 13 of the Evidence Act. It is too late now to contend after the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Ramranjan Chakravarty* v. *Ram Narain Singh*[3] that the decree is not admissible in evidence against the defendants. We are unable to follow the reasoning of the Subordinate Judge:

> "that the recital is in first part of the decree and the defendants rightly question its binding effect: see B.K.A., p. 520, 115."

15. In the absence of any evidence to the contrary and having regard to the fact

that the recital is to be found in a very ancient document (1852) by the ancestor of defendants 1 to 4 and having regard to the evasive nature of the written statements of defendants 1 to 4, we are of opinion that plaintiffs have proved the purchase of the Bikrampore Jalkar by Premchand at the revenue sale.

16. Mr. Jogesh Chandra Roy appearing for the plaintiffs-appellants have admitted

the title of defendants 1 to 4 in the Char Mukundia Jalkar and have admitted that the said jalkar appertains to Touzi No. 4,000 of the Collectorate of the District of Faridpur.

17. The question of boundaries is the more difficult. This dispute regarding boundaries between the two jalkars commenced in very ancient times. The proceedings of those times are fortunately on the record of this case. We are of opinion that the decision of the years 1816 and 1843, Ex. H(B/54) and Ex. CBBKB-68 should form the basis of our decision on the question of boundaries. (His Lordship then considered the evidence and proceeded.) It is very difficult to say at this distance of time that possession of the fishery was exercised up to that limit and it seems less consistent with probabilities that after the defeat of the plaintiff's predecessor in the suit of 1843 the Mukundia Zamindars would allow the Bikrampore Zamindars to exercise possession on that portion of the fishery from which they have been dispossessed by the decree of 1816 and the delivery of possession by the Munsif Kashi Nath. As pointed out by Lord O'Hagan in the Scotch case of *Lord Advocate* v. *Lord Lovat*[4] the course of conduct which the proprietor might be expected to follow with regard to his own interests must be taken into account in determining the sufficiency of a possession of the fishery. (His Lordship then considered the leases granted by the proprietors and proceeded.) Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute a prima facie title: see *Bristow* v. *R. Cormican*[5].

18. For the purpose of establishing title to the upstream of the Deokhali-Sahebdi line up to which plaintiffs' title has been established it becomes incumbent on the plaintiffs to establish by clear and convincing evidence that actual possession was in accordance with their assertion. We are of opinion that such evidence is lacking in the present case. We do not see any reason to doubt the authenticity of these leases and kabulyats or counter parts of leases. The plaintiffs were certainly entitled to grant leases up to the Deokhali Sahebdi line up to which their upstream limit had been determined and they actually granted these leases but in doing so they made assertions of a larger boundary of their Jalkar than they were entitled to.

19. In dealing with these ancient leases and kabulyats we are not unmindful of what was said by the House of Lords in the case just cited, *Bristow* v. *Cormican*[5], Lord Chancellor Cairns in delivering his speech said that these old leases have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself as lessor for title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title to it these circumstances are themselves admissible as evidence of title. They are real transactions between man and man, not intelligible except on the footing of title or at least an honest belief in title. The payment of rent under such a lease is a further and additional fact also admissible as evidence on the same principle: p. 652-3 (Appeal cases). But the matter in controversy before us is whether plaintiffs had made out such a possessory title to the fishing in that part of

the fishery which lies upstream of the Deokhali-Sahebdi limit as to entitle them to sue the defendants for trespass to that part of the Jalkar. (His Lordship then again considered the evidence of leases and holding that it was insufficient proceeded.) It is next argued for the plaintiffs that the defendants are precluded from contending that the upstream limit of their Jalkar was not on the northern bank, the peepul tree standing at the Bari of Keamuddi Chakladar of Janajat, and the same having been diluviated the Khal of Debinagore in the same line with the above, on the southern bank of the river, the peepul tree on the south of the Bari of Sada Nanda Guha of Deokhali by reason of the award of Mr. Sarada Charan Mitra C. 267 which was given in Suits Nos. 37 of 1909 and 51 of 1909 and No. 8 of 1909 which were inter partes on the principle

of res judicata. The award was made part of the decrees in those suits. It becomes necessary therefore to examine the decision and the pleadings in those cases and the circumstances which led to the reference to arbitration which resulted in the award. A proceeding under Section 145 of the Cr PC, was started on 15th July 1905 in respect of the portion of the Jalkar which lay within the boundaries ABCD as shown in the sketch map attached to the plaint: see Vol. B, Map 1. The boundaries of ABCD are North. The line drawn from Bari of Arjan Khan Munshi of Nanda Dulalpur and Char Amirabad on the west bank of the river towards the East up to the main current. South, the line drawn from the Bari of Habib Ulla Ukil on the western bank of the river towards the East up to main current in the same line. East, main current. West, from the Bari of Arjan Khan Munshi of Char Amirabad Nandalpur up to the Bari Habibulla. See plaint of Baja in Suit No. 8 (C-181). The plaintiffs and the defendants and their ijaradars were parties to these proceedings. The Magistrate was unable to find out which of the parties were in actual possession and attached the portion of the Jalkar within these boundaries till a competent civil Court decided between the rights of the parties. The Raja defendants instituted Suit No. 8 of 20th February 1908 in the Court of Subordinate Judge of Faridpur alleging the downstream limit of their Jalkar to be the Koshabhanga and Satar line see plaint (C-174 181) whereas the plaintiffs brought Suit No. 37 alleging their upstream limit the Janajat (which after diluviation had become the site of Debinagar Khal) and Deokhali line: see (C. 279, 290) and Chandra Benode Pal and others instituted Suit No. 51. The issues in Title Suit No. 8 of 1909 in which the Raja defendants were plaintiffs were nine in number. Issue 8 ran as follows:

> "Whether the disputed Jalkar is within the limits of plaintiffs (Rajas) Mahal Char Mukundia. If not can the plaintiffs get any relief?"

20. All the matters in dispute were referred with the consent of all parties to the arbitration of Mr. Sarada Charan Mitra a former Judge of the High Court after he had resigned office and he gave an award declaring that the

> "Jalkar in dispute in the three cases was part and parcel of the zamindari known as Bikrampur belonging to all the landlord parties as claimed in Suit No. 37 of 1909 (present plaintiff's suit) and not a part of the Zamindary Char Mukundia as claimed by the plaintiffs in Suit No. 8 of 1909. No objection was taken in time by the Raja defendants to this award and the award was confirmed and decrees followed on this award: see BKC p. 269. The Raja defendants preferred appeals to the Court of the District Judge of Faridpur and the learned District Judge (the late Mr. Garlick) in dismissing the appeal used rather hard expressions and said that the appeal was "an immoral appeal" and that the making of the appeal was a dishonest breach of a binding agreement."

21. The result wat that the decrees on the award became final. It is contended for the plaintiffs that these decrees operate as res judicata and bar the defence that the down-stream limit of the Mukundia Jalkar was the Koshabhanga Satar line or as has been put by the plaintiffs' learned advocate they discredit the Koshabhanga line. The portion of the fishery, the subject-matter of the suits is not included in the portion now in dispute. The rule of res judicata as embodied in Section 11 of the CPC, 1908, does not depend upon the identity of the subject-matter but it depends on the identity of the issues. The difficulty in arriving at a conclusion on this part of the case is that the learned arbitrator has not recorded his finding on the issue as to what was the downstream limit of the defendant's Jalkar. If he had done so, the matter undoubtedly would have been res judicata. It is contended for the plaintiffs that no decision would have been given for the plaintiffs unless the learned Judge was of opinion that the Koshabhanga line was not the downstream limit of the defendant's Jalkar or which comes to the same thing, the upstream limit of the plaintiffs' Jalkar. In order to consider whether a previous decision is res judicata or not the substantial effect of what has been decided in the case has to be considered. It seems to me that the decrees are conclusive to this extent that the downstream limit of the defendant's Jalkar must be above the line where the line DC in the sketch map cuts the river, but it is not res judicata on the question that any portion above that line is the upstream limit of the plaintiff's Jalkar. (His Lordship then considered the evidence and holding that the plaintiff had failed to prove adverse possession beyond Deokhali-Sahebdi line proceeded to consider the commissioner's map.) It is argued

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for defendants 6 to 9 that the location of Sabdy char by the commissioner is obviously incorrect on the face of Rennel's map G-13 for it comes between Bowbapur and Nasseypur but it is shown by the commissioner on the north of Nasipur.

22. Not a single question was put to the commissioner in cross-examination in this behalf and it is easy to propound riddles before the Court of appeal. Rennel's map indicated correctly the course of rivers but it cannot be regarded as giving correctly the direction of villages for the method adopted for ascertaining village was by gun and sound, an extremely unscientific method, which makes reliance upon it difficult for the purpose of ascertaining true direction of villages. It is next argued that the river in 1819 at the time of delivery of possession by Kashi Nath was flowing north to south and Sahebdi char was to the cast of Deokhali and in a line with Deokhali, Chauddarasi and Harina as appears from the statement of the plaintiffs in the suit which led to the rubakari of 1843, and then it is said that we know the positions of the three villages there can be no escape from the position that Sabdy chur must be to the east of Deokhali and not towards its north-east. For what was once in the east of a particular village must always remain towards the east however the course of the river may change. But we are not troubled with this consideration seeing that between 1819 and 1840, when the suit was filed by plaintiff's predecessor, the river was flowing east to west and we have the relative positions of Deokhali and Sahebdi with the changed course of the river, one to the south of the other. We have got the relative position of the villages with reference to the changed course of the river from the statements made by the Mukundia Zamindars at a time much nearer their ken, and it transpires from their statement that Sahebdi char was on the northern bank of the river in 1843, while Deokhali was on the southern bank. There is no substance in the argument that Sahebdi was on the eastern bank at the time of the delivery of possession by Kashi Nath in 1819 : 1226 B.S. Whatever the relative position was in 1819 we have got this:

that in 1843 when the river was flowing east to west Sahebdi char was on the north of Deokhali and that is the present position as shown in the Commissioner's map. If therefore we join point No. 160 of the Commissioner's map which is the site of Asawtha tree to a point slightly to the north of the northernmost Sabdy char shown in burnt-sienna colour in the Commissioner's map and produce it towards the river we find the line cuts a point between stations 7 and 8 on the southern bank and station No. 28 on the northern bank of the present flowing river Padma and we think that the upstream limit of the plaintiff's jalkar is the line which joins a point between stations 7 and 8 to station No. 28 on the opposite bank of the river. Plaintiffs will be entitled to get a decree for recovery of joint possession provided their right has not been lost by adverse possession of the defendants for more than the statutory period of 12 years, or by ouster by the defendants for more than the statutory period.

23. We therefore proceed to discuss the question of ouster or adverse possession. In considering this question of adverse possession it is important to bear in mind the distinction between the elements necessary to constitute adverse possession when Mukundia Zamindari had not passed into the hands of defendants 1 to 4 who are cosharers in the Bikrampore Jalkar and the period after 1882 when it passed into their hands. It is conceded on behalf of the appellants that if there had been good evidence of adverse possession of the jalkar up to the Koshabhanga Satar line between 1867 and 1882 plaintiffs' title must be held to be extinguished. On 26th April 1867 Mr. Wise accepted a kabuliyat from one Kali Kumar De where the assertion was made that the downstream limit was Koshabhanga to Satar line: see Ex. B, p. 202. On 20th November 1872-Mr. Wise grants a patni patta (Ex. 5) to Girish Chandra Guha in which the same downstream limit of the Mukundia Jalkar is asserted, *B* 226 and on 17th January 1873 the corresponding patni kabuliyat is executed by Girish Chendra Guha. But after the execution of this patta and kabuliyat we have got no evidence of possession of the jalkar within the Koshabhanga Satar line for nearly eight years when an ex parte decree for rent obtained by Girish Chandra on 24th November 1882 for some portion of the

fishery near the mouth of the Satar river. This decree which was obtained by Guha is certainly evidence of Guha's possession but its probative value is very small. The weight to be attached to it must be very small seeing that it is not shown that the decree was executed and rent realized: see *Neil* v. *Duke of Devonshire*[6].

24. It is an important circumstance that there is no assertion by the Mukundia Zamindar of his right to the jalkar up to the Koshabhanga Satar line after the decree of 1816 and 1843 which defeated his claim up to that limit up to the year 1867 when for the first time Mr. Wise accepted the kabuliyat from Kali Kumar De alleging the upstream limit to be Koshabhanga and Satar line. In order to establish title by adverse possession more convincing evidence beyond solitary ex parte decree for rent should have been forthcoming. Girish Chandra mortgaged his two-thirds share in the patni to the Raja brothers and two-thirds share of the patni in the Mukundia Jalkar was purchased by the Raja and his brothers on 20th March 1882 [see Ex. G-B-245] and the peon's report of delivery of possession is dated 11th July 1882. This evidence is in our opinion not sufficient to establish actual adverse possession of the stretch of water extending up to Koshabhanga-Satar line. It is not likely that the plaintiffs' predecessors-in-title would allow possession to be wrested from them beyond the Deokhali and Sadaikhali limit when they were able to keep Prithipati Ram Krishna Roy the earlier Mukundia Zamindar out of possession even after the decree of 1816. The

Guhas have not produced a single kabuliyat or patta from fishermen showing their possession of the jalkar up to the Koshabhanga-Satar line between 1872 to 1880 although Purna Chandra Guha deposes in (BK 478 A 20 to 30) that he saw registered kabuliyats in his grandfather's time; and on this evidence they cannot certainly found their title by adverse possession.

25. After 1882 when the Raja defendants 1 to 4 became the owners of the Mukundia Jalkar they were also cosharers of the Bikrampore Jalkar possessing the portion of the fishery downstream of the Mukundia Jalkar. When granting leases to fishermen up to Koshabhanga limit they might be exercising the right both as owners of Mukundia Jalkar and owners of the Bikrampore Jalkar. The question to be determined with reference to this part of the case is when did they give notice to the plaintiffs, their cosharers, in the Bikrampur Jalkar that they were granting the leases up to Koshabhunga-Satar line in their capacity as owners and patnidars of the Mukundia Jalkar and not as the cosharers of the Bikrampore Jalkar. The numerous pattas and kabuliyats (S series) which are undoubtedly genuine documents were executed in favour of or by fishermen for large sums of rent, on the assertion that the fishery up to Koshabhanga-Satar line belong to them in their right as Mukundia Zamindars; but it does not appear that plaintiffs had any notice of the assertion of this hostile title till within 12 years of suit. Mere participation of the rent and profits of a jalkar without more by the Raja cosharers even for a long period of time is not sufficient to constitute ouster: see *Corea* v. *Appuhamy*[7] and *Hardit Singh* v. *Gurmukh Singh*[8]. (After further considering evidence re: adverse possession by the defendants the judgment proceeded). It is to be served that these leases after the institution of the suit of 1909 are of very little use after they as they were given after the dispute had arisen. It is to be observed that between 1906-18 both parties were trying to enlarge their respective rights in the jalkar and it cannot be said that the defendants were in uninterrupted and exclusive adverse possession of the portion of the fishery to which plaintiffs have established their title. Reference has been made to the case of *Raja Sree Nath* v. *Dina Bandu Sen*[1] and it is said that the defendants openly asserted in that suit that their downstream boundary was the Koshabhanga-Satar line. The present plaintiffs were no parties to the said suit and the-portion in dispute in that case was admittedly above the portion of the fishery now in dispute. Great stress was laid by the learned advocate for defendants 1 to 4 on the following passage in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Sreenath* v. *Dinabandhu*[1].

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> "and by means of such proceedings in 1797, 1816, 1843 by means of similar proceedings in litigation with some of the present defendants and by a long succession of ijara pattas and kabuliyats which they put in evidence, they prove de facto possession, as under their jalkar rights of the whole fishery in both streams between their upper and their lower limits."

26. But as the present plaintiffs were no parties to the suit this finding is not strictly evidence against them. The question of adverse possession by the defendants loses much force as it appears that there were disputes prior to 1917 regarding the collection of rent from the disputed portion of the jalkar between plaintiffs' and defendants' lessees which led to proceedings under Section 144 of the Cr PC, and the matter was compromised, [see Ex. 15 C, Vol. 1 P. 1] and the order under S. 144 was rescinded. Indeed it is very frankly admitted by the learned advocate for defendants 6

to 9 that the decision of the case should depend on the decision on the question of title and not on the assertions and counter-assertions regarding the upstream limit of the plaintiffs and downstream limit of the defendant's jalkar in the numerous leases and kabuliyats. We are on the whole of opinion that the real dispute with regard to the portion of the fishery now in dispute arose with the action of Sadar Ali Bepari, one of the fishermen lessees of the Baja defendants whose looting of the fish from the disputed portion resulted in the 145 proceedings which terminated on 31st October 1918 in favour of the defendants. The present suit has been brought within three years from that date and is well within time. We are of opinion that plaintiff's title to the portion to which he has established their title has not been lost by adverse possession of the defendants. (The remaining portion of the judgment is not necessary for reporting—Ed.).

S.K. GHOSE, J.:— I agree.

R.K.

27. *Suit decreed*.

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1. AIR 1914 PC 48 : 41 IA 221 : 42 Cal 489 : 25 IC 467 (PC).

2. (1885) 11 Cal 434.

3. (1895) 22 Cal 533 : 22 IA 60 (PC).

4. (1880) 5 AC 273.

5. (1878) 3 AC 641.

6. (1882) 8 AC 135 : 31 WR 622.

7. (1912) AC 230 : 81 LJ PC 151.

8. AIR 1918 PC 1 : 64 PR 1918 (PC).

(1962) 1 SCR 574 : AIR 1961 SC 1457

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, A.K. SARKAR, K.N. WANCHOO, K.C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.)

Petition No. 66 of 1956

DARYAO AND OTHERS ... Petitioners;

Versus

STATE OF U.P. AND OTHERS ... Respondents.

Petition No. 67 of 1956

HURMAT, SON OF SATWA ... Petitioner;

Versus

STATE OF U.P. AND OTHERS ... Respondents.

Petition No. 8 of 1960

MAHENDRA LAL JAINI ... Petitioner;

Versus

STATE OF U.P. AND OTHERS ... Respondents.

Petition No. 77 of 1957

ROOP CHAND ... Petitioner;

Versus

STATE OF PUNJAB AND ANOTHER ... Respondents.

Petition No. 15 of 1957

KRISHAN KUMAR AND OTHERS ... Petitioners;

Versus

UNION OF INDIA AND ANOTHER ... Respondents.

Petition No. 5 of 1958

SADASHIV RAMCHANDRA DALVI ... Petitioner;

Versus

COLLECTOR OF NASIK AND ANOTHER ... Respondents.

Writ Petitions Nos. 66 & 67/56, 8/60, 77/57, 15/57 and 5/58*, decided on March 27, 1961

Advocates who appeared in this case :

Naunit Lal, Advocate, for the Petitioners in WPs Nos. 66 & 67 of 1956;

C.P. Lal Advocate, for Respondent 1 in WPs Nos. 66 & 67 of 1956;

Bhawani Lal and P.C. Agrawal, Advocates, for Respondents 3 & 4 in WPs Nos. 66 & 67 of 1956;

C.B. Agarwala, Senior Advocate (K.P. Gupta, Advocate, with him), for the Petitioner in WP No. 8 of 1960;

Veda Vyasa, Senior Advocate (C.P. Lal, Advocate, with him), for the Respondents in;

Pritam Singh Safeer, Advocate, for the Petitioner in WP No. 77 of 1957;

S.M. Sikri, Advocate General, Punjab, N.S. Bindra, Senior Advocate, D. Gupta, Advocate with them), for Respondent 1 in WP No. 77 of 1957;

Govind Saran Singh, Advocate, for Respondent 2 in WP No. 77 of 1957;

A.N. Sinha and Raghunath, Advocates, for the Petitioner in WP No. 15 of 1957;

C.K. Daphtary, Solicitor-General for India; N.S. Bindra, Senior Advocate (R.H. Dhebar, Advocate, with them), for the Respondent in WP No. 15 of 1957;

B.R.L. Iyengar, Advocate, for the Petitioner in WP No. 5 of 1958;

C.K. Daphtary, Solicitor-General for India (R. Ganapathy Iyer and R.H. Dhebar, Advocates, with him), for the Respondents in WP No. 5 of 1958.

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, J.— These six writ petitions filed under Article 32 have been placed before the Court for final disposal in a group because though they arise between separate parties and are unconnected with each other a common question of law arises in all of them. The opponents in all these petitions have raised a preliminary objection against the maintainability of the writ petitions on the ground that in each case the petitioners had moved the High Court for a similar writ under Article 226 and the High Court has rejected the said petitions. The argument is that the dismissal of a writ petition filed by a party for obtaining an appropriate writ creates a bar of res judicata against a similar petition filed in this Court under Article 32 on the same or similar facts and praying for the same or similar writ. The question as to whether such a bar of res judicata, can be pleaded against a petition filed in this Court under Article 32 has been adverted to in some of the reported decisions of this Court but it has not so far been fully considered or finally decided; and that is the preliminary question for the decision of which the six writ petitions have been placed together for disposal in a group. In dealing with this group we will set out the facts which give rise to Writ Petition No. 66 of 1956 and decide the general point raised for our decision. Our decision in this writ petition will govern the other writ petitions as well.

2. Petition No. 66 of 1956 alleges that for the last fifty years the petitioners and their ancestors have been the tenants of the land described in Annexure A attached to the petition and that Respondents 3 to 5 are the proprietors of the said land. Owing to communal disturbances in the Western District of Uttar Pradesh in 1947, the petitioners had to leave their village in July, 1947; later in November, 1947, they returned but they found that during their temporary absence Respondents 3 to 5 had entered in unlawful possession of the said land. Since the said respondents refused to deliver possession of the land to the petitioners the petitioners had to file suits for ejectment under Section 180 of the U.P. Tenancy Act, 1939. These suits were filed in June, 1948. In the trial court the petitioners succeeded and a decree was passed in their favour. The said decree was confirmed in appeal which was taken by Respondents 3 to 5 before the learned Additional Commissioner. In pursuance of the appellate decree the petitioners obtained possession of the land through Court.

3. Respondents 3 to 5 then preferred a second appeal before the Board of Revenue under Section 267 of the U.P. Tenancy Act, 1939. On March 29, 1954, the Board allowed the appeal preferred by Respondents 3 to 5 and dismissed the petitioner's suit with respect to the land described in Annexure A, whereas the said respondents' appeal with regard to other lands were dismissed. The decision of the Board was based on the ground that by virtue of the U.P. Zamindary Abolition and Land Reforms (Amendment) Act 16 of 1953 Respondents 3 to 5 had become entitled to the possession of the land.

4. Aggrieved by this decision the petitioners moved the High Court at Allahabad under Article 226 of the Constitution for the issue of a writ of certiorari to quash the said judgment. Before the said petition was filed a Full Bench of the Allahabad High Court had already interpreted Section 20 of the U.P. Land Reforms Act as amended by Act 16 of 1953. The effect of the said decision was plainly against the petitioners' contentions, and so the learned advocate who appeared for the petitioners had no alternative but not to press the petition before the High Court. In consequence the

said petition was dismissed on March 29, 1955. It appears that Section 20 has again been amended by Section 4 of Act 20 of 1954. It is under these circumstances that the petitioners have filed the present petition under Article 32 on March 14, 1956. It is plain that at the time when the present petition has been filed the period of limitation prescribed for an appeal under Article 136 against the dismissal of the petitioners' petition before the Allahabad High Court had already expired. It is also clear that the grounds of attack against the decision of the Board which the petitioners seek to raise by their present petition are exactly the same as the grounds which they had raised before the Allahabad High Court; and so it is urged by the respondents that the present petition is barred by res judicata.

5. Mr Agarwala who addressed the principal arguments on behalf of the petitioners in this group contends that the principle of res judicata which is no more than a technical rule similar to the rule of estoppel cannot be pleaded against a petition which seeks to enforce the fundamental rights guaranteed by the Constitution. He argues that the right to move the Supreme Court for the enforcement of the fundamental rights which is guaranteed by Article 32(1) is itself a fundamental right and it would be singularly inappropriate to whittle down the said fundamental right by putting it in the straight jacket of the technical rule of res judicata. On the other hand it is urged by the learned Advocate-General of Punjab, who led the respondents, that Article 32 (1) does not guarantee to every citizen the right to make a petition under the said article but it merely gives him the right to move this Court by appropriate proceedings, and he contends that the appropriate proceedings in cases like the present would be proceedings by way of an application for special leave under Article 136 or by way of appeal under the appropriate article of the Constitution. It is also suggested that the right to move which is guaranteed by Article 32(1) does not impose on this Court an obligation to grant the relief, because as in the case of Article 226 so in the case of Article 32 also the granting of leave is discretionary.

6. In support of the argument that it is in the discretion of this Court to grant an appropriate relief or refuse to do so reliance has been placed on the observations made in two reported decisions of this Court. In *Laxmanappa Hanumantappa Jamkhandi* v. *Union of India*[1] this Court held that as there is a special provision in Article 265 of the Constitution that no tax shall be levied or collected except by authority of law, clause 1 of Article 31 must be regarded as concerned with deprivation of property otherwise than by imposition or collection of tax and as the right conferred by Article 265 is not a fundamental right conferred by Part III of the Constitution, it cannot be enforced under Article 32. In other words, the decision was that the petition filed before this Court under Article 32 was not maintainable; but Mahajan, C.J., who spoke for the Court, proceeded to observe that "even otherwise in the peculiar circumstances that have arisen it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court". The learned Chief Justice has also added that when this position was put to Mr Sen he fairly and rightly conceded that it was not possible for him to combat this position. To the same effect are the observations made by the same learned Chief Justice in *Dewan Bahadur Seth Gopal Das Mohta* v. *Union of India*[2]. It will, however, be noticed that the observations made in both the cases are *obiter*, and, with respect, it would be difficult to treat them as a decision on the question that the issue of an appropriate writ under Article 32 is a matter of discretion, and that even if the petitioner proves his fundamental rights and their unconstitutional infringement this Court nevertheless can refuse to issue an appropriate writ in his favour. Besides, the subsequent decision of this Court in *Basheshar Nath* v. *CIT*[3] tender to show that if a petitioner makes out a case of illegal contravention of his fundamental rights he may be entitled to claim an appropriate relief and a plea of waiver cannot be raised against his claim. It is true that the question of res judicata did not fall to be considered in that case but the tenor of all

the judgments, which no doubt disclose a difference in approach, seems to emphasise the basic importance of the fundamental rights guaranteed by the Constitution and the effect of the decision appears to be that the citizens are ordinarily entitled to appropriate relief under Article 32, once it is shown that their fundamental rights have been illegally or unconstitutionally violated. Therefore, we are not impressed by the argument that we should deal with the question of the applicability of the rule of res judicata to a petition under Article 32 on the basis that like Article 226 Article 32 itself gives merely a discretionary power to the Court to grant an appropriate relief.

7. The argument that Article 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case seems to us to be unsound. It is urged that in a case where the petitioner has moved the High Court by a writ petition under Article 226 all that he is entitled to do under Article 32(1) is to move this Court by an application for special leave under Article 136; that, it is contended, is the effect of the expression "appropriate proceedings" used in Article 32 (1). In our opinion, on a fair construction of Article 32(1) the expression "appropriate proceedings" has reference to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by appropriate proceedings. That is why we must proceed to deal with the question of res judicata on the basis that a fundamental right has been guaranteed to the citizen to move this Court by an original petition wherever his grievance is that his fundamental rights have been illegally contravened.

8. There can be no doubt that the fundamental right guaranteed by Article 32(1) is a very important safeguard for the protection of the fundamental rights of the citizens, and as a result of the said guarantee this Court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in *Romesh Thappar* v. *State of Madras*[4] in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Article 32 on the ground that as a matter of orderly procedure the petitioner should first have resorted to the High Court under Article 226, and observed that "this Court is thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights". Thus the right given to the citizen to move this Court by a petition under Article 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of res judicata this aspect of the matter has no doubt to be borne in mind.

9. But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is

founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

10. In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William B. Hale in the leading *Duchess of Kingston case*[5]. Said Sir William B. Hale "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation[6]". Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (p. 187, paragraph 362). "Res judicata", it is observed in *Corpus Juris*, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — *interest republicae ut sit finis litium*; the other, the hardship on the individual that he should be vexed twice for the same cause — *nemo debet bis vexari pro eadem causa*"[7]. In this sense the recognised basis of the rule of *res judicata* is different from that of technical estoppel. "Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law"[8]. Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted.

18. The same question can be considered from another point of view. If a judgment has been pronounced by a court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law. Therefore, if a judgment has been pronounced by the High Court in a writ petition filed by a party rejecting his prayer for the issue of an appropriate writ on the ground either that he had no fundamental right as pleaded by him or there has been no contravention of the right proved or that the contravention is justified by the Constitution itself, it must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself. The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observed: "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences"[9]. Similar is the statement of the law in *Corpus Juris*: "the doctrine of estoppel by judgment does not rest on any superior authority of the court rendering the judgment, and a judgment of one court is a bar to an action between the same parties for the same cause in the same court or in another court, whether the latter has concurrent or other jurisdiction[10]". This rule is subject to the limitation that the judgment in the former action must have been rendered by a

court or tribunal of competent jurisdiction[10]. "It is, however, essential that there should have been a judicial determination of rights in controversy with a final decision thereon"[11]. In other words, an original petition for a writ under Article 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Article 226. There can be little doubt that the jurisdiction of this Court to entertain applications under Article 32 which are original cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of High Courts pronounced in writ petitions under Article 226. Thus, on general considerations of public policy there seems to be no reason why the rule of res judicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Article 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced be a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained.

19. This Court had occasion to consider the application of the rule of res judicata to a petition filed under Article 32 in *M.S.M. Sharma* v. *Dr Shree Krishna Sinha*[12]. In that case the petitioner had moved this Court under Article 32 and claimed an appropriate writ against the Chairman and the Members of the Committee of Privileges of the State Legislative Assembly. The said petition was dismissed. Subsequently he filed another petition substantially for the same relief and substantially on the same allegations. One of the points which then arose for the decision of this Court was whether the second petition was competent, and this Court held that it was not because of the rule of res judicata. It is true that the earlier decision on which res judicata was pleaded was a decision of this Court in a petition filed under Article 32 and in that sense the background of the dispute was different, because the judgment on which the plea was based was a judgment of this Court and not of any High Court. Even so, this decision affords assistance in determining the point before us. In upholding the plea of res judicata this Court observed that the question determined by the previous decision of this Court cannot be reopened in the present case and must govern the rights and obligations of the parties which are substantially the same. In support of this decision Sinha, C.J., who spoke for the Court, referred to the earlier decision of this Court in *Raj Lakshmi Dasi* v. *Banamali Sen*[13] and observed that the principle underlying res judicata is applicable in respect of a question which has been raised and decided after full contest, even though the first Tribunal which decided the matter may have no jurisdiction to try the subsequent suit and even though the subject-matter of the dispute was not exactly the same in the two proceedings. We may add incidentally that the Court which tried the earlier proceedings in the case of *Raj Lakshmi Dasi*[13] was a court of exclusive jurisdiction. Thus this decision establishes the principle that the rule of res judicata can be invoked even against a petition filed under Article 32.

20. We may at this stage refer to some of the earlier decisions of this Court where the present problem was posed but not finally or definitely answered. In *Janardan Ready* v. *State of Hyderabad*[14] it appeared that against the decision of the High Court a petition for special leave had been filed but the same had been rejected and this was followed by petitions under Article 32. These petitions were in fact entertained though on the merits they were dismissed, and in doing so it was observed by Fazl Ali, J., who delivered the judgment of the Court, that "it may, however, be observed that in this case we have not considered it necessary to decide whether an application under

Article 32 is maintainable after a similar application under Article 226 is dismissed by the High Court, and we reserve our opinion on that question". To the same effect are the observations made by Mukherjea, J., as he then was, in *Syed Qasim Razvi* v. *State of Hyderabad*[15].

21. On the other hand, in *Bhagubhai Dullabhabhai Bhandari* v. *District Magistrate, Thana*[16] the decision of the High Court was treated as binding between the parties when it was observed by reference to the said proceedings that "but that is a closed chapter so far as the Courts including this court also are concerned inasmuch as the petitioner's conviction stands confirmed as a result of the refusal of this Court to grant him special leave to appeal from the judgment of the Bombay High Court". In other words, these observations seem to suggest that the majority view was that if an order of conviction and sentence passed by the High Court would be binding on the convicted person and cannot be assailed subsequently by him in a proceeding taken under Article 321 when it appeared that this Court had refused special leave to the said convicted person to appeal against the said order of conviction.

22. The next question to consider is whether it makes any difference to the application of this rule that the decision on which the plea of res judicata is raised is a decision not of this Court but of a High Court exercising its jurisdiction under Article 226. The argument is that one of the essential requirements of Section 11 of the Code of Civil Procedure is that the Court which tries the first suit or proceeding should be competent to try the second suit or proceeding, and since the High Court cannot entertain an application under Article 32 its decision cannot be treated as res judicata for the purpose of such a petition. It is doubtful if the technical requirement prescribed by Section 11 as to the competence of the first Court to try the subsequent suit is an essential part of the general rule of res judicata; but assuming that it is, in substance even the said test is satisfied because the jurisdiction of the High Court in dealing with a writ petition filed under Article 226 is substantially the same as the jurisdiction of this Court in entertaining an application under Article 32. The scope of the writs, orders or directions which the High Court can issue in appropriate cases under Article 226 is concurrent with the scope of similar writs, orders or directions which may be issued by this Court under Article 32. The cause of action for the two applications would be the same. It is the assertion of the existence of a fundamental right and its illegal contravention in both cases and the relief claimed in both the cases is also of the same character. Article 226 confers jurisdiction on the High Court to entertain a suitable writ petition, whereas Article 32 provides for moving this Court for a similar writ petition for the same purpose. Therefore, the argument that a petition under Article 32 cannot be entertained by a High Court under Article 226 is without any substance; and so the plea that the judgment of the High Court cannot be treated as res judicata on the ground that it cannot entertain a petition under Article 32 must be rejected.

23. It is, however, necessary to add that in exercising its jurisdiction under Article 226 the High Court may sometimes refuse to issue an appropriate writ or order on the ground that the party applying for the writ is guilty of laches and in that sense the issue of a high prerogative writ may reasonably be treated as a matter of discretion. On the other hand, the right granted to a citizen to move this Court by appropriate proceedings under Article 32(1) being itself a fundamental right this Court ordinarily may have to issue an appropriate writ or order provided it is shown that the petitioner has a fundamental right which has been illegally or unconstitutionally contravened. It is not unlikely that if a petition is filed even under Article 32 after a long lapse of time considerations may arise whether rights in favour of third parties which may have arisen in the meanwhile could be allowed to be affected, and in such a case the effect of laches on the part of the petitioner or of his acquiescence may have to be considered; but, ordinarily if a petitioner makes out a case for the issue of an

appropriate writ or order he would be entitled to have such a writ or order under Article 32 and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Article 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if the High Court has refused to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleaded in support of the bar of res judicata. If, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Article 32.

24. In this connection reliance has been placed on the fact that in England habeas corpus petitions can be filed one after the other and the dismissal of one habeas corpus petition is never held to preclude the making of a subsequent petition for the same reason. In our opinion, there is no analogy between the petition for habeas corpus and petitions filed either under Article 226 or under Article 32. For historical reasons the writ for habeas corpus is treated as standing in a category by itself; but, even with regard to a habeas corpus petition it has now been held in England in *Re Hastings (No. 2)*[17] that "an applicant for a writ of habeas corpus in a criminal matter who has once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard a second time by another Divisional Court in the same Division, since a decision of a Divisional Court of the Queen's Bench Division is equivalent to the decision of all the judges of the Division, just as the decision of one of the old common law courts sitting in banc was the equivalent of the decision of all the judges of that Court". Lord Parker, C.J., who delivered the judgment of the Court, has elaborately examined the historical genesis of the writ, several dicta pronounced by different Judges in dealing with successive writ petitions, and has concluded that "the authorities cannot be said to support the principle that except in vacation an applicant could go from Judge to Judge as opposed to going from court to court"(p. 633), so that even in regard to a habeas corpus petition it is now settled in England that an applicant cannot move one Divisional Court of the Queen's Bench Division after another. The said decision has been subsequently applied in *Re Hastings (No. 3)*[18] to a writ petition filed for habeas corpus in a Divisional Court of the Chancery Division. In England, technically an order passed on a petition for habeas corpus is not regarded as a judgment and that places the petitions for habeas corpus in a class by themselves. Therefore we do not think that the English analogy of several habeas corpus applications can assist the petitioners in the present case when they seek to resist the application of res judicata to petitions filed under Article 32. Before we part with the topic we would, however, like to add that we propose to express no opinion on the question as to whether repeated applications for habeas corpus would be competent under our Constitution. That is a matter with which we are not concerned in the present proceedings.

25. There is one more argument which still remains to be considered. It is urged that the remedies available to the petitioners to move the High Court under Article 226 and this Court under Article 32 are alternate remedies and so the adoption of one remedy cannot bar the adoption of the other. These remedies are not exclusive but are cumulative and so no bar of res judicata can be pleaded when a party who has filed a petition under Article 226 seeks to invoke the jurisdiction of this Court under Article 32. In support of this contention reliance has been placed on the decision of the Calcutta High Court in *Mussammat Gulab Koer* v. *Badshah Bahadur*[19]. In that case a party who had unsuccessfully sought for the review of a consent order on the ground

of fraud brought a suit for a similar relief and was met by a plea of res judicata. This plea was rejected by the Court on the ground that the two remedies though co-existing were not inconsistent so that when a party aggrieved has had recourse first to one remedy it cannot be precluded from subsequently taking recourse to the other. In fact the judgment shows that the Court took the view that an application for review was in the circumstances an inappropriate remedy and that the only remedy available to the party was that of a suit. In dealing with the question of res judicata the Court examined the special features and conditions attaching to the application for review, the provisions with regard to the finality of the orders passed in such review proceedings and the limited nature of the right to appeal provided against such orders. In the result the Court held that the two remedies cannot be regarded as parallel and equally efficacious and so no question of election of remedies arose in those cases. We do not think that this decision can be read as laying down a general proposition of law that even in regard to alternate remedies if a party takes recourse to one remedy and a contest arising therefrom is tried by a Court of competent jurisdiction and all points of controversy are settled the intervention of the decision of the Court would make no difference at all. In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect. Thus considered there can be no doubt that if a writ petition filed by a party has been dismissed on the merits by the High Court the judgment thus pronounced is binding between the parties and it cannot be circumvented or by-passed by his taking recourse to Article 32 of the Constitution. Therefore, we are not satisfied that the ground of alternative remedies is well founded.

26. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no

other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us.

27. In Petition No. 66 of 1956 we have already seen that the petition filed in the High Court was on the same allegations and was for the same relief. The petitioners had moved the High Court to obtain a writ of certiorari to quash the decision of the Revenue Board against them, and when the matter was argued before the High Court in view of the previous decisions of the High Court their learned counsel did not press the petition. In other words, the points of law raised by the petition were dismissed on the merits. That being so, it is a clear case where the writ petition has been dismissed on the merits, and so the dismissal of the writ petition creates a bar against the competence of the present petition under Article 32. The position with regard to the companion Petition No. 67 of 1956, is exactly the same. In the result these two petitions fail and are dismissed; there would be no order as to costs.

28. In Writ Petition No. 8 of 1960 the position is substantially different. The previous petition for a writ filed by the petitioner (No. 68 of 1952) in the Allahabad High Court was withdrawn by his learned counsel and the High Court therefore dismissed the said petition with the express observation that the merits had not been considered by the High Court in dismissing it and so no order as to costs was passed. This order dismissing the writ petition as withdrawn which was passed on February 3, 1955, cannot therefore support the plea of res judicata against the present petition. It appears that a co-lessee of the petitioner had also filed a similar Writ Petition, No. 299 of 1958. On this writ petition the High Court no doubt made certain observations and findings but in the end it came to the conclusion that a writ petition was not the proper proceeding for deciding such old disputes about title and so it left the petitioner to obtain a declaration about title from a competent civil or revenue court in a regular suit. Thus it would be clear that the dismissal of this writ petition (on 17-3-1958) also cannot constitute a bar against the competence of the present writ petition. The preliminary objection raised against this writ petition is therefore rejected and it is ordered that this writ petition be set down for hearing before a Constitution Bench.

29. In Petition No. 77 of 1957 the petitioner has stated in paragraph 11 of his petition that he had moved the High Court of Punjab by a writ petition under Articles 226 and 227 but the same was dismissed in limine on July 14, 1957. It is not clear from this statement whether any speaking order was passed on the petition or not. It appears that the petitioner further filed an application for review of the said order under Order 47, Rule 1 read with Section 151 of the Code but the said application was also heard and dismissed in limine on March 1, 1957. It is also not clear whether a speaking order was passed on this application or not. That is why, on the material as it stands it is not possible for us to deal with the merits of the preliminary objection. We would accordingly direct that the petitioner should-file the two orders of dismissal passed by the Punjab High Court. After the said orders are filed this petition may be placed for hearing before the Constitution Bench and the question of res judicata may be considered in the light of our decision in the present group.

30. In Petition No. 15 of 1957 initially we had a bare recital that the writ petition made by the petitioner in the Punjab High Court had been dismissed. Subsequently, however, the said order itself has been produced and it appears that it gives no reasons for dismissal. Accordingly we must hold that the said order does not create a bar of res judicata and so the petition will have to be set down for hearing on the merits.

31. In Writ Petition No. 5 of 1958 the position is clear. The petitioner had moved the Bombay High Court for an appropriate writ challenging the order of the Collector in respect of the land in question. The contentions raised by the petitioner were examined in the light of the rejoinder made by the Collector and substantially the

petitioner's case was rejected. It was held by the High Court that the power conferred on the State Government by Section 5(3) of the impugned Act, the Bombay Service Inam (Useful to the Community) Abolition Act, 1953, was not arbitrary nor was its exercise in this particular case unreasonable or arbitrary. The High Court also held that the land of the petitioner attracted the relevant provisions of the said impugned statute. Mr Ayyangar for the petitioner realised the difficulties in his way, and so he attempted to argue that the contentions which he wanted to raise in his present petition are put in a different form, and in support of this argument he has invited our attention to grounds 8 and 10 framed by him in paragraph X of the petition. We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same. Therefore the decision of the High Court pronounced by it on the merits of the petitioner's writ petition under Article 226 is a bar to the making of the present petition under Article 32. In the result this writ petition fails and is dismissed. There would be no order as to costs.

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* (Under Article 32 of the Constitution of India for enforcement of Fundamental Rights).

[1] (1955) 1 SCR 769 at pp. 772, 773

[2] (1955) 1 SCR 773 at p. 776

[3] (1959) Supp (1) SCR 528

[4] (1950) SCR 594

[5] 2 Smith Lead Cas 13 Ed. pp. 644, 645

[6] *Halsbury's Laws of England*, 3rd Edn., Vol. 15, paragraph 357, p. 185

[7] *Corpus Juris*, Vol. 34, p. 743

[8] Ibid p. 745

[9] *Halsbury's Laws of England*, 3rd Edn., Vol. 22, p. 780, paragraph 1660

[10] *Corpus Juris Secundum*, Vol. 50 (Judgments), p. 603

[11] Ibid p. 608

[12] AIR 1960 S.C. 1186

[13] (1953) SCR 154

[14] (1951) SCR 344 at p. 370

[15] (1953) SCR 589

[16] (1956) SCR 533

[17] (1958) 3 All ER QBD 625

[18] (1959) 1 All ER Ch D 698

[19] (1908-09) 13 CWN 1197

(1966) 3 SCR 300 : AIR 1966 SC 1332

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, C.J. AND K.N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.)

SHEODAN SINGH ... Appellant;

Versus

DARYAO KUNWAR (SMT) ... Respondent.

Civil Appeal Nos. 802 and 803 of 1963*, decided on January 14, 1966

Advocates who appeared in this case :

M.V. Goswami and B.C. Misra, for the Appellant;

Prayag Das and J.P. Goyal, for the Respondent.

The Judgment of the Court was delivered by

K.N. WANCHOO, J.— These are connected appeals by special leave against the judgment of the High Court of Allahabad, and the only question raised herein is one of res judicata. They will be dealt with together. The appellant's father brought Suit No. 37 of 1950 against the respondent, Smt Daryao Kunwar, for a declaration that he was the owner of the properties in suit and for possession in the alternative. The appellant was also a party to the suit as a proforma defendant. Since his father is dead, he has been substituted in his place. The case put forward in the plaint was that Harnam Singh was the uncle of the appellant's father. Ram Kishan was the adopted son of Harnam Singh, and the respondent is his widow. The appellant and his father were living jointly with Harnam Singh and his adopted son Ram Kishan and on the death of Harnam Singh and his adopted son, the appellant and his father became owners of the joint properties by survivorship; but the names of the widows of Harnam Singh and Ram Kishan were entered in revenue papers for their consolation, though they had no right or title to any part of the property in dispute. There were other allegations in the plaint with which we are however not concerned in the present appeals.

2. Shortly afterwards the appellant's father filed another Suit No. 42 of 1950 against the respondent and one other person claiming the price of the crops which stood on certain *sir* and *khudkashat* plots in two villages on the allegation that the respondent had cut and misappropriated the crops standing on these plots without having any right, title or interest therein. The respondent Smt Daryao Kunwar contested both the suits. Her main defence was that there had been complete partition in the family as a result of which Harnam Singh and after him his adopted son Ram Kishan were the sole owners of their separated shares. After the death of Ram Kishan, the respondent inherited his entire property as his widow. Both these suits had been filed in the Court of the Civil Judge.

3. While these suits were pending, the respondent instituted two suits of her own, Nos. 77 and 91 of 1950, against the appellant and his father. Suit No. 77 was for recovery of the price of her share of the crop grown on certain sir and *khudkashat* plots which had been cut and misappropriated by the appellant and his father. Suit No. 91 was also for a similar relief in respect of the respondent's share of crops grown on certain sir and *khudkashat* plots in another village which had also been cut and misappropriated by the appellant and his father. Her case was that the plots in question in both the villages belonged to the parties jointly and the crop was jointly sown by them and she was entitled to half of the said crops. Further in Suit No. 77 of 1950 she also claimed the relief of permanent injunction restraining the appellant and

his father from letting out the said plots without her consent. These two suits were filed in the Court of the Munsif while suits filed by the appellant's father had been instituted in the Court of the Civil Judge. Subsequently by an order of the District Judge, the two suits filed by the respondent were transferred to the Court of the Civil Judge. Thereafter all the four suits were consolidated and tried together by the Civil Judge with the consent of the parties. All these suits were disposed of by a common judgment but separate decrees were prepared in each suit. In all these suits five issues were common. In addition there were other issues in each case respecting the particular merits thereof. One of the common issues related to respective rights of the parties to the suit property. The finding of the Civil Judge on this issue was that Smt Daryao Kunwar was entitled to the properties claimed by the appellant's father in his Suit No. 37 of 1950. The Civil Judge therefore dismissed that suit. Further in view of the finding on the question of title in Suit No. 37 of 1950, Suit No. 91 of 1950 was decreed in favour of the respondent. Further Suit No. 42 by the appellant's father was on the same finding decreed to the extent of half only; Suit No. 77 of 1950 was decreed also to the extent of half and a permanent injunction was granted in favour of the respondent Smt Daryao Kunwar as prayed by her in that suit.

4. The appellant's father was aggrieved by these decrees. Consequently he filed two first appeals in the High Court. Appeal No. 365 of 1951 was against the dismissal of Suit No. 37 while Appeal No. 366 of 1951 was against the dismissal of Suit No. 42. The appellant's father also filed two appeals in the Court of the District Judge against the judgments and decrees in the suit filed by the respondent, Smt Daryao Kunwar. Appeal No. 452 of 1951 was against the decree in Suit No. 77 while Appeal No. 453 of 1951 was against the decree in Suit No. 91. By an order of the High Court, the two appeals pending in the Court of the District Judge were transferred to the High Court. Thereafter Appeal No. 453 of 1951 arising out of Suit No. 91 was dismissed by the High Court on October 9, 1953 as being time-barred while Appeal No. 452 of 1951 arising out of Suit No. 77 was dismissed by the High Court on October 7, 1955 on the ground of failure of the appellant's father to apply for translation and printing of the record as required by the rules of the High Court. It may be mentioned that Appeals Nos. 452 and 453 were given different numbers on transfer to the High Court; but it is unnecessary to refer to those number for present purposes.

5. After Appeals Nos. 452 and 453 had been dismissed, an application was made on behalf of the respondent, Smt Daryao Kunwar, praying that first Appeals Nos. 365 and 366 of 1951 be dismissed, as the main question involved therein, namely, title of Smt Daryao Kunwar to the suit property, had become final on account of the dismissal of the appeals arising out of Suits Nos. 77 and 91 of 1950. When this question came up for hearing before a learned Single Judge, the following question, namely— "whether the appeal is barred by Section 11 of the Code of Civil Procedure or by the general principles of res judicata as the appeals against the decisions in Suits Nos. 77 and 91 of 1951 were rejected and dismissed by this Court and those decisions have become final and binding between the parties" was referred to a Full Bench for decision in view of some conflict between two Division Benches of that Court.

6. The Full Bench came to the conclusion that two matters were directly and substantially in issue in all the four suits, namely— (*i*) whether Harnam Singh and his adopted son Ram Kishan died in a state of jointness with the appellant and his father, and (*ii*) whether the property in suit was joint family property of Ram Kishan and the appellant's father. The decision of the Civil Judge on both these issues was against the appellant and his father and in favour of Smt Daryao Kunwar. The Full Bench held that though there were four appeals originally before the High Court, two of them had been dismissed and the very same issues which arose in first Appeals Nos. 365 and 366 had also arisen in those two appeals which had been dismissed. The Full Bench found further that the terms of Section 11 of the Code of Civil Procedure were fully applicable

and therefore the two first Appeals Nos. 365 and 366 were barred by res judicata to the extent of the decision of the five issues which were common in four connected appeals. In the result the Full Bench returned that answer to the question referred to it.

7. After this decision of the Full Bench, the matter went back to the learned Single Judge for decision, who thereupon dismissed the appeals as barred by Section 11 of the Code of Civil Procedure. The appellant then obtained special leave from this Court; and that is how the matter has come up before us.

8. We may at the out set refer to the relevant provisions of Section 11 of the Code of Civil Procedure insofar as they are material for present purposes. They read thus:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> *Explanation 1*.—The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> * * *"

It is not necessary to refer to the other Explanations.

9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—

(*i*) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(*ii*) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(*iii*) The parties must have litigated under the same title in the former suit;

(*iv*) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(*v*) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied.

10. Four contentions have been urged on behalf of the appellant in this connection. They are—

(*i*) that title to property was not directly and substantially in issue in Suits Nos. 77 and 91;

(*ii*) that the Court of the Munsif could not try the title Suit No. 37 of 1950;

(*iii*) that it cannot be said that appeals arising out of Suits Nos. 77 and 91 were former suits and as such the decision therein would be res judicata;

(*iv*) that it cannot be said that the two appeals from Suits Nos. 77 and 91 which were dismissed by the High Court, one on the ground of limitation and the other on the ground of not printing the records, were heard and finally decided.

So it is contended that the conditions necessary for res judicata to arise under Section 11 have not been satisfied and the High Court was in error in holding that its dismissal of the two appeals arising from Suits Nos. 77 and 91 amounted to *res judicata* so far

as Appeals Nos. 365 and 366 were concerned.

Re (i)

11. The judgment of the Additional Civil Judge shows that there were five issues common to all the four suits, and the main point raised in these common issues was whether Harnam Singh and his adopted son Ram Kishan were joint with the appellant and his father and whether Ram Kishan died in a state of jointness with them. This main question was decided against the appellant and his father and it was held by the Additional Civil Judge that Harnam Singh and Ram Kishan were separate from the appellant and his father and that Ram Kishan did not die in a state of jointness with them. On this view of the matter, the Additional Civil Judge held that the respondent, Smt Daryao Kunwar, succeeded to Ram Kishan on his death and was entitled to the separated share of Ram Kishan and the appellant and his father had no right to the property by survivorship. In the face of the judgment of the Additional Civil Judge which shows that there were five common issues in all the four suits, the appellant cannot be heard to say that these issues were not directly and substantially in issue in Suits Nos. 77 and 91 also. Further this contention was not raised in the High Court and the appellant cannot be permitted to raise it for the first time in this Court. Besides the question whether these common issues were directly and substantially in issue in Suits Nos. 77 and 91 can only be decided after a perusal of the pleadings of the parties. In the paper book as originally printed, the appellant did not include the pleadings. Later he filed copies of the plaints an application. Even now we have not got copies of the written statements and replications, if any of Suits Nos. 77 and 91. In the circumstances we must accept from the fact that the judgment of the Additional Civil Judge shows that these five issues were raised in Suits Nos. 77 and 91, that they were directly and substantially in issue in those suits also and did arise out of the pleadings of the parties. We therefore reject the contention that issues as to title were not directly and substantially in issue in Suits Nos. 77 and 91.

Re (ii)

12. There is no substance in the contention that the Munsif before whom Suits Nos. 77 and 91 were filed could not try the Title Suit No. 37 and therefore, there can be no question of res judicata, as the Title Suit No. 37, assuming it to be a subsequent suit, could not be tried by the Munsif's court which tried the former suit. It is true that Suits Nos. 77 and 91 were filed in the Munsif's Court; but they were transferred to the Court of the Additional Civil Judge and in actual fact were tried by the Additional Civil Judge. It is the court which decides the former suit whose jurisdiction to try the subsequent suit has to be considered and not the court in which the former suit may have been filed. Therefore, though Suits Nos. 77 and 91 may have been filed in the Munsif's Court, they were transferred to the Court of the Additional Civil Judge and were decided by him. There is no dispute that the court which decided the former suits, namely Suits Nos. 77 and 91 (assuming them to be former suits) had jurisdiction to try the Title Suit No. 37. The contention that the Munsif before whom Suits Nos. 77 and 91 were filed, could not try the subsequent Suit No. 37 has therefore no force in the circumstances of the present litigation.

Re (iii)

13. Then it is urged that all the four suits were consolidated and decided on the same day by the same judgment and there can therefore be no question that Suits Nos. 77 and 91 were former suits and thus the decision as to title in those suits became *res judicata*. It is not in dispute that the High Court's decision in the appeals arising from Suits Nos. 77 and 91 was earlier. Reliance in this connection is placed on the decision of this Court in *Nahari* v. *Shankar*[1]. That case however has no application to the facts of the present case, because there the suit was only one which was followed by two appeals. The appeals were heard together and disposed of by the

same judgment though separate decrees were prepared. An appeal was taken against one of the decrees. In those circumstances this Court held that as there was only one suit, it was not necessary to file two separate appeals and the fact that one of the appeals was time-barred did not affect the maintainability of the other appeal and the question of res judicata did not at all arise. In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from Suits Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail.

Re (iv).

14. This brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of Suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of Suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit. But none of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of Suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from Suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court may itself not be on the merit the result of the High Court's decision is to confirm the decision on the issue of title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial court on the merits, whatever may be the reason for the dismissal of the appeals arising from Suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of Suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of Suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make *res judicata* impossible in cases where

the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once *res judicata* again becomes res sub-judice and it is the decree of the appeal court which will then be *res judicata*. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming toto the trial court's decision given on merits, the appeal court's decree cannot be *res judicata*, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be *res judicata*. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no *res judicata* if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

15. It now remains to refer to certain decisions which were cited at the bar in this connection. The first decision on which reliance is placed on behalf of the appellant is *Sheosagar Singh* v. *Sitaram*[2]. In that case there was a suit for a declaration that the defendant was not the son of a particular person. It appeared that in a former suit between the same parties, the issue so raised had been decided against the plaintiffs by the trial court. In appeal the only thing finally decided was that in a suit constituted as the former suit was, no decision ought to have been pronounced on the merits. In those circumstances the Privy Council held that the issue had not been heard and finally decided in the former suit. These facts would show that that case has no application to the present case. In that case the finality of the judgment of the trial court in the former suit had been destroyed by the appeal taken therefrom and the appeal court decided that no decision ought to have been pronounced on the merits in the former suit constituted as it was. It was in those circumstances that the Privy Council held that the issue had not been heard and finally decided in the former suit. The facts in that case therefore were very different from the facts in the present case, for the very decision of the appeal court showed that nothing had been decided in that case and the decree of the trial court on the merits was not confirmed. In the case before us though the decision of the High Court was on a preliminary point the decision, on the merits of the trial court was confirmed and that makes the decision of the High Court *res judicata*.

16. The next case to which reference has been made is *Ashgar Ali Khan* v. *Ganesh Das*[3]. In that case the appellant in pursuance of a deed of dissolution of partnership, executed a bond for the payment of some money to the respondent. He sued to set aside the bond on the ground of fraudulent misrepresentation as to the amount due. The trial court and on appeal the District Judge held that the alleged fraud was not established, and dismissed the suit. Upon a further appeal to the Judicial Commissioner it was held without entering into the merits, that the appellant could not avoid the bond as he did not claim to avoid the deed. The final court of appeal

thus refused to determine the issue of fraud and dismissed the suit on another ground. In a subsequent suit by the respondent upon the bond, the appellant raised as a defence the same case of fraud. It was held that the issue raised by the defence was not *res judicata* since the matter had not been finally decided by the final Court of appeal. That case also has no application to the facts of the present case, for in that case the final court of appeal did not decide the question of fraud and dismissed the suit on another ground. In such a case it is well-settled that there can be no *res judicata* where the final appeal court confirms the decision of the courts below on a different ground or on one out of several grounds and does not decide the other ground. The reason for this is that it is the decision of the final court which is *res judicata* and if the final court does not decide an issue it cannot be said that that issue has been heard and finally decided. In the present case, however, the result of the decision of the High Court in dismissing the appeals arising from Suits Nos. 77 and 91 is to confirm the judgment of the trial court on all the issues which were common and thus it must be held that the High Court's decision does amount to the appeals being heard and finally decided.

17. Then strong reliance has been placed on behalf of the appellant on *Shankar Sahai* v. *Bhagwat Sahai*[4]. In that case it was held that where two suits between the same parties involving common issues were disposed of by one judgment but two decrees, and an appeal was preferred against the decree in one but it was either not preferred in the other or was rejected as incompetent, the matter decided by the latter decree did not become res judicata and it could be reopened in appeal against the former. This case certainly supports the view urged on behalf of the appellant. This case also overruled an earlier view of the Oudh Chief Court in *Bhagauti Din* v. *Bhagwat*[5]. The reason given for the main proposition in this decision is that the court must look at the substance of the matter and not be guided by technical considerations. In view of what we have said above, we cannot agree with the view taken in, that case, and must hold that it was wrongly decided insofar as it holds that even where the appeal from one decree is dismissed, there will be no *res judicata*.

18. The next case to which reference may be made is *Obedur Rahman* v. *Darbari Lal*[6]. In that case there were five appeals before the High Court, three of which had abated. There was a common issue in all the five appeals, namely, whether a certain lease had expired or not and it was urged that in view of the abatement of the three other appeals, the decision of that issue had become *res judicata*. The contention was overruled by the observation that "where there has been an appeal, the matter is no longer res judicata but res sub judice and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be *res judicata*". This view in our opinion is incorrect. We may in this connection refer to *Syed Ahmad Ali Khan Alavi* v. *Hinga Lal*[7] where it was held that where the appeal was struck off as having abated, the decision would operate as *res judicata*. If the view taken by the Lahore High Court is correct, the result would be that there may be inconsistent decisions on the same issue with respect to the point involved in that case, namely, whether a certain lease had expired or not and the very object of res judicata is to avoid inconsistent decision. Where therefore the result of the dismissal or abatement of an appeal is to confirm the decision of the trial court on the merits such dismissal must amount to the appeal being heard and finally decided and would operate as res judicata.

19. The next case to which reference has been made is *Ghansham Singh* v. *Bhola Singh*[8]. In that case there was a suit for sale on a mortgage and the trial court gave a decree in favour of the plaintiff but awarded no costs. The plaintiff appealed against the decree insofar as it disallowed costs. The defendant also appealed as to the amount of interest allowed to the plaintiff. Both the appeals were heard together and decided by one judgment, and both the appeals were allowed. The plaintiff appealed to the High Court against the decree in the defendant's appeal below but did not

appeal against the decree which was in his favour with respect to costs. It was held that the fact that the plaintiff had not appealed against the decision in his appeal was no bar to the hearing of the appeal against the decree passed in the defendant's appeal below. We do not see how this case can help the appellant. The matters in the two appeals were different, one relating to costs and the other relating to interest; the rest of the judgment of the trial court was not disputed and had become final. In such a case there was no question of the plaintiff appealing from a decision in his own favour as to costs and there could be no question of the decision as to costs being *res judicata* in the matter of interest. The facts of that case were therefore entirely different and do not help the appellant. It may also be added that that was a case of one suit from which two appeals had arisen and not of two suits.

20. The next case to which reference has been made is *Manohar Vinayak* v. *Laxman Anandrao*[9]. In that case two suits were consolidated by consent of the parties and there were certain common issues. Appeal was taken from the decision in one suit and not from the decision in the other, and it was urged in the High Court that the decision in the other suit had become final. The High Court applied the principle that res judicata could not apply in the same proceeding in which the decision was given and added that by a parity of reasoning it could not apply to suits which were consolidated. We may indicate that a contrary view has been taken in *Mrs Gertrude Oates* v. *Mrs Millicent D'silva*[10] and *Zaharia* v. *Debia*[11]. We need not consider the correctness of these rival views as they raise the question as to whether one decision or the other can be said to be former where the two suits were decided by the same judgment on the same date. This question does not fall to be decided before us and we do not propose to express any opinion thereon. But the Nagpur decision is of no help to the appellant, for in the present case *res judicata* arises because of earlier decision of the High Court in appeals arising from Suits Nos. 77 and 91. *Panchanada Velan* v. *Vaithinatha Sastrial*[12] and *Mst Lachhmi* v. *Bhulli*[13] are similar to the Nagpur case and we need express no opinion as to their correctness.

21. The next case to which reference has been made is *Khetramohan Baral* v. *Rasananda Misra*[14]. In that case six suits were heard together mainly because an important common issue was involved even though the parties were not the same and the properties in dispute were also different. The decision in one of the suits was not challenged in appeal while appeals were taken from other suits. The High Court held that in such circumstances the decision in one suit from which no appeal was taken would not be *res judicata* in other suits from which appeals were taken. In these cases the parties and properties were different and we do not think it necessary to express any opinion about the correctness of this decision. The facts in the present case are clearly different for the parties are the same and the title to the properties in dispute also depended upon one common question relating to jointness or separation.

22. A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of *res judicata* raised in the present appeals is this. (Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be *res judicata* and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal court does not result in the confirmation of the decision of the trial court given on the merits, as for example, where the appeal court holds that the trial court had no jurisdiction and dismisses the

appeal even though the trial court might have dismissed the suit on the merits.) In this view of the matter, the appeals must fail, for the trial court had in the present case decided all the four suits on the merits including the decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of Suits Nos. 77 and 91 was that the decision of the trial court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues became res judicata so far as appeals Nos. 365 and 366 are concerned and Section 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in Suits Nos. 77 and 91 has become *res judicata*, Appeals Nos. 365 and 366 must fail.

23. We therefore dismiss the appeals with costs, one set of hearing fee.

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* Appeal by special leave from the judgment and decree dated November 30, 1962 of the Allahabad High Court in First Appeals Nos. 365 and 366 of 1951.

[1] (1950) SCR 754

[2] LR (1896) 24 IA 50

[3] LR (1917) 44 IA 213

[4] AIR 1946 Oudh 33

[5] AIR 1933 Oudh 531

[6] AIR 1927 Lah 1

[7] ILR (1946) 21 Luck, 586

[8] ILR (1923) 45 All 506

[9] AIR 1947 Nag 248

[10] AIR 1933 Pat 78

[11] ILR (1911) 33 All 51

[12] ILR (1906) 29 Mad 333

[13] ILR (1927) Lah 384

[14] AIR 1962 Orissa 141

The expression "sale of goods" in Entry 54 in List II of Schedule VII of the Constitution has also the same meaning as that expression had in Entry 48 in List II of the Government of India Act, 1935. The State Legislature may not therefore extend the import of the expression "sale of goods" so as to impose liability for tax on transactions which are not sales of goods within the meaning of the Sale of Goods Act.

5. By Article 366(12) of the Constitution the expression "goods" is defined as inclusive of "all materials, commodities and articles". That is, however an inclusive definition and does not throw much light on the meaning of the expression "goods". But the definition of "goods" in the Sale of Goods Act, 1930, as meaning "every kind of movable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Standing timber may ordinarily not be regarded as "goods", but by the inclusive definition given in Section 2(7) of the Sale of Goods Act things which are attached to the land may be the subject-matter of contract of sale provided that under the terms of the contract they are to be severed before sale or under the contract of sale.

6. In the present case it was expressly provided that the timber agreed to be sold shall be severed under the contract of sale. The timber was therefore "goods" within the meaning of Section 2(7) of the Sale of Goods Act and the expression "sale of goods" in the Constitution in Entry 54, List II having the same meaning as that expression has in the Sale of Goods Act, sale of timber agreed to be severed under the terms of the contract may be regarded as sale of goods.

7. The appeal is allowed and the petition filed by the respondent must be dismissed. Since the State succeeds in this appeal, relying upon a statute which was passed after the judgment of the High Court there will be no order as to costs throughout.

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(*From Bombay*)

[BEFORE J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.]

MATHURA PRASAD BAJOO JAISWAL AND OTHERS .. Appellants ;

Versus

DOSSIBAI N. B. JEEJEEBHOY† .. Respondent.

Civil Appeals Nos. 1061 and 1627-1629 of 1966, decided on 26th February, 1970

Code of Civil Procedure, 1908 (5 of 1908)—Section 11—Res judicata —Decision on question of law—Subsequent change in judicial decision—Whether earlier decision operates as res judicata between same parties —Matter in issue.

In pursuance of a lease granted by the respondent, for constructing buildings for residential or business purposes, the appellant constructed buildings on the land. His application in the Court of the Civil Judge for

†Appeals by special leave from the Judgment and Order, dated 9th/10th March, 1965 of the Bombay High Court in Civil Revision Applications Nos. 1428, 1430 and 1626 of 1961.

determination of standard rent under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, was dismissed on the ground that the Act did not apply to open land let for constructing buildings *etc.*, and this order was affirmed in revision. In view of another decision of the Bombay High Court in ILR 1956 Bom 827, the appellant filed a fresh petition in the Court of Small Causes as the area in which the land was situated was included within the limits of Greater Bombay. The Trial Court rejected the application on the ground that the question whether the Act applied to the case was res judicata since it had been finally decided by the High Court between the same parties as regards the same land in the earlier application for fixation of standard rent. The High Court confirmed the order. On appeal to the Supreme Court,

Held :

(*i*) The doctrine of res judicata belongs to the domain of procedure : it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment effecting the jurisdiction of a court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent court on a matter in issue may be res judicata in another proceeding between the same parties : the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding. (Para 5)

(*ii*) The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter on issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision : the decision on law cannot be dissociated from the decision on facts on which the right is founded. (Para 5)

(*iii*) A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declared valid a transaction which is prohibited by law. (Para 5)

(*iv*) Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties : *Tarini Charan Bhattacharjee's case*, ILR 56 Cal 723. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit.

(Paras 7 and 9)

(*v*) A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. (Para 10)

(*vi*) Where the decision is on a question of law, *i.e.*, the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure means the right litigated between the parties, *i. e.*, the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land. (Para 11)

(*vii*) In the present case the decision of the Civil Judge, Junior Division, Borivli, that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous : See *Mrs. Dossibai N. B. Jeejeebhoy* v. *Khemchand Gorumal and Others*, (1962)3 SCR 928. If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature. (Para 12)

Cases referred to :

Mrs. Dossibai N. B. Jeejeebhoy v. *Hingoo Manohar Missar*, Rev. App. Nos. 233 to 242 of 1955; *Vinayak Gopal Limaye* v. *Laxman Kashinath Athavale*, 1962 (3) SCR 928; *Parthasardhi Ayyangar* v. *Chinnakrishna Ayyangar*, ILR 5 Mad 304; *Chamanlal* v. *Bapubhai*, ILR 22 Bom 669; *Kanta Devi* v. *Kalawati*, AIR 1946 Lah 419; *Chandi Prasad* v. *Maharaja Mahendra Singh*, ILR 23 All 5; *Tarini Charan Bhattacharjee* v. *Kedar Nath Haldar*, ILR 56 Cal 723; *Bindeshwari Charan Singh* v. *Bageshwari Charan Singh*, LR 63 IA 53; *Broken Hill Proprietary Company Ltd.* v. *Municipal Council of Broken Hill*, 1926 AC 94.

Appeals *allowed.*

Advocates who appeared in this case :

M. C. Chagla, Senior Advocate (*J. L. Hathi*, *K.L. Hathi* and *K. N. Bhat*, Advocates with him), for Appellants (in all Appeals).

R. P. Bhat and *Jeenendra Lal*, Advocates and *R. A. Gagrat* and *B. R. Agarwala*, Advocates of Messrs. Gagrat and Co. for Respondent (in all Appeals).

The Judgment of the Court was delivered by

SHAH, J.—Under an indenture, dated August 2, 1950, Dossibai—respondent in this appeal—granted a lease of 555 sq. yards in village Pahadi, Taluka Borivli to Mathura Prasad—appellant herein—for constructing buildings for residential or business purposes. The appellant constructed buildings on the land. He then submitted an application in the Court of the Civil Judge, Junior Division, Borivli, District Thana, that the standard rent of the land be determined under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Civil Judge rejected the application holding that the provisions of the Bombay Rents, Hotel and Lodging House Rates Control

Act, 1947, did not apply to open land let for constructing buildings for residence, education, business, trade or storage. This order was confirmed on September 28, 1955, by a single Judge of the Bombay High Court in a group of revision applications : *Mrs. Dossibai N. B. Jeejeebhoy* v. *Hingoo Manohar Missar*, Nos. 233 to 242 of 1955. But in *Vinayak Gopal Limaye* v. *Laxman Kashinath Athavale*,[1] the High Court of Bombay held that the question whether Section 6(1) of the Act applies to any particular lease must be determined on its terms, and a building lease in respect of an open plot is not excluded from Section 6(1) of the Act solely because open land may be used for residence or educational purposes only after a structure is built thereon. Relying upon this judgment, the appellant filed a fresh petition in the Court of the Small Causes, Bombay, for an order determining the standard rent of the premises. The application was filed in the Court of Small Causes because the area in which the land was situated had since been included within the limits of the Greater Bombay area. The Trial Judge rejected the application holding that the question whether to an open piece of land let for the purpose of constructing buildings for residence, education, business or trade Section 6(1) of the Act applied was res judicata since it had been finally decided by the High Court between the same parties in respect of the same land in the earlier proceedings for fixation of standard rent. The order was confirmed by a Bench of the Court of Small Causes and by the High Court of Bombay. With special leave, the appellant has appealed to this Court.

2. The view expressed by the High Court of Bombay in *Mrs. Dossibai N. B. Jeejeebhoy* v. *Hingoo Manohar Missar* (Civil Revision Application No. 233 of 1955, decided on September 28, 1955) was overruled by this Court in *Mrs. Dossibai N. B. Jeejeebhoy* v. *Khemchand Gorumal and Others*.[2] In the latter case the Court affirmed the view expressed by the Bombay High Court in *Vinayak Gopal Limaye's case*.[1]

3. But all the Courts have held that the earlier decision of the High Court of Bombay between the same parties and relating to the same land is res judicata. Section 11 of the Code of Civil Procedure which enacts the general rule of res judicata, in so far as it is relevant, provides :

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The Civil Judge, Junior Division, Borivli, was competent to try the application for determination of standard rent, and he held that Section 6(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, did not apply to open land let for construction of residential and business premises.

4. The rule of res judicata applies if "the matter directly and substantially in issue" in a suit or proceeding was directly and substantially in issue in the previous suit between the same parties and had been heard and finally decided by a competent Court. The Civil Judge, Junior Division, Borivli, decided the application between the parties to the present proceeding for determination of standard rent in respect of the same piece of land let for construction of buildings for residential or business purposes. The High Court has held that a

1. ILR (1956) Bom 827. 2. 1962(3) SCR 928.

decision of a competent Court may operate as res judicata in respect of not only an issue of fact, but mixed issues of law and fact, and even abstract questions of law. It was also assumed by the High Court that a decision relating to the jurisdiction of the Court to entertain or not to entertain a proceeding is binding and conclusive between those parties in respect of the same question in a later proceeding.

5. But the doctrine of res judicata belongs to the domain of procedure : it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties : the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision : the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

6. The authorities on the question whether a decision on a question of law operates as res judicata disclose widely differing views. In some cases it was decided that a decision on a question of law can never be res judicata in a subsequent proceeding between the same parties : *Parthasardhi Ayyangar* v. *Chinnakrishna Ayyangar*[3] ; *Chamanlal* v. *Bapubhai*[4] ; and *Kanta Devi* v. *Kalawati*.[5] On the other hand Aikman, J., in *Chandi Prasad* v. *Maharaja Mahendra Singh*,[6] held that a decision on a question of law is always res judicata. But as observed by Rankin, C. J., in *Tarini Charan Bhattacharjee* v. *Kedar Nath Haldar*[7] :

> "Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration."

3. ILR 5 Mad 304.
4. ILR 22 Bom 669.
5. AIR (1946) Lah 419.
6. ILR 23 All 5.
7. ILR 56 Cal 723.

We may analyse the illustrative cases relating to questions of law, decisions on which may be deemed res judicata in subsequent proceeding. In *Bindeshwari Charan Singh* v. *Bageshwari Charan Singh*,[8] the Judicial Committee held that a decision of a Court in a previous suit between the same parties that Section 12-A of the Chota Nagpur Encumbered Estates Act, 6 of 1876, which renders void a transaction to which it applies was inapplicable, was res judicata. In that case the owner of an impartible estate, after his estate was released from management, executed a maintenance grant in favour of his minor son B, but without the sanction of the Commissioner as required by Section 12-A of the Act. B on attaining majority sued his father and brothers for a maintenance grant at the rate of Rs. 4,000 per annum. The claim was decreed, and the plaintiff was awarded a decree for a grant of Rs. 4,000 inclusive of the previous grant of 1909, and the Court held that the grant of 1909 was valid in law. The father implemented the decree and made an additional maintenance grant up to the value of the decreed sum. In an action by the sons of B's brothers challenging the two grants on the plea that the grants were illegal and not binding upon them, the Judicial Committee held that the plea was barred as res judicata in respect of both the grants—in respect of the first because there was an express decision on the validity of the first grant in the earlier suit, and in respect of the second the decision in the first suit was res judicata as to the validity of the second grant which was made in fulfilment of the obligation under the Court's decision. The Judicial Committee held that in respect of the first grant, the decision that Section 12-A did not apply to the grant, was res judicata, and in respect of the second grant the construction between the same parties of Section 12-A was res judicata. Validity of the second grant was never adjudicated upon in any previous suit : the second grant was held valid because between the parties it was decided that to the grant of maintenance of an impartible zamindari Section 12-A of the Chota Nagpur Encumbered Estates Act had no application. This part of the judgment of the Judicial Committee is open to doubt.

7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties : *Tarini Charan Bhattacharjee's case* (supra). It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

8. In a case relating to levy of tax a decision valuing property or determining liability to tax in a different taxable period or event is binding only in that period or event, and is not binding in the subsequent years, and therefore the rule of res judicata has no application : See *Broken Hill Proprietary Company Ltd.* v. *Municipal Council of Broken Hill*.[9]

9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C. J., observed in *Tarini Charan Bhattacharjee's case* (supra) :

> "The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend ; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

8. LR 63 IA 53. 9. (1926) AC 94.

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, *i. e.*, the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure means the right litigated between the parties, *i. e.*, the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

12. In the present case the decision of the Civil Judge, Junior Division, Borivli, that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous : See *Mrs. Dossibai N. B. Jeejeebhoy* v. *Khemchand Goiumal and Others* (supra). If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature.

13. The appeals are allowed, and the orders passed by the High Court and the Court of Small Causes are set aside and the proceedings are remanded to the Court of First Instance to deal with and dispose them of in accordance with law. There will be no order as to costs throughout.

1970(1) Supreme Court Cases 619

(From Jammu and Kashmir)

[BEFORE M. HIDAYATULLAH C. J., AND J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.]

G. R. BAQUAL .. Appellant ;

Versus

STATE OF JAMMU AND KASHMIR† .. Respondent.

†Appeal from the Judgment and Order, dated 21-12-1966 of the Jammu and Kashmir High Court in Writ Petition No. 40 of 1965.

(1979) 4 Supreme Court Cases 83

(BEFORE N. L. UNTWALIA AND A. P. SEN, JJ.)

AVTAR SINGH AND OTHERS .. Appellants;

Versus

JAGJIT SINGH AND ANOTHER .. Respondents.

Civil Appeal No. 2021 of 1969†, decided on July 27, 1979

Civil Procedure Code, 1908 — Section 11 — Civil Court's decision regarding lack of jurisdiction, held, will operate as res judicata in a subsequent suit — Civil Court declining jurisdiction and directing for presentation in proper Revenue Court — Revenue Court also returning the claim petition declining its jurisdiction — Subsequent institution of suit in Civil Court on the same claim, held, barred by res judicata

Upendra Nath Bose v. *Lall*, AIR 1940 PC 222, 225, *followed*

Jwala Debi v. *Amir Singh*, AIR 1929 All 132, *overruled*

Appeal dismissed R/4465/C

Advocates who appeared in this case:
R. K. Garg, Advocate, for the Appellants;
Hardev Singh, Advocate, for Respondent 1;
N. S. Bindra, Senior Advocate (*T. S. Arora*, Advocate, with him), for Respondent 2.

The Judgment of the Court was delivered by

Untwalia, J.—This appeal arises out of an unfortunate litigation where the plaintiff-appellant in this appeal has got to fail in this Court too on some technical grounds.

2. One Sardar Balwant Singh died on March 10, 1955 leaving only three sons according to the case of appellants, namely, the two appellants and respondent 2. Respondent 1 claimed to be a fourth son of Balwant Singh entitled to ¼th share in the property left by him. The appellants filed suit no. 41 of 1958, in the Court of Sub-Judge, Bassi. The Civil Court on the objection of respondent 1 framed a preliminary issue whether the said Court was competent to try the suit or was it a matter which could be decided only by the Settlement Commissioner. By order dated July 7, 1958 the learned Subordinate Judge decided that the civil court had no jurisdiction to try this suit and directed the return of the plaint for presentation to the proper Revenue Court. When the appellants filed their claim in the Revenue Court their petition was returned holding that the Revenue Court had no jurisdiction to try it. Thereupon the appellants instituted suit no. 13 of 1960 in the Court of Sub-Judge, First Class, Bassi on April 2, 1960. This suit has failed throughout on the ground of res judicata. The High Court has affirmed the dismissal on the view that the decision dated July 7, 1958 given by the Civil Court in Suit No. 41 of 1958 on the point of Civil Court's jurisdiction to try the suit will operate as res judicata. In our opinion the High Court is right.

3. The learned counsel for the appellants submitted that the appellants were driven from pillar to post for the redress of their grievances. When they

†Appeal by Special Leave from the Judgment and Order dated January 15, 1969 of the Punjab and Haryana High Court in R. S. A. 905 of 1963.

instituted the suit in Civil Court, that Court held that it had no jurisdiction to try it. When the suit was filed in the Revenue Court, the said Court took a contrary view. Where could the appellants then go? We do sympathise with the appellant's dilemma but they were wrongly advised to do as they did. Either they ought to have followed the matter in the First Civil Suit and insisted up to the end that the suit was triable by a Civil Court, or, they would have taken the matter further before the higher authorities and Court from the order of the Revenue Court and persisted that the matter whether the Civil Court had jurisdiction to decide the dispute between the parties or not was res judicata; the Revenue Court had no jurisdiction to go behind the decision of the Civil Court. The appellants did neither. It is unfortunate that due to the wrong paths which they followed under wrong advice they have ultimately to fail on the technical ground of res judicata but there is no way out.

4. It was pointed out by Lord Russell of Killowen in **Upendra Nath Bose v. Lall**[1] that there could be res judicata in regard to the question of lack of jurisdiction of the Civil Court to try a matter but:

> A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction: such reasons are not decisions, and are certainly not decisions by a Court of competent jurisdiction.

The above passage does not help the appellants, rather, goes against them. Mr. Garg had also placed reliance upon a single Judge decision of the Allahabad High Court in **Jwala Devi** v. **Amir Singh**[2], wherein the learned Judge observed at page 132:

> Looked at closely, a question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. The plaintiff invokes the jurisdiction of the Court. The defendant may or may not appear. If the Court finds that it has no jurisdiction to entertain the plaint, it will order the return of it for presentation to the proper Court. The defendant, if he appears, and if he so chooses, may point out to the Court that it has no jurisdiction. A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. The fact that a decision as to jurisdiction is not binding on the parties in a subsequent litigation will be apparent from this.

5. We do not approve at all the views as expressed by the learned single Judge of the Allahabad High Court. If defendant does not appear and the Court on its own returns the plaint on the ground of lack of jurisdiction the order in a subsequent suit may not operate as res judicata but if the defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as res judicata in a subsequent suit although the reasons for its decisions may not be so.

6. For the reasons stated above we dismiss this appeal but direct the parties to bear their own costs throughout.

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1. AIR 1910 PC 222, 225 2. AIR 1929 All 132

(1995) 3 Supreme Court Cases 693

(BEFORE K. RAMASWAMY AND B.L. HANSARIA, JJ.)

MAHBOOB SAHAB .. Appellant;

Versus

SYED ISMAIL AND OTHERS .. Respondents.

Civil Appeal No. 513 of 1979†, decided on March 23, 1995

A. Civil Procedure Code, 1908 — S. 11 — Doctrine of res judicata — Applicability between co-defendants — Conditions for — There must exist conflict between the co-defendants and it must be considered necessary by the court to decide the conflict to give relief to the plaintiff in the suit — Decree obtained by fraud or collusion cannot operate as res judicata — Doctrine applies against a party who was not eo nomine made party nor entered appearance — Agreement of sale of land entered into by owner-defendant with appellant to discharge antecedent debts — Suit for specific performance filed by appellant — To avoid the sale with a view to defraud the creditors, false claim of oral gift of the land made by him in favour of his family members-respondents on the basis of a decree made in an earlier suit filed by another person — Defendant-respondents also impleaded as defendants in the earlier suit — Oral gift not subject-matter of the earlier suit — No conflict of interest between the defendants in that suit — Held on facts, doctrine of res judicata not applicable to bar the subsequent suit filed by appellant — Evidence Act, 1872, Ss. 40 to 44

Held :

Under Section 11 CPC when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claimed, litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiffs or co-defendants. But for application of this doctrine between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other. (Para 8)

Syed Mohd. Saadat Ali Khan v. *Mirza Wiquar Ali Beg*, AIR 1943 PC 115 : 48 CWN 66; *Shashibushan Prasad Mishra* v. *Babuji Rai*, (1969) 2 SCR 971 : AIR 1970 SC 809; *Iftikhar Ahmed* v. *Syed Meharban Ali*, (1974) 2 SCC 151, *relied on*

Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that they should have knowledge that the right, title and interest would be in adjudication and the finding or the decree therein would operate as res judicata to their right, title and interest in the subject-

† From the Judgment and Order dated 2-1-1979 of the Karnataka High Court in R.S.A. No. 161 of 1975

matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiff's title either accepted or negatived therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record. Therefore, in applying the doctrine of res judicata between co-defendants or co-plaintiffs, care must, of necessity, be taken by the courts to see that there must in fact be a conflict of interest between the co-defendants or co-plaintiffs concerned and it is necessary to decide the conflict in order to give relief which the plaintiff in the suit claimed and the question must have been directly and substantially in issue and was finally decided therein. (Paras 9 and 10)

In the present case the seller of the land *M* was playing fraud upon his creditors by creating false oral gifts or spurious claims of mortgages with a view to defraud them. When the evidence on record established that the earlier suit was collusive or fraudulent to defraud the creditors, it is a relevant fact and the court would take cognizance thereof to find whether the trial court is precluded to try the issue. There was no conflict of interest between the defendants in that suit. The dispute therein was whether the possessory mortgagee was bound by the decree and the creditor could proceed against *M* and the said property is liable to sale for realisation of his decree debt? In that context the relevancy or validity of the gift is immaterial. The oral gift was not subject-matter of the earlier suit. The High Court, therefore, committed gross palpable error of law in applying the doctrine of res judicata between co-defendants relying upon the decree in the earlier suit, even if it could be pressed into service in the second appeal. (Paras 10 and 11)

B. Muslim Law — Gift — Immovable property — Ingredients of a valid gift — Need not be in writing and registered — Complete divesting of possession of the property by the donor essential — Mother cannot be guardian of the minor-donee — Alleged gift of land jointly in favour of wife and minor sons and further oral gift by the wife of her share to her eldest son — Held on facts, not proved

Held:

Though gift by a Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. Equally, in Mohammadan law the mother cannot act nor be appointed as property guardian of the minor. Equally, she cannot act as legal guardian. (Para 5)

In the present case no evidence had been adduced to establish declaration of the gift, acceptance of the gift by or on behalf of the minor or delivery of possession or taking possession or who had accepted the gift actually or constructively. No property guardian was appointed to act on behalf of the minors.

There is no evidence that the father acted as legal guardian. So also there is no proof of acceptance of the oral gifts said to have been made by the mother to the eldest son, of her undivided share. There is no proof as well that possession was delivered under the oral gift and accepted on behalf of the minor and taken possession. (Paras 5 and 6)

Principles of Mahomedan Law by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, Ss 147 to 152, 348, 349, 359, 362, 363, *relied on*

R-M/T/14259/C

Advocates who appeared in this case :
Devendra Singh, Advocate, for the Appellant;
S.S. Javali, Senior Advocate (P.R. Ramasesh, Advocate, with him) for the Respondents.

The Judgment of the Court was delivered by

K. RAMASWAMY, J.— Syed Ismail and Ibrahim, sons of Maqdoom, Panchamale filed OS No. 28 of 1965, impleading their parents and appellant/purchaser, for possession of the suit lands and for mesne profits from the appellant. The averments made in support thereof are that their father had executed a gift deed bequeathing 15 acres, 38 gunthas out of 31 acres, 36 gunthas in Survey No. 781 of Aland Village, jointly in their favour and their mother Smt Chandi, third defendant, who in her turn, orally gifted over her share to Syed Ismail in April 1958 at the time of his marriage. Being minors, their father-second defendant, while cultivating the lands on their behalf, had colluded with the Patwari and executed sale deed Ex. D-1 in favour of the appellant. On their becoming aware of the same, they filed the suit since their father had no right, title and interest therein to alienate the lands. The sales, therefore, in favour of the appellant were invalid, inoperative and do not bind them. The appellant pleaded that Maqdoom had entered into an agreement of sale under Ex. D-22 on 12-4-1961 to sell 12 acres of land for valuable consideration and had executed the sale deed, Ex. D-1 dated 12-5-1961, to discharge antecedent debts. Similarly an agreement of sale of 4 acres of land for 2500 was executed and the appellant had obtained permission from the Assistant Commissioner on 4-8-1964 for sale thereof. When he and Smt Chandi refused to execute the sale deed, he filed OS No. 4/1 of 1966 for specific performance which was decreed on contest and the sale deed Ex. D-3 was executed and registered by the court. Their parents had not given any gifts which were set up only to defraud the appellant. It was brought out at the trial that in OS No. 3/1/1951 filed by one Ismail on the foot of a possessory mortgage, the executability of another decree obtained by another creditor, was impugned, wherein by judgment and decree dated 24-9-1951, the court held that Maqdoom had jointly gifted the lands to the respondents and their mother by a registered gift deed.

2. The aforesaid finding was pleaded to operate as res judicata against the appellant. As a preliminary issue, the trial court held that the decree in OS No. 3/1/1951 does not operate as res judicata but decreed the suit on merit. In RA No. 211/1970, the Additional Civil Judge, Gulbarga reversed the decree and dismissed the suit holding that Maqdoom as an owner had

alienated the property. His name continued to be the owner in revenue records till it was mutated in the name of the appellants after his purchase. Neither the original nor certified copy of the gift deed alleged to have been executed by Maqdoom was filed. A letter of the Sub-Registrar to show its loss filed in the appeal cannot be used as evidence of execution of the gift over. The mother cannot act as a property guardian when the father is alive. The oral gift by the mother to the respondents was false as neither acceptance of the gift nor delivery of possession of the lands either by the father or the mother was proved. It was not proved that the father or anyone had acted as guardian when Smt Chandi gifted her undivided share to the first respondent nor is there any proof of taking possession from the wife under the oral gift deed. The alleged gifts, therefore, were not proved, nor were they valid in law. Maqdoom was a chronic debtor and to defraud the creditors, he set up false plea of gifts in favour of his children and wife or spurious mortgages in favour of third party. Before the appellate court, the decree in OS No. 3/1/1951 was not pressed into service as res judicata to sustain the decree of the trial court.

3. The High Court without disturbing any of the findings of facts recorded by the appellate court, reversed the judgment solely on the finding that the decree in OS No. 3/1/1951 operates as res judicata as the parents and the respondents are co-defendants in that suit. Having been divested of his title, Maqdoom had no right to alienate the properties of the minors in favour of the appellant. Accordingly the High Court reversed the decree of the appellate court and confirmed that of the trial court in Second Appeal No. 161 of 1973, dated 2-1-1979.

4. The question, therefore, is whether the High Court was right in its conclusion that the decree in OS No. 3/1/1951 operates as res judicata and whether reversal of appellate decree without disturbing the findings of fact on merits is legal. Having given our anxious consideration to the respective contentions of both the counsel we think that the High Court was wholly wrong in its approach. Neither the mother nor the father was examined as a witness to prove the gifts said to have been given in favour of their minor sons Ismail and Ibrahim, Respondents 1 and 2. Syed Ismail too was not examined as a witness. Ibrahim in his evidence had admitted the execution of the sale deed by his father and he acted as an attesting witness to the sale transaction under Ex. D-1. He also admitted that his father mortgaged the property under Ex.P-3. In the objection petition the gift was not set up. The appellate court, as a final court of fact, found that alleged registered gift deed said to have been jointly given by Maqdoom and his wife jointly to his minor sons was not filed either in this suit or in OS No. 3/1/1951.

5. Under Section 147 of the *Principles of Mahomedan Law* by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of moveable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the

validity of the gift should be, (*i*) a declaration of gift by the donor, (*ii*) acceptance of the gift, express or implied, by or on behalf of the donee, and (*iii*) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only the gift is complete. Section 152 envisages that where the donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. No evidence has been adduced to establish declaration of the gift, acceptance of the gift by or on behalf of the minor or delivery of possession or taking possession or who had accepted the gift actually or constructively. Admittedly he was in possession and enjoyment of the property till it was sold to the appellant. Equally, in Mohammedan law mother cannot act nor be appointed as property guardian of the minor. Equally, she cannot act as legal guardian.

6. Section 348 defines 'minor' to mean "a person who has not completed the age of eighteen years". Section 349 provides that "all applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890". Section 359 enumerates the persons entitled, in the order mentioned therein, to be guardian of the property of a minor, namely, (1) the father; (2) the executor appointed by the father's will; (3) the paternal grandfather; and (4) the executor appointed by the will of the paternal grandfather. Section 362 limits the power of the legal guardian to alienate immovable property except in the circumstances enumerated therein. Similarly, the court as guardian has no power to mortgage or charge or transfer by sale, gift, exchange or otherwise and part with possession of immovable property of the ward or to lease that property except with the previous permission of the court and subject to the conditions mentioned in Section 363. Admittedly, no property guardian was appointed to act on behalf of the minors. No evidence that the father acted as legal guardian. So also there is no proof of acceptance of the oral gifts said to have been made by the mother to Ismail, the eldest son, of her undivided share. There is no proof as well that possession was delivered under the oral gift and accepted on behalf of the minor and taken possession.

7. Her one-third undivided share was not the subject-matter of OS No. 3/1/1951. The Additional Civil Judge, therefore, was right in his findings that the gifts have not been proved. They were not complete. Admittedly, the father continued to be in possession and enjoyment of the lands as owner as evidenced by the revenue records until it was mutated in the name of the appellants to the extent of 16 acres purchased by him as per the aforesaid sale deeds Ex. D-1 and Ex. D-3. Ibrahim has attested Ex. D-1 when his father conveyed the lands as an owner. Though the sale was against his interest, he had not objected to the sale. He, thereby, is estopped by conduct and record to assail Ex. D-1 sale or to claim any interest in the lands.

8. Under these circumstances the question emerges whether the High Court was right in reversing the appellate decree on the doctrine of res judicata. At this juncture it may be relevant to mention that the trial court negatived the plea of res judicata as a preliminary issue. Though it was open to sustain the trial court decree on the basis of the doctrine of res judicata, it was not argued before the appellate court on its basis. Thereby the findings of the trial court that the decree in OS No. 3/1/1951 does not operate as res judicata became final. The question then is whether the doctrine of res judicata stands attracted to the facts in this case. It is true that under Section 11 CPC when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claimed, litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiffs or co-defendants. But for application of this doctrine between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. This is the settled law as held in *Syed Mohd. Saadat Ali Khan* v. *Mirza Wiquar Ali Beg*[1]; *Shashibushan Prasad Mishra* v. *Babuji Rai*[2]; and *Iftikhar Ahmed* v. *Syed Meharban Ali*[3]. Take for instance that if in a suit by 'A' against 'B & C', the matter is directly and substantially in issue between B & C, and an adjudication upon that matter was necessary to determine the suit to grant relief to 'A'; the adjudication would operate as res judicata in a subsequent suit between B & C in which either of them is plaintiff and the other defendant. In other words, if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other.

1 AIR 1943 PC 115 : 48 CWN 66
2 (1969) 2 SCR 971 : AIR 1970 SC 809
3 (1974) 2 SCC 151

9. Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that they should have knowledge that the right, title and interest would be in adjudication and the finding or the decree therein would operate as res judicata to their right, title and interest in the subject-matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiff's title either accepted or negatived therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record.

10. Therefore, in applying the doctrine of res judicata between co-defendants or co-plaintiffs, care must, of necessity, be taken by the courts to see that there must in fact be a conflict of interest between the co-defendants or co-plaintiffs concerned and it is necessary to decide the conflict in order to give relief which the plaintiff in the suit claimed and the question must have been directly and substantially in issue and was finally decided therein. As found by the appellate court, Maqdoom was playing fraud upon his creditors by creating false oral gifts or spurious claims of mortgages with a view to defraud them. Section 44 of the Evidence Act envisages that any party to a suit or proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42 has been obtained by fraud or collusion. Under Section 40, the existence of the judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

11. When the evidence on record establishes that the suit in OS No. 3/1/1951 was collusive or fraudulent to defraud the creditors, it is a relevant fact and the court would take cognizance thereof to find whether the trial court is precluded to try the issue. The High Court had not adverted to nor bestowed its attention on this aspect of the matter except mechanical application of the principles laid by this Court in *Iftikhar Ahmed case*[3]. The pleadings in OS No. 3/1/1951 were not produced in the courts below. The judgment, Annexure II, indicates that the respondents and their another brother and the parents were impleaded as defendants 1 to 5. Sixth defendant was the decree-holder in another suit. It was claimed therein that the defendants 1 to 4 were said to have executed possessory mortgage in favour of one Ismail, the plaintiff therein. A joint written statement was filed by them admitting the claim of the plaintiff who had pleaded the gift said to

have been given by Maqdoom in favour of the three sons and his wife. They have admitted the same. Thus it would be clear that there was no conflict of interest between the defendants in that suit. On the other hand they had confessed to the claim set up by the alleged possessory mortgagee therein. Though the appellant claimed title to the property through the parents of the respondents, there was neither conflict of interest nor was it necessary to decide about the validity of the gift said to have been executed by Maqdoom. The dispute therein was whether the possessory mortgagee was bound by the decree and the creditor could proceed against Maqdoom and the said property is liable to sale for realisation of his decree debt? In that context the relevancy or validity of the gift is immaterial. It was admitted therein that they had executed possessory mortgage in favour of Ibrahim, plaintiff therein. On that basis, the only question would have been whether he would be entitled to resist the execution of the decree obtained against Maqdoom by the 6th defendant therein? The oral gift or sale of 4 acres under Ex. D-3 was not the subject-matter of OS No. 3/1/1951. The High Court, therefore, committed gross palpable error of law in applying the doctrine of res judicata between co-defendants relying upon the decree in OS No. 3/1/1951 dated 24-9-1951, even if it could be pressed into service in the second appeal.

12. The appeal is accordingly allowed. The judgment and decree of the High Court are set aside and that of the appellate court stands restored, in consequence the suit of Respondents 1 and 2 stands dismissed with costs throughout.

(1995) 3 Supreme Court Cases 700

(BEFORE R.M. SAHAI AND B.L. HANSARIA, JJ.)

SUMANLAL CHHOTALAL KAMDAR
AND OTHERS .. Appellants;

Versus

ASHA TRILOKBHAI SHAH (MISS)
AND OTHERS .. Respondents.

Civil Appeals Nos. 5403-04 of 1995†, decided on May 9, 1995

Constitution of India — Arts. 32, 15(3) and 39(e) & (f) — Adoption of Indian children by foreign nationals — Guidelines earlier laid down by Supreme Court reiterated — Adoptions in violation of or non-compliance with the guidelines may lead to adoption being declared invalid and expose the person concerned to strict action including prosecution

Lakshmi Kant Pandey v. *Union of India*, (1984) 2 SCC 244 : (1984) 2 SCR 795; *Laxmi Kant Pandey* v. *Union of India*, 1985 Supp SCC 701 : 1985 Supp (3) SCR 71, *affirmed*

R-M/14466/C

† From the Judgment and Order dated 19/22-10-1988 of the Gujarat High Court in L.P.As. Nos. 364 & 365 of 1988

(1995) 6 Supreme Court Cases 733

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

DEVA RAM AND ANOTHER .. Appellants;

Versus

ISHWAR CHAND AND ANOTHER .. Respondents.

Civil Appeal No. 3112 of 1995†, decided on October 16, 1995

A. Civil Procedure Code, 1908 — Or. 2 R. 2 — Bar on omitting one part of the claim in a suit and raising the same in a subsequent suit — Applicable if both the suits based on same cause of action — Previous suit for recovery of sale price of land dismissed on ground that the document on the basis of which the suit was filed was not a sale deed but an agreement for sale — Subsequent suit for recovery of possession on the basis of title — Held, causes of action in the two suits not identical and therefore bar under Or. 2 R. 2 inapplicable

Held :

The provisions of Order 2 Rule 2 indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause. (Para 12)

Order 2 Rule 2 CPC requires the unity of all claims based on the same cause of action in one suit. If the identity of causes of action is established, the rule would immediately become applicable and it will have to be held that since the relief claimed in the subsequent suit was omitted to be claimed in the earlier suit, without the leave of the court in which the previous suit was originally filed, the subsequent suit for possession is liable to be dismissed as the defendants in both the suits, cannot be vexed twice by two separate suits in respect of the same cause of action. But it does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar. (Paras 14 and 16)

Naba Kumar Hazra v. *Radhashyam Mahish*, AIR 1931 PC 229 : 35 CWN 977 : 61 MLJ 294; *Arjun Lal Gupta* v. *Mriganka Mohan Sur*, (1974) 2 SCC 586 : AIR 1975 SC 207; *State of M.P.* v. *State of Maharashtra*, (1977) 2 SCC 288 : 1977 SCC (L&S) 232 : AIR 1977 SC 1466; *Kewal Singh* v. *B. Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161; *Sidramappa* v. *Rajashetty*, (1970) 1 SCC 186 : AIR 1970 SC 1059; *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810 : (1965) 1 Andh LT 107, *relied on*

In the present case the cause of action in the subsequent suit was entirely different. Since the previous suit was for recovery of sale price, the plaintiffs (respondents) could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to the defendants (appellants). The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of causes of action in the previous suit and the subsequent suit was not established. (Para 18)

B. Civil Procedure Code, 1908 — S. 11 — Res judicata — Principle of — Applicability — Must be 'directly and substantially in issue' — In previous suit for recovery of sale price of land, an issue raised whether defendant-appellants

† From the Judgment and Order dated 8-7-1994 of the Himachal Pradesh High Court in R.S.A. No. 210 of 1986

were in possession of the land as tenants under the plaintiff-respondents — Suit dismissed by trial court with a finding that defendants were such tenants — While affirming the judgment of trial court, appellate court reversing the finding regarding tenancy — In subsequent suit filed by respondent for recovery of possession of the land on ground of title, neither the defendant-appellants pleading, nor any issue framed nor any finding recorded on the question of appellants' tenancy under respondents — Held, issues and causes of action different in the previous suit and therefore, rule of res judicata not invocable

Held.

Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "*Interest reipublicae ut sit finis litium*" (it concerns the State that there be an end to law suits) and partly on the maxim "*Nemo debet bis vexari pro una at eadem causa*" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the Court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised (Para 23)

Here, in the subsequent suit, the issue which was raised and tried in the previous suit was not raised, framed or tried and no finding, therefore, came to be recorded as to whether the defendants were tenants of the land in suit. It is true that the instant suit which is the subsequent suit, is between the same parties who had litigated in the previous suit and also that the subject-matter of this suit, namely, the disputed land, is the same as was involved in the previous suit but the issues and causes of action were different Consequently, the basic requirement for the applicability of rule of res judicata is wanting and, therefore, in the absence of pleadings, in the absence of issues and in the absence of any finding, it is not open to the appellants to invoke the rule of res judicata on the ground that in the earlier suit it was found by trial court that the appellants were the tenants of the land in dispute under the respondents. (Para 24)

C. **Civil Procedure Code, 1908 — Ss. 96, 100 and Or. 43 R. 1 — Appeal against mere finding not maintainable — Where while dismissing a suit, an adverse finding is recorded against defendant on some issue by trial court or where while dismissing the first appeal preferred by the plaintiff the appellate court records a finding against the defendant, held, the defendant has no right to appeal/second appeal questioning that finding**

Held

An appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order' Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court. (Para 27)

Ganga Bai v *Vijay Kumar*, (1974) 2 SCC 393 , (1974) 3 SCR 882, *Midnapur Zamindari Co Ltd* v *Naresh Narayan Roy*, AIR 1922 PC 241 , 48 IA 49, *Run Bahadur Singh* v *Lucho Koer*, ILR (1885) 11 Cal 301 12 IA 23 (PC), *relied on*

Pateshwari Din v *Mahant Sarju Dass*, AIR 1938 Oudh 18 1937 OWN 1127, *approved*

Bansi Lal Ratwa v *Laxminarayan*, (1969) 2 An WR 246, *Arjun Singh* v *Tara Das Ghosh*, AIR 1974 Pat 1 1974 BLJR 101, *referred to*

D. **Constitution of India — Arts. 136 and 142 — Relief — Suit for recovery of possession of land decreed in favour of plaintiff-respondents and appeal**

preferred by defendant-appellants dismissed by High Court — Points canvassed before Supreme Court decided against the appellants — However, having regard to the facts that appellants remaining in possession over the land for a considerably long time, that respondents themselves had in an earlier suit pleaded that the land had already been sold to appellants and that a finding was recorded by trial court in the previous suit that appellants were tenants under respondents, though no plea to that effect raised by appellants in the subsequent suit, held, interest of justice would be met if a compact area of 10 bighas (out of 34.9 bighas of the suit land) be left with the appellants treating them as protected tenants and decree for possession made executable only in respect of the remaining area — Tenancy and Land Laws — Generally — Protected tenant

R-M/15054/C

Advocates who appeared in this case

V.C. Mahajan, Senior Advocate (Gaurav Jain and Ms Abha Jain, Advocates, with him) for the Appellants;

P.N. Nag, Senior Advocate (R.K. Singh, Advocate, with him) for the Respondents.

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J.— The legal proceedings for land comprising Khata Khatauni No. 45/63, Khasra No. 348 (Area 34.9 bighas) situate in Village Chuling, District Kinnaur in the State of Himachal Pradesh was initiated by the appellants (defendants) before the Compensation Officer, Pooh, for certain relief but when their application seems to have been contested by respondents (plaintiffs), it was withdrawn on 24-8-1971. Thereafter, the present respondent's father Shri Padam Ram, who is since dead and is represented by the respondents, came forward with a suit for recovery of a sum of Rs 6300 as sale price for the aforesaid land against the present appellants on the ground that by document dated 1-9-1976 (referred to as 2-9-1976 at some places in the record), the land in question of which he was the owner was transferred to the appellant which the appellants had promised to pay on 11-11-1976 but they did not pay the amount and continued to remain in possession which they should have surrendered for having not paid the above stipulated amount.

2. The suit was contested by the appellants on the grounds inter alia that they were tenants under the plaintiffs, namely Padam Ram, and were already in possession. They also pleaded that the document dated 1-9-1976 was obtained by fraud and undue influence and was, in any case, void being against the provisions of Himachal Pradesh Tenancy and Land Reforms Act under which they have become owners of the land.

3. A number of issues were framed in this suit, one of which, namely, Issue 5, read as under:

> "5. Whether the defendant is in possession of the suit land as tenant under the plaintiff since Samvat 2005 as alleged?"

4. The suit was dismissed by the trial court (Senior Sub-Judge, Kinnaur) by judgment and order dated 15-1-1981 with the findings, inter alia, that the agreement was without consideration and was hit by the provisions of Section 91 of the Himachal Pradesh Tenancy and Land Reforms Act. It also

recorded a finding on Issue 5 that the defendants were tenants of the land in suit under the plaintiff since Samvat 2005.

5. The judgment of the trial court was upheld by the learned Additional District Judge, Shimla in an appeal filed by the plaintiff which was dismissed with the findings that the land in question was at no stage sold by the plaintiff-respondents to the present appellants and consequently the plaintiffs were not entitled to recover Rs 6300 from the appellants as sale price as the document in question was only an agreement for sale and not a sale deed. The lower appellate court also specifically reversed the finding of the trial court on Issue 5 and held that the defendants had failed to prove themselves to be tenants of the disputed land under the plaintiff. Those legal proceedings terminated at that stage.

6. The plaintiff, however, initiated new proceedings by filing Suit No. 91/1/1982 for possession against the present appellants on the basis of the title, pleading inter alia that they were the owners of the land in question and the defendants, namely, the present appellants who had already been held in the earlier suit that they were not the tenants of the land in suit, were not entitled to retain possession.

7. This suit was resisted by the appellants on the ground that the suit was barred by Order 2 Rule 2 of the Code of Civil Procedure and that it was barred by time as they were in possession over the land in question since Samvat 2005 and had become owners of the land in suit by adverse possession.

8. The trial court, namely, Senior Sub-Judge, Kinnaur at Kalpa, dismissed the suit by judgment and order dated 21-4-1984 with the finding that the suit was barred by the principles of Order 2 Rule 2 and was beyond time. In appeal, decided by the District Judge, Shimla, on 31-3-1986 the findings recorded by the trial court were reversed and the suit was decreed with the findings that it was not barred by Order 2 Rule 2 of the Civil Procedure Code nor was it beyond time.

9. The appellants then filed a second appeal in the High Court of Himachal Pradesh which by its judgment dated 8-7-1994 dismissed the appeal and that is how the matter is before us now.

10. Learned counsel for the appellants has contended that the findings recorded by the District Judge that the suit of the respondents was not barred by Order 2 Rule 2 of the Civil Procedure Code was erroneous and the appellants having already been held to be tenants under the respondents by the trial court in the earlier suit, the suit for possession was not maintainable and ought to have been dismissed by the District Judge as also by the High Court as was done by the trial court. It was also contended that the findings recorded by the trial court on the status of the appellants in the previous suit that they were tenants of the land in suit should still be treated to hold the field notwithstanding its reversal by the lower appellate court as the lower appellate court had ultimately decided the appeal in their favour with the result that they being the successful party had no occasion to file the appeal

and challenge the findings. In this situation, it is contended, the findings of the trial court cannot be treated to have been reversed.

11. We will deal with Order 2 Rule 2 of the Civil Procedure Code first. It provides as under:

> "2. *Suit to include the whole claim.*— (1) Every suit shall include the whole of the claim which the plaintiff be entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
>
> (2) *Relinquishment of part of claim.*— Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) *Omission to sue for one of several reliefs.*— A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted."

12. A bare perusal of the above provisions would indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause.

13. In *Naba Kumar Hazra* v. *Radhashyam Mahish*[1], it was laid down that the plaintiff cannot be permitted to draw the defendant to court twice for the same cause by splitting up the claim and suing, in the first instance, in respect of a part of claim only.

14. What the rule, therefore, requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar. (See *Arjun Lal Gupta* v. *Mriganka Mohan Sur*[2]; *State of M.P.* v. *State of Maharashtra*[3]; *Kewal Singh* v. *B. Lajwanti*[4]).

15. In *Sidramappa* v. *Rajashetty*[5], it was laid down that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter

1 AIR 1931 PC 229 : 35 CWN 977 : 61 MLJ 294
2 (1974) 2 SCC 586 : AIR 1975 SC 207
3 (1977) 2 SCC 288 : 1977 SCC (L&S) 232 : AIR 1977 SC 1466
4 (1980) 1 SCC 290 : AIR 1980 SC 161
5 (1970) 1 SCC 186 : AIR 1970 SC 1059

namely, the subsequent suit, will not be barred by the rule contained in Order 2 Rule 2, CPC. In *Gurbux Singh* v. *Bhooralal*[6], it was observed:

> "In order that a plea of a bar under O. 2 R. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

16. In view of the above, what is to be seen in the instant case is whether the cause of action on the basis of which the previous suit was filed, is identical to the cause of action on which the subsequent suit giving rise to the present appeal, was filed. If the identity of causes of action is established, the rule would immediately become applicable and it will have to be held that since the relief claimed in the subsequent suit was omitted to be claimed in the earlier suit, without the leave of the court in which the previous suit was originally filed, the subsequent suit for possession is liable to be dismissed as the appellants, being the defendants in both the suits, cannot be vexed twice by two separate suits in respect of the same cause of action.

17. We have already noticed in the earlier part of the judgment that the previous suit was filed for recovery of a sum of Rs 6300 as sale price of the land in suit which was dismissed with the finding that the document on which the suit was filed was not a sale deed but was a mere agreement for sale and, therefore, the amount in question could not be recovered as sale price. That document, thus, constituted the basis of the suit.

18. The subsequent suit was brought by the respondents for recovery of possession on the ground that they were the owners of the land in suit and were consequently entitled to recover its possession The cause of action in the subsequent suit was, therefore, entirely different. Since the previous suit was for recovery of sale price, the respondents could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to the defendants (appellants). The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of causes of action in the previous suit and the subsequent suit was not established. Consequently, the District Judge as also the High Court were correct in rejecting the plea raised by the appellants with regard to Order 2 Rule 2 of the Civil Procedure Code.

6 AIR 1964 SC 1810 (1965) 1 Andh LT 107

19. Learned counsel for the appellants next contended that the finding recorded by the trial court in the previous suit on Issue 5 that the appellants were the tenants of the land in suit under the respondents since Samvat 2005 should be treated to be still available to them and on that basis they can legally plead that the suit of the respondents for possession of the land in suit was liable to be dismissed. It is contended that the finding on Issue 5 was reversed by the lower appellate court in an appeal which was ultimately decided in their favour and, therefore, it was not possible for them to challenge the findings of the lower appellate court in any higher forum for the simple reason that an appeal under Section 96, or, for that matter, under Section 100 of the Civil Procedure Code, lies only against a decree and not against a finding. In this situation, it is contended, the appellate judgment insofar as it relates to the finding on Issue 5, is liable to be ignored. It is pointed out that if this is done, the original findings recorded by the trial court on the status of the appellants that they are the tenants of the land under the respondents, would revive and operate as res judicata against the respondents who cannot be granted the relief of possession.

20. We may, at the very outset, point out that in the subsequent suit, the appellants in their capacity as defendants did not plead the rule of res judicata. As a matter of fact, they did not in their written statement even refer to the findings recorded by the trial court in the previous suit nor did they claim that they were tenants of the land in suit under the respondents. Their main defence was that they were in possession over the land in suit since Samvat 2005 and had, therefore, acquired title by adverse possession. They also pleaded that the suit was barred by time and was, in any case, not maintainable in view of the provisions contained in Order 2 Rule 2 of the Civil Procedure Code. The appellants, thus, raised an altogether new defence and did not plead that they were tenants under the respondents. Consequently, an issue whether the appellants were tenants of the land in dispute was not framed and, therefore, there was no occasion to refer to the findings recorded in the previous suit.

21. Rule of res judicata is contained in Section 11 of the Civil Procedure Code. Bereft of all its explanations, namely, Explanations I to VIII, Section 11 is quoted below:

> "11. *Res judicata.*— No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

22. "*Res judicata pro veritate accipitur*" is the full maxim which has, over the years, shrunk to mere "*res judicata*".

23. Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "*Interest reipublicae*

ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "*Nemo debet bis vexari pro una at eadem causa*" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

24. In the previous suit, which was instituted by the respondents, an issue, namely, Issue 5 was framed on the status of the appellant as to whether they were the tenants of the land in suit under the respondents but in the subsequent suit this issue was not raised as the appellants who were the defendants in the subsequent suits did not plead that they were the tenants under the respondents. What they pleaded was that they were in possession since a long time namely from Samvat 2005 and had, therefore, acquired title by adverse possession. Consequently, in the subsequent suits, the issue which was raised and tried in the previous suit was not raised, framed or tried and no finding, therefore, came to be recorded as to whether the defendants were tenants of the land in suit. It is true that the instant suit which is the subsequent suit, is between the same parties who had litigated in the previous suit and it is also true that the subject-matter of this suit, namely, the disputed land, is the same as was involved in the previous suit but the issues and causes of action were different. Consequently, the basic requirement for the applicability of rule of res judicata is wanting and, therefore, in the absence of pleadings, in the absence of issues and in the absence of any finding, it is not open to the learned counsel for the appellants to invoke the rule of res judicata on the ground that in the earlier suit it was found by trial court that the appellants were the tenants of the land in dispute under the respondents.

25. Let us now consider the plea regarding the effect of an adverse finding recorded by the court against a party in whose favour the suit or the appeal is ultimately decided.

26. It is provided in Section 96 of the CPC that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeal from the decision of such court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree passed in appeal. Thus sine qua non in both the provisions is the 'decree' and unless the decree is passed, an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code. Similarly, an appeal lies against an 'order' under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the 'orders' against which appeal would lie have been enumerated. Unless there is an 'order' as defined in Section 2(14) and unless that 'order' falls within the list of 'orders' indicated in Order 43, an appeal would not lie.

27. Thus, an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'. Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court. (See *Ganga Bai* v. *Vijay Kumar*[7].)

28. In *Midnapur Zamindari Co. Ltd.* v. *Naresh Narayan Roy*[8], it was observed as under:

> "Their Lordships do not consider that this will be found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them: but it is the finding of a court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have now been able to perform."

29. Similar view was also expressed in an earlier decision in *Run Bahadur Singh* v. *Lucho Koer*[9].

30. The Oudh Chief Court in *Pateshwari Din* v. *Mahant Sarju Dass*[10] held that where a decree in previous suit is wholly in favour of a person and gives him all the reliefs sought for by him, he has no right of appeal against the decree so as to enable him to contest any adverse finding against him in such suit. Hence, such adverse finding cannot operate as res judicata as against him in a subsequent suit.

31. The High Court of Andhra Pradesh in *Bansi Lal Ratwa* v. *Laxminarayan*[11] and the Full Bench of the High Court of Patna in *Arjun Singh* v. *Tara Das Ghosh*[12] have taken the view that an appeal would not lie against mere adverse finding unless such finding would constitute res judicata in subsequent proceedings. We are, however, not concerned with this aspect of the matter in the present case nor are we concerned with the earlier aspect as the plea of res judicata having not been raised in the written statement, the appellant cannot be permitted to raise the plea here.

32. In view of what we have held above, the points canvassed before us are decided against the appellants.

33. We, however, cannot overlook the fact that the appellants are in possession over the land in suit for a considerably long time and the respondents themselves at one stage had pleaded (in the previous suit filed by them) that the land had already been sold to the appellants and that the appellants were liable to pay the sale consideration of Rs 6300 to them. It is strange that in spite of the findings having been recorded by the trial court in their favour that they were the tenants of the land in suit under the

7 (1974) 2 SCC 393 : (1974) 3 SCR 882
8 AIR 1922 PC 241 : 48 IA 49, 55
9 ILR (1885) 11 Cal 301 : 12 IA 23 (PC)
10 AIR 1938 Oudh 18 : 1937 OWN 1127
11 (1969) 2 An WR 246
12 AIR 1974 Pat 1 : 1974 BLJR 101

respondents, the appellants did not raise that plea in the subsequent suit filed by the respondents for recovery of possession. Maybe, because the finding was set aside by appellate court. Why this was not done is not within our jurisdiction to enquire. All that we can say is that the area of the land of the suit is 34.9 bighas and the interest of justice would be met if a compact area of 10 bighas is left with the appellants and the decree for possession is made executable only in respect of the remaining area namely an area of 24.9 bighas. The appellants shall be treated as protected tenants in respect of ten bighas of land. The Tehsildar concerned shall partition the land between the parties as directed by us. The appellants shall surrender the area falling to the share of the respondents within one month of the order of the Tehsildar. The order of the Tehsildar shall be final. The judgment of the courts below including that of the High Court shall stand modified to that extent.

34. The appeal is partly allowed to the extent indicated above but without any order as to costs.

(1995) 6 Supreme Court Cases 742

(BEFORE M.M. PUNCHHI AND S.C. SEN, JJ.)

MOOLCHAND AND OTHERS .. Appellants;

Versus

FATIMA SULTANA BEGUM AND OTHERS .. Respondents.

Civil Appeal No. 1081 of 1976†, decided on November 14, 1995

Civil Procedure Code, 1908 — S. 151 and Or. 21 R. 90 — Inherent power of court in conducting sale of property — Scope — Interest of justice is the primary consideration — Sale of property by court through receiver appointed by it — Application under Or. 21 R. 90 for setting aside the sale rejected by trial court as being not maintainable — High Court while agreeing with the trial court that objection under R. 90 did not lie, taking the view that court has inherent power to oversee whether the sale was properly conducted and whether there was any merit in the objection and accordingly it remanding the matter to trial court to go into it treating the application as maintainable — Held, High Court was justified in doing so

Held:

Interests of justice are the primary consideration in granting or not granting prayers in a petition under Section 151 CPC. No rule or procedure can curtail that power of the court. The High Court has rightly pursued that path in permitting the trial court to examine the objections raised, to promote the cause of justice. In an administrative suit, the receivers appointed by the court to perform a function are agents of the court and like a good principal, the court can put the receivers to accountability. To awaken the role of the court in that behalf, applications by the parties connected with the suit are perfectly in order to obviate any doubt entering in that regard and to effect a sense of transparency so that no blame or aspersion is

† From the Judgment and Order dated 21-7-1976 of the Andhra Pradesh High Court in Appeal against Order No. 15 of 1974

For example, in many cases of exemptions, the Industry Department gives exemption, while the same is denied by the Revenue Department. Similarly, with the enactment of regulatory laws in several cases there could be overlapping of jurisdictions between, let us say, SEBI and insurance regulators. Civil appeals lie to this Court. Stakes in such cases are huge. One cannot possibly expect timely clearance by the CoD. In such cases, grant of clearance to one and not to the other may result in generation of more and more litigation. The mechanism has outlived its utility.

18. In the changed scenario indicated above, we are of the view that time has come under the above circumstances to recall the directions of this Court in its various orders reported as: (*i*) *ONGC-II*[1] dated 11-10-1991, (*ii*) *ONGC-III*[2] dated 7-1-1994, and (*iii*) *ONGC-IV*[3] dated 20-7-2007.

19. In the circumstances, we hereby recall the following orders reported in:

(*i*) *ONGC-II*[1] dated 11-10-1991,

(*ii*) *ONGC-III*[2] dated 7-1-1994, and

(*iii*) *ONGC-IV*[3] dated 20-7-2007.

20. For the aforestated reasons, IA No. 4 filed by the assessee in Civil Appeal No. 1903 of 2008 is dismissed.

(2011) 3 Supreme Court Cases 408

(BEFORE G.S. SINGHVI AND A.K. GANGULY, JJ.)

M. NAGABHUSHANA .. Appellant;

Versus

STATE OF KARNATAKA AND OTHERS .. Respondents.

Civil Appeal No. 1215 of 2011†, decided on February 2, 2011

A. Constitution of India — Art. 136 — Abuse of process of court/law — Exemplary costs of ₹10 lakhs imposed as a deterrent — Appellant reagitating its case already decided by Supreme Court in *AIMO case*, (2006) 4 SCC 683, before High Court and then questioning those judgments before Supreme Court, is nothing but abuse of process of court — Such litigative adventure of appellant is contrary to principles of res judicata as well as principles of constructive res judicata and principles analogous thereto — Main purpose of filing this appeal was to hold up, on one or other pretext, implementation of earlier decision of Supreme Court — Hence appeal dismissed with costs of ₹10 lakhs (Paras 23 to 25, 18, 11 and 37)

State of Karnataka v. *All India Manufacturers Organisation*, (2006) 4 SCC 683; *K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573, *relied on*

The Supreme Court Practice, 1995, (p. 344), *relied on*

† Arising out of SLP (C) No. 26391 of 2010. From the Judgment and Order dated 23-7-2010 of the High Court of Karnataka at Bangalore in WA No. 1192 of 2007

B. **Supreme Court Rules, 1966 — Or. 41 Rr. 1 & 3 — Costs — Recovery, in default — Mode of — Appellant reagitating an already decided case by Supreme Court — On facts held, appellant abused process of court — Costs of ₹10 lakhs imposed — Appellant directed to pay costs in favour of High Court Legal Services Authority — In default, appropriate authority would initiate proceedings against the appellant on complaint filed by High Court Legal Services Authority — Costs to be recovered as arrears of land revenue — Practice and Procedure — Costs — Civil Procedure Code, 1908, Ss. 35 and 35-A (Para 39)**

C. **Land Acquisition and Requisition — Karnataka Industrial Areas Development Act, 1966 (18 of 1966) — Ss. 28(4) and 28(5) — Acquisition of land under — Inapplicability of S. 11-A, LA Act, 1894 — Appellant contending that acquisition was vitiated as award was not passed within time stipulated under S. 11-A, LA Act — Held, on publication of notification under S. 28(4), land vests in State Government free from all encumbrance — Such vesting takes place by operation of law — S. 11-A, LA Act is not applicable to proceedings under KIAD Act, 1966 — Land Acquisition Act, 1894, S. 11-A (Paras 26, 29 to 31 and 35)**

Munithimmaiah v. *State of Karnataka*, (2002) 4 SCC 326; *Offshore Holdings (P) Ltd.* v. *Bangalore Development Authority*, (2011) 3 SCC 139 : (2011) 1 SCC (Civ) 662; *Girnar Traders (3)* v. *State of Maharashtra*, (2011) 3 SCC 1 : (2011) 1 SCC (Civ) 578, *applied*

Pratap v. *State of Rajasthan*, (1996) 3 SCC 1, *followed*

Mariyappa v. *State of Karnataka*, (1998) 3 SCC 276, *distinguished*

D. **Civil Procedure Code, 1908 — S. 11 — Principles of res judicata — Foundation of — History of doctrine, traced — Held, it is in the interest of State that there should be an end to litigation — No one ought to be vexed twice in a litigation if it appears to court that it is for one and the same cause — Judgment of a proper trial by a competent court has to be treated as final and conclusive determination of issues involved in matter — In absence of such principles great oppression might be caused in pretext of law and there would be no end to litigation — Rich and malicious litigant will succeed in vexing his opponent by repetitive suits and actions resulting in weaker party to relinquish his rights — To prevent such anarchy doctrine of res judicata has been evolved — Maxims — *Interest reipublicae ut sit finis litium* — *Nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* — Rule of Law — Res judicata — Role of doctrine**

E. **Civil Procedure Code, 1908 — S. 11 — Res judicata — Plea of — Nature of — Held, it is not technical doctrine — It is a fundamental principle sustaining the rule of law ensuring finality of litigation — It prevents the approaching of courts for reagitating same issues which have already been finally decided between parties — Thus promoting honest and fair administration of justice — Rule of Law — Res judicata — Role of doctrine**

Dismissing the appeal with costs, the Supreme Court

Held :

The principles of res judicata are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. This doctrine of res judicata is common to all civilised systems of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest. (Para 12)

That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties. (Para 13)

Lachhmi v. *Bhulli*, ILR (1927) 8 Lah 384, *referred to*

F. **Civil Procedure Code, 1908 — S. 11 — Res judicata — Approach in applying doctrine by courts — Held, while applying the principles of res judicata the court should not be hampered by any technical rules of interpretation (Para 17)**

Sheoparsan Singh v. *Ramnandan Singh*, (1915-16) 43 IA 91 : ILR (1916) 43 Cal 694 (PC), *relied on*

G. **Land Acquisition and Requisition — Karnataka Industrial Areas Development Act, 1966 (18 of 1966) — Ss. 28(4) and 28(5) — Land Acquisition Act, 1894 — Ss. 4, 5 and 11 — Compared (Paras 34 and 30)**

H. **Constitution of India — Arts. 226 and 32 — Writ proceedings — Constructive res judicata — Applicability — Reiterated, principles of res judicata are based on considerations of public policy — Essentials of public policy is that judgment of a competent court should be final and no person should be made to face same litigation twice — Res judicata is to prevent abuse of process of court — Adjudication of competent court is final and conclusive not only with regard to actual litigation but also with regard to all incidental or connected litigation arising out thereof — Hence principles of constructive res judicata are applicable to writ proceedings — Civil Procedure Code, 1908, S. 11 (Paras 19 to 22)**

State of Karnataka v. *All India Manufacturers Organisation*, (2006) 4 SCC 683; *Devilal Modi* v. *STO*, AIR 1965 SC 1150; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348; *State of U.P.* v. *Nawab Hussain*, (1977) 2 SCC 806 : 1977 SCC (L&S) 362, *relied on*

Greenhalgh v. *Mallard*, (1947) 2 All ER 255 (CA), *held, approved*

Daryao v. *State of U.P.*, AIR 1961 SC 1457 : (1962) 1 SCR 574, *cited*

I. **Constitution of India — Arts. 136 and 226 — New plea — Impermissibility in view of principles of constructive res judicata — Appellant questioning land acquisition proceedings — Issues involved in the matter had already been decided by Supreme Court — Appellant raising a new plea that he was not aware that his lands were outside the purview of Framework Agreement (FWA) — Held, appellant never raised issue that his lands were outside purview of FWA in earlier writ proceedings — No sufficient explanation was offered for not raising that issue in earlier writ petitions — In view of applicability of principles of constructive res judicata, appellant not permitted to raise his new plea — Civil Procedure Code, 1908, S. 11 (Para 16)**

G-D/47275/CV

Advocates who appeared in this case :

Anoop G. Chaudhari and Ms June Chaudhari, Senior Advocates (Raghavendra S. Srivatsa and Venkat Subramanium, Advocates) for the Appellant;

Dushyant Dave and Dr. Abhishek M. Singhvi, Senior Advocates (Anant Raman, R.V.S. Nair, Shanth Kr. V. Mahale and Ms Anitha Shenoy, Advocates) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2011) 3 SCC 139 : (2011) 1 SCC (Civ) 662, *Offshore Holdings (P) Ltd.* v. *Bangalore Development Authority* 421*a-b*
2. (2011) 3 SCC 1 : (2011) 1 SCC (Civ) 578, *Girnar Traders (3)* v. *State of Maharashtra* 421*d-e*
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4. (2002) 4 SCC 326, *Munithimmaiah* v. *State of Karnataka* 420*h*
5. (1998) 3 SCC 573, *K.K. Modi* v. *K.N. Modi* 419*b*, 419*d*
6. (1998) 3 SCC 276, *Mariyappa* v. *State of Karnataka* 421*e*, 421*e-f*, 421*g*
7. (1996) 3 SCC 1, *Pratap* v. *State of Rajasthan* 420*f*, 420*g-h*
8. (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348, *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra* 418*f*
9. (1977) 2 SCC 806 : 1977 SCC (L&S) 362, *State of U.P.* v. *Nawab Hussain* 418*e-f*
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12. (1947) 2 All ER 255 (CA), *Greenhalgh* v. *Mallard* 418*c-d*, 418*e-f*
13. ILR (1927) 8 Lah 384, *Lachhmi* v. *Bhulli* 416*d*, 417*a-b*
14. (1915-16) 43 IA 91 : ILR (1916) 43 Cal 694 (PC), *Sheoparsan Singh* v. *Ramnandan Singh* 417*g-h*

The Judgment of the Court was delivered by

A.K. GANGULY, J.— Leave granted. This appeal is directed against the judgment and order dated 23-7-2010 passed by the Division Bench of the High Court of Karnataka whereby the learned Judges dismissed WA No. 1192 of 2007 which was filed impugning an acquisition proceeding to the State of Karnataka. It may also be noted that while dismissing the appeal, the Division Bench affirmed the judgment of the learned Single Judge dated 28-5-2007.

2. From the perusal of the judgment of the learned Single Judge it appears that the appellant claims to be the owner of the land bearing Survey No. 76/1 and Survey No. 76/2 of Thotada Guddadahalli Village, Bangalore North Taluk. The appellant alleged that these two plots of land were outside the purview of the Framework Agreement (FWA) and notification issued under Sections 28(1) and 28(4) of the Karnataka Industrial Areas Development Act (the KIAD Act). While dismissing the writ petition, the learned Single Judge held that the acquisition proceedings in question were challenged by the writ petitioner, the appellant herein, in a previous Writ Petition No. 46078 of 2003 which was initially accepted and the acquisition proceedings were quashed. Then on appeal, the Division Bench (in Writ Appeals Nos. 713 and 2210 of 2004) reversed the judgment of the learned Single Judge. Thereafter, the Division Bench order was upheld by this Court and this Court approved the acquisition proceedings. Therefore, the writ petition, out of which this present appeal arises, purports to be an attempt to litigate once again, inter alia, on the ground that the aforesaid blocks of land were outside the purview of the FWA dated 3-4-1997.

3. The learned Judges of the Division Bench held that the second round of litigation is misconceived inasmuch as the acquisition proceedings were upheld right up to this Court. The Division Bench in the impugned judgment noted the aforesaid facts which were also noted by the learned Single Judge. Apart from that the Division Bench also noted that another batch of public interest litigation in WP No. 45334 of 2004 and connected matters were also disposed of by this Court directing the State of Karnataka and all its instrumentalities including the Housing Board to forthwith execute the project as conceived originally and upheld by this Court and it was also directed that the FWA be implemented. The Division Bench, however, noted that on behalf of the appellant an additional ground has been raised that the acquisition stood vitiated since no award was passed as contemplated under Section 11-A of the Land Acquisition Act (hereinafter "the said Act").

4. One of the contentions raised before the Division Bench on behalf of the appellant was that the question of principle of constructive res judicata is not applicable to a writ petition. This contention was raised in the context of alleged non-publication of award and the consequential invalidation of the acquisition proceeding. Even though that contention was raised for the first time before the Division Bench, the Division Bench, after referring to several judgments of this Court, held that the said contention is not tenable in law.

5. The Division Bench also noted that in the earlier round of litigation the contentions relating to the land falling outside the area of the FWA being acquired, were raised and were repelled. In fact the contentions, raised in the previous round of litigation, have been noted expressly in para 17 of the impugned judgment, which are as under:

> "*1.* Most of the lands in question fall outside the area required for peripheral road, etc. and they are fully developed. The acquisition for the benefit of private company like NICE Ltd. could not be termed as public purpose.

2. The acquisition for peripheral road, etc. would be illegal notwithstanding the definition of infrastructural facilities as incorporated under Section 2(8-*a*) of the Act. The proposed acquisition is in respect of the alleged contract between the State and M/s NICE Ltd. which is stated to be based on agreement dated 3-4-1997.

3. It amounts to colourable exercise of power and fraud on power and in such an event, the entire acquisition proceedings are to have been quashed by the learned Single Judge.

4. On reading para 23(2) of the impugned order, it is clear that the proposed acquisition of land as notified under Section 28(1) of the Act is different from the alleged purpose, which are quite different and from the same, it is clear that the acquisition initiated is not bona fide, but the same is as a result of colourable exercise of power coupled with exercise of fraud on power and on this count also, the notification issued under Section 28(1) also ought to have been quashed.

5. The Government did not apply its mind to the acquisition proceedings and there is total non-application of mind by the Government to the relevant facts in initiating the acquisition proceedings under the KIAD Act.

6. There was a total change in the stand of the opponents with regard to the 'public purpose' which was stated in the preliminary notification vis-à-vis their statement of objection filed before the Court and moreover the conduct of M/s NICE Co. in allotting certain extent of lands to the Association of India Machine Tool Manufacturers (AIMTM) to put up a big conventional centre, even before the acquisition proceedings are complete, disentitles them from supporting the acquisition of lands.

7. Since admittedly no industrial area was being framed in the lands proposed to be acquired, the Karnataka Industrial Areas Development Board could never be permitted to acquire lands for the formation of infrastructural facility without there being any industries."

6. In the impugned judgment at para 18, the findings of the previous Division Bench, on the contentions extracted above, were also noted. Relevant parts of it are extracted:

"Insofar as the appeals filed by the appellant, Indian Machine Tools Manufacturers Association in Writ Appeals Nos. 3326-27 of 2004 are concerned, we find that there is considerable force in the submission made by the learned counsel for the appellant that the writ petition filed by Respondents 1 and 2 itself was not maintainable. In fact the learned Senior Counsel for the contesting respondent fairly conceded the same. *The writ petition filed by the 2nd respondent, M. Nagabhushan in WP No. 39559 of 2003 came to be dismissed by this Court holding that he had purchased the land in question from its previous owner D.R. Raghavendra subsequent to final notification issued under Section 28(4) of the Act and that further the previous owner D.R. Raghavendra had already handed over possession of the land in question to the Land Acquisition Officer by accepting the award.*

Therefore, apart from the fact that there is no merit in any of the contentions urged on behalf of the landowners, we find that the appeals filed by the appellant Indian Machine Tool Manufacturers Association has to succeed on the ground that the writ petition filed by Respondents 1 and 2 itself was not maintainable. Since the appellant IMTMA was not a party before the learned Single Judge, the leave sought for is granted."

(emphasis supplied)

7. Challenging the aforesaid judgment, the present appellant filed a special leave petition before this Court, which, on grant of leave, was numbered as Civil Appeal No. 3878 of 2005. The grounds which were substantially raised by the present appellant in the previous appeal (No. 3878 of 2005) have been raised again in this appeal. The alleged grounds in the present appeal about acquisition of land beyond the requirement of the FWA were raised by the present appellant in the previous Appeal No. 3878 of 2005 also.

8. On those contentions, a three-Judge Bench of this Court, while dealing with several appeals including the one filed by the present appellant, rendered the judgment in *State of Karnataka* v. *All India Manufacturers Organisation*[1] (*AIMO case*), wherein the said three-Judge Bench held: (SCC p. 711, para 76)

"*76.* The next contention urged on behalf of the landowners is that the lands were not being acquired for a public purpose. The counsel who have argued for the landowners have expatiated in their contention by urging that land in excess of what was required under the FWA had been acquired; land far away from the actual alignment of the road and periphery had been acquired; consequently, it is urged that even if the implementation of the highway project is assumed to be for a public purpose, acquisition of land far away therefrom would not amount to a public purpose nor would it be covered by the provisions of the KIAD Act."

9. In para 77 of the said Report, it was further held: (*AIMO case*[1], SCC pp. 711-12)

"*77.* In our view, this was an entirely misconceived argument. As we have pointed out in the earlier part of our judgment, the Project is an integrated infrastructure development project and not merely a highway project. The Project as it has been styled, conceived and implemented was the Bangalore-Mysore Infrastructure Corridor Project, which conceived of the development of roads between Bangalore and Mysore, for which there were several interchanges in and around the periphery of the city of Bangalore, together with numerous developmental infrastructure activities along with the highway at several points. As an integrated project, it may require the acquisition and transfer of lands even away from the main alignment of the road."

1 (2006) 4 SCC 683

In SCC para 79 at p. 712 of the Report, this Court affirmed the previous judgment of the Division Bench of the High Court in the following words:

> "*79.* The learned Single Judge erred in assuming that the lands acquired from places away from the main alignment of the road were not a part of the Project and that is the reason he was persuaded to hold that only 60% of the land acquisition was justified because it pertained to the land acquired for the main alignment of the highway. This, in the view of the Division Bench, and in our view, was entirely erroneous. The Division Bench was right in taking the view that the Project was an integrated project intended for public purpose and, irrespective of where the land was situated, so long as it arose from the terms of the FWA, there was no question of characterising it as unconnected with a public purpose. We are, therefore, in agreement with the finding of the High Court on this issue."

10. The Division Bench judgment of the High Court was further affirmed by this Court in clear and express words in SCC para 81 of the Report: (*AIMO case*[1], SCC pp. 712-13)

> "*81.* In summary, having perused the well-considered judgment of the Division Bench which is under appeal in the light of the contentions advanced at the Bar, we are not satisfied that the acquisitions were, in any way, liable to be interfered with by the High Court, even to the extent as held by the learned Single Judge. We agree with the decision of the Division Bench that the acquisition of the entire land for the Project was carried out in consonance with the provisions of the KIAD Act for a public project of great importance for the development of the State of Karnataka. We do not think that a project of this magnitude and urgency can be held up by individuals raising frivolous and untenable objections thereto. The powers under the KIAD Act represent the powers of eminent domain vested in the State, which may need to be exercised even to the detriment of individuals' property rights so long as it achieves a larger public purpose. Looking at the case as a whole, we are satisfied that the Project is intended to represent the larger public interest of the State and that is why it was entered into and implemented all along."

11. We find that disregarding the aforesaid clear finding of this Court, the appellant, on identical issues, further filed a new writ petition out of which the present appeal arises. That writ petition, as noted above, was rejected both by the learned Single Judge and by the Division Bench in clear terms. It is obvious that such a litigative adventure by the present appellant is clearly against the principles of res judicata as well as principles of constructive res judicata and principles analogous thereto.

12. The principles of res judicata are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the

same cause. This doctrine of res judicata is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

14. Tek Chand, J. delivering the unanimous Full Bench decision in *Lachhmi* v. *Bhulli*[2] traced the history of this doctrine both in Hindu and Mohammedan jurisprudence as follows: (ILR pp. 391-92)

> "In the *Mitakshra* (Book II, Chapter I, Section V, verse 5) one of the four kinds of effective answers to a suit is 'a plea by former judgment' and in verse 10, *Katyayana* is quoted as laying down that 'one against whom a judgment had formerly been given, if he brings forward the matter again, must be answered by a plea of *purva nyaya* or former judgment' (Macnaughten and Colebrooke's translation, p. 22). The doctrine, however, seems to have been recognised much earlier in Hindu jurisprudence, judging from the fact that both *Smriti Chandrika* (Mysore Edn., pp. 97-98) and *Virmitrodaya* (Vidya-Sagar Edn., p. 77) base the defence of *prang nyaya* (former decision) on the following text of the ancient law-giver *Harita*, who is believed by some Orientalists to have flourished in the 9th century BC and whose Smriti is now extant only in fragments—
>
> > 'The plaintiff should be non-suited if the defendant avers: "in this very affair, there was litigation between him and myself previously", and it is found that the plaintiff had lost his case.'
> >
> > There are texts of *Prasara* (Bengal Asiatic Society Edn., p. 56) and of *Mayukha* (Kane's Edn., p. 15) to the same effect.
> >
> > Among Muhammadan law-givers similar effect was given to the plea of 'Niza-i-munfasla' or 'Amar Mania taqrir mukhalif'. Under Roman Law, as administered by the Proetors' courts, a defendant could repel the plaintiff's claim by means of *exceptio rei judicatoe* or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and as stated in *Roby's Roman Private*

2 ILR (1927) 8 Lah 384

Law (Vol. II, p. 338) the general principle recognised was that 'one suit and one decision was enough for any single dispute' and that 'a matter once brought to trial should not be tried except, of course, by way of appeal'."

15. The learned Judge in *Bhulli case*[2] also noted that in British India the rule of res judicata was first introduced by Section 16 of Bengal Regulation 3 of 1773 which prohibited the Zila and City Courts from entertaining any cause which, from the production of a former decree or the record of the court, appears to have been heard and determined by any Judge or any Superintendent of a court having competent jurisdiction. The learned Judge found that the earliest legislative attempt at codification of the law on the subject was made in 1859, when the first Civil Procedure Code was enacted, whereunder Section 2 of the Code barred every court from taking cognizance of suits which, on the same cause of action, have been heard and determined by a court of competent jurisdiction. The learned Judge opined, and in our view rightly, that this was partial recognition of the English rule insofar as it embodied the principles relating to estoppel by judgment or estoppel by record. Thereafter, when the Code was again revised in 1877, the operation of the rule was extended in Section 13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action but the prohibition was extended against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent court. The learned Judge also noted that before the principle assumed its present form in Section 11 of the Code of 1908, the section was expanded twice. However, the learned Judge noted that Section 11 is not exhaustive of the law on the subject.

16. It is nobody's case that the appellant did not know the contents of the FWA. From this it follows that it was open to the appellant to question, in the previous proceeding filed by it, that his land which was acquired was not included in the FWA. No reasonable explanation was offered by the appellant to indicate why he had not raised this issue. Therefore, in our judgment, such an issue cannot be raised in this proceeding in view of the doctrine of constructive res judicata.

17. It may be noted in this context that while applying the principles of res judicata the court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that:

> "... the application of the rule by courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

(See *Sheoparsan Singh* v. *Ramnandan Singh*[3], IA at p. 99 : ILR at p. 706.)

18. Therefore, any proceeding which has been initiated in breach of the principle of res judicata is prima facie a proceeding which has been initiated in abuse of the process of court.

3 (1915-16) 43 IA 91 : ILR (1916) 43 Cal 694 (PC)

19. A Constitution Bench of this Court in *Devilal Modi* v. *STO*[4], has explained this principle in very clear terms: (AIR p. 1152, para 7)

> "*7.* ... But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Article 226, cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice (vide *Daryao* v. *State of U.P.*[5])."

20. This Court in *AIMO case*[1] explained in clear terms that principle behind the doctrine of res judicata is to prevent an abuse of the process of court. In explaining the said principle the Bench in *AIMO case*[1] relied on the following formulation of Somervell, L.J. in *Greenhalgh* v. *Mallard*[6] (All ER p. 257 H): (*AIMO case*[1], SCC p. 700, para 39)

> "*39.* ... 'I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*.' " (emphasis supplied in *AIMO case*[1])

The Bench in *AIMO case*[1] also noted that the judgment of the Court of Appeal in *Greenhalgh*[6] was approved by this Court in *State of U.P.* v. *Nawab Hussain*[7], SCC at p. 809, para 4.

21. Following all these principles a Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*[8] laid down the following principle: (SCC p. 741, para 35)

> "*35.* ... an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

4 AIR 1965 SC 1150
5 AIR 1961 SC 1457 : (1962) 1 SCR 574
6 (1947) 2 All ER 255 (CA)
7 (1977) 2 SCC 806 : 1977 SCC (L&S) 362
8 (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348

22. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of constructive res judicata, as explained in Explanation IV to Section 11 CPC, are also applicable to writ petitions.

23. Thus, the attempt to re-argue the case which has been finally decided by the court of last resort is a clear abuse of process of the court, regardless of the principles of res judicata, as has been held by this Court in *K.K. Modi* v. *K.N. Modi*[9]. In SCC para 44 of the Report, this principle has been very lucidly discussed by this Court and the relevant portions whereof are extracted below: (SCC p. 592)

> "*44*. One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata."

24. In coming to the aforementioned finding, this Court relied on *The Supreme Court Practice, 1995* published by Sweet & Maxwell (p. 344). The relevant principles laid down in the aforesaid practice and which have been accepted by this Court are as follows: (*K.K. Modi case*[9], SCC p. 592, para 43)

> "*43*. ... 'This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material.' "

25. On the premises aforesaid, it is clear that the attempt by the appellant to reagitate the same issues which were considered by this Court and were rejected expressly in the previous judgment in *AIMO case*[1], is a clear instance of an abuse of process of this Court apart from the fact that such issues are barred by principles of res judicata or constructive res judicata and principles analogous thereto.

26. The other point which has been argued by the appellant is that Notification dated 30-3-2004 issued under Section 28(4) of the KIAD Act stands vitiated in view of the provisions of Section 11-A of the said Act inasmuch as no award was passed within two years from the date of the notification. This Court is unable to accept the aforesaid contention for the following reasons.

27. It may be noted that the said question was not urged by the appellant in its writ petition before the learned Single Judge. Of course, this was urged before the Division Bench of the High Court unsuccessfully. Apart from that we also find no substance in the aforesaid contentions.

9 (1998) 3 SCC 573

28. If we compare the provisions of Sections 28(4) and 28(5) of the KIAD Act with the provisions of Sections 4 and 6 of the said Act, we discern a substantial difference between the two. In order to appreciate the purport of both Sections 28(4) and 28(5) of the KIAD Act, they are to be read together and are set out below:

> "**28.** ***Acquisition of land.***— * * *
>
> (4) After orders are passed under sub-section (3), where the State Government is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-section (1), a declaration shall, by notification in the Official Gazette, be made to that effect.
>
> (5) On the publication in the Official Gazette of the declaration under sub-section (4), the land shall vest absolutely in the State Government free from all encumbrances."

29. The appellant has not challenged the validity of the aforesaid provisions. Therefore, on a combined reading of the provisions of Sections 28(4) and 28(5) of the KIAD Act, it is clear that on the publication of the Notification under Section 28(4) of the KIAD Act i.e. from 30-3-2004, the land in question vested in the State free from all encumbrances by operation of Section 28(5) of the KIAD Act, whereas the land acquired under the said Act vests only under Section 16 thereof, which runs as under:

> "**16.** ***Power to take possession.***—When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances."

30. On a comparison of the aforesaid provisions, namely, Sections 28(4) and 28(5) of the KIAD Act with Section 16 of the said Act, it is clear that the land which is subject to acquisition proceeding under the said Act gets vested with the Government only when the Collector makes an award under Section 11, and the Government takes possession. Under Sections 28(4) and 28(5) of the KIAD Act, such vesting takes place by operation of law and it has nothing to do with the making of any award. This is where Sections 28(4) and 28(5) of the KIAD Act are vitally different from Sections 4 and 6 of the said Act.

31. A somewhat similar question came up for consideration before a three-Judge Bench of this Court in *Pratap* v. *State of Rajasthan*[10]. In that case the acquisition proceedings commenced under Section 52(2) of the Rajasthan Urban Improvement Act, 1959 and the same contentions were raised, namely, that the acquisition notification gets invalidated for not making an award within a period of two years from the date of notification. Repelling the said contention, the learned Judges held that once the land is vested in the Government, the provisions of Section 11-A are not attracted and the acquisition proceedings will not lapse. (*Pratap case*[10], SCC para 12 at p. 8 of the Report.)

32. In *Munithimmaiah* v. *State of Karnataka*[11] this Court held that the provisions of Sections 6 and 11-A of the said Act do not apply to the

10 (1996) 3 SCC 1
11 (2002) 4 SCC 326

provisions of the Bangalore Development Authority Act, 1976 (the BDA Act). In SCC para 15 at p. 335 of the Report this Court made a distinction between the purposes of the two enactments and held that all the provisions of the said Act do not apply to the BDA Act. Subsequently, the Constitution Bench of this Court in *Offshore Holdings (P) Ltd.* v. *Bangalore Development Authority*[12], held that Section 11-A of the said Act does not apply to acquisition under the BDA Act.

33. The same principle is attracted to the present case also. Here also on a comparison between the provisions of the said Act and the KIAD Act, we find that those two Acts were enacted to achieve substantially different purposes. Insofar as the KIAD Act is concerned, from its Statement of Objects and Reasons, it is clear that the same was enacted to achieve the following purposes:

> "It is considered necessary to make provision for the orderly establishment and development of industries in suitable areas in the State. To achieve this object, it is proposed to specify suitable areas for industrial development and establish a board to develop such areas and make available lands therein for establishment of industries."

34. The KIAD Act is of course a self-contained code. The said Act is primarily a law regulating acquisition of land for public purpose and for payment of compensation. Acquisition of land under the said Act is not concerned solely with the purpose of planned development of any city. It has to cater to different situations which come within the expanded horizon of public purpose. Recently the Constitution Bench of this Court in *Girnar Traders (3)* v. *State of Maharashtra*[13] held that Section 11-A of the said Act does not apply to acquisition under the provisions of the Maharashtra Regional and Town Planning Act, 1966.

35. The learned counsel for the appellant has relied on the judgment of this Court in *Mariyappa* v. *State of Karnataka*[14]. The said decision was cited for the purpose of contending that Section 11-A is applicable to an acquisition under the KIAD Act. In *Mariyappa*[14] before coming to hold that provision of Section 11-A of the Central Act applies to the Karnataka Acquisition of Land for Grant of House Sites Act, 1972 (hereinafter "the 1972 Act"), this Court held that the 1972 Act is not a self-contained code. The Court also held that the 1972 Act and the Central Act are supplemental to each other to the extent that unless the Central Act supplements the Karnataka Act, the latter cannot function. The Court further held that both the Acts, namely, the 1972 Act and the Central Act deal with the same subject. But in the instant case the KIAD Act is a self-contained code and the Central Act is not supplemental to it. Therefore, the ratio in *Mariyappa*[14] is not attracted to the facts of the present case.

36. Following the aforesaid well-settled principles, this Court is of the opinion that there is no substance in the contention of the appellant that

12 (2011) 3 SCC 139 : (2011) 1 SCC (Civ) 662 : (2011) 1 Scale 533
13 (2011) 3 SCC 1 : (2011) 1 SCC (Civ) 578 : (2011) 1 Scale 223
14 (1998) 3 SCC 276

acquisition under the KIAD Act lapsed for alleged non-compliance with the provisions of Section 11-A of the said Act. For the reasons aforesaid all the contentions of the appellant, being without any substance, fail and the appeal is dismissed.

37. For the reasons indicated hereinabove, this Court holds that the filing of this appeal before this Court is an instance of an abuse of the process of court. The main purpose was to hold up, on one or the other pretext, the land acquisition proceeding which, as held by this Court in *AIMO case*[1], was initiated to "achieve a larger public purpose".

38. In that view of the matter, this Court makes it clear that the State Government should complete the project as early as possible and should not do anything, including releasing any land acquired under this project, as that may impede the completion of the project and would not be compatible with the larger public interest which the project is intended to serve.

39. This Court, therefore, dismisses this appeal with costs assessed at ₹10 lakhs, to be paid by the appellant in favour of the Karnataka High Court Legal Services Authority within a period of six weeks from date. In default, a proceeding will be initiated against the appellant on a complaint by the Karnataka High Court Legal Services Authority by the appropriate authority under the relevant Public Demand Recovery Act for recovery of this cost amount as arrears of land revenue.

40. The appeal is, thus, dismissed with costs as aforesaid. Interim orders, if any, are vacated.

(2011) 3 Supreme Court Cases 422

(BEFORE ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.)

HARYANA STATE WAREHOUSING CORPORATION AND OTHERS .. Petitioners;

Versus

JAGAT RAM AND ANOTHER .. Respondents.

SLPs (C) No. 2659 of 2011† with No. 451 of 2011,
decided on February 23, 2011

A. **Service Law — Promotion — Seniority-cum-merit — Valid application of — Respondent 1 being senior to petitioner and having minimum necessary merit but being less meritorious than petitioner — Effect of — Respondent 1, on facts, held (*per curiam*), entitled to promotion over petitioner — Seniority-cum-merit criterion requires a minimum necessary merit but does not require comparative assessment of merit — Held, petitioner cannot be given promotion in preference to Respondent 1 on ground that he is more meritorious, would violate seniority-cum-merit criterion**
(Paras 14 to 20; and 40 to 49)

† From the Judgment and Order dated 11-10-2010 of the High Court of Punjab and Haryana at Chandigarh in Letters Patent Appeal No. 490 of 2010 (O&M)

(2011) 12 Supreme Court Cases 252

(BEFORE P. SATHASIVAM AND H.L. GOKHALE, JJ.)

STATE OF RAJASTHAN AND OTHERS .. Appellants;

Versus

JEEV RAJ AND OTHERS .. Respondents.

Civil Appeals Nos. 1585-86 of 2005†, decided on August 11, 2011

A. **Government Grants, Largesse, Public Premises and Property — Allotment/Grant of land — Allotment of land in lieu of compensation for cancellation of a grant by authority incompetent to do so — Unsustainability — Initial grant if itself void ab initio — Grant of 603.16 bighas of land including 460.15 bighas (subject-matter of dispute) on 23-4-1969 by Public Health and Engineering Department (PHED) to respondents in lieu of compensation for cancellation of "bapi patta" — Held, allotment of land was without jurisdiction as PHED had no power to transfer land since land in question belonged to Revenue Department of State and it was Land Revenue Department alone which had such powers — Moreover, respondents could not be granted said benefit without proper adjudication on merits, because admittedly validity of Order dt. 23-4-1969 making the initial grant was not adjudicated by any appellate/revisional forum — Besides, land in question was utilised as catchment area of potable water and grant of "bapi patta" was void ab initio since in larger public interest no land could be allotted/granted if it obstructs flow of water — State Government (Revenue Department) directed to decide validity of grant of disputed land as it was also deciding allotment of 143 bighas of land pursuant to impugned judgment (Paras 16, 17 and 20 to 24)**

State v. *Jeev Raj*, Special Appeal Writ No. 270 of 2002 decided on 14-10-2003 (Raj); *Jeev Raj* v. *State*, Civil Writ No. 1526 of 1993 order dated 19-3-2002 (Raj), *reversed*

B. **Civil Procedure Code, 1908 — Ss. 11 and 9 — Res judicata — Applicability — Effect of bar on jurisdiction of court concerned — Held, principle of res judicata is applicable only if there is discussion or finding on the same subject-matter — In instant case, principle of res judicata was inapplicable since neither subject-matter of validity of allotment Order dt. 23-4-1969 was considered on merits by Munsif Court nor decree passed by civil court was within its jurisdiction because Land Revenue Act barred jurisdiction of civil court — As such, validity of Order dt. 23-4-1969 remained unexamined — Tenancy and Land Laws — Rajasthan Land Revenue Act, 1956 (15 of 1956) — S. 259 — Practice and Procedure — Res judicata (Paras 13 to 15 and 19)**

Sabitri Dei v. *Sarat Chandra Rout*, (1996) 3 SCC 301; *Sushil Kumar Mehta* v. *Gobind Ram Bohra*, (1990) 1 SCC 193, *relied on*

Appeals allowed P-D/48428/SV

† From the Judgment and Order dated 14-10-2003 of the High Court of Judicature of Rajasthan at Jodhpur in D.B. Civil Special Appeal (W) No. 270 of 2002 and in DB Cross-Objection No. 1 of 2003

Advocates who appeared in this case :

Dipankar Gupta, Senior Advocate (Dr. Manish Singhvi, Milind Kumar, Puneet Jain, L.N. Gahlot, Ms Pratibha Jain, Gp. Capt. Karan Singh Bhati, Ms Aishwarya Bhati, Ms K. Singh and R. Bhaskar, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. Special Appeal Writ No. 270 of 2002 decided on 14-10-2003 (Raj), *State* v. *Jeev Raj* 253*c*, 254*d-e*, 257*b*, 257*g-h*
2. Civil Writ No. 1526 of 1993 order dated 19-3-2002 (Raj), *Jeev Raj* v. *State* 254*d*, 257*e*
3. (1996) 3 SCC 301, *Sabitri Dei* v. *Sarat Chandra Rout* 255*g*
4. (1990) 1 SCC 193, *Sushil Kumar Mehta* v. *Gobind Ram Bohra* 256*a*

The Judgment of the Court was delivered by

P. SATHASIVAM, J.— These appeals arise from the final judgment and order dated 14-10-2003 passed by the High Court of Judicature of Rajasthan at Jodhpur in *State* v. *Jeev Raj*[1] wherein the appeal filed by the appellants herein was dismissed and the cross-objection filed by the respondents was allowed by the High Court.

Brief facts

2. On 12-10-1941, Respondent 1 and his brother Pusa Ram (since expired)—his legal representatives are on record—were granted "Bapi Patta" No. 14 for agricultural land measuring about 603.16 bighas in Village Gevan, Tehsil Jodhpur by the then Jodhpur Government. As the land in question was part of the catchment area of the feeder canal of Kaliberi canal and stone slabs which were constructed by the respondents were obstructing the flow of water, on 19-7-1942, at the request of the Public Health and Engineering Department (in short "the PHED"), the Jodhpur Government cancelled the patta and removed the stone slabs.

3. On 5-9-1945, the respondents claimed compensation of Rs 37,826 for the loss of their land and stone slabs. On 14-6-1949, the State Government made payment of Rs 9377 as compensation to the respondents. Thereafter, in the year 1968, after a gap of about 20 years, the respondents again claimed compensation of Rs 73,885 as price of the aforesaid land and stone slabs from the PHED through a notice. The PHED passed an Order dated 23-4-1969 to restore the land in question to the respondents in lieu of compensation amount sought for by them. In compliance with the said order, the possession of 460.15 bighas of land was restored to them on 27-5-1969 and the same was also mutated in their name.

4. On some complaints being made, the restoration of the land was cancelled by the State Government on 1-5-1973. Challenging the same, the respondents filed a writ petition before the High Court. The learned Single Judge of the High Court, by an order dated 24-11-1976, quashed the Order dated 1-5-1973 and directed that in case the State wants to reopen the Order dated 23-4-1969, it can do so by giving proper opportunity of hearing to the petitioners therein. After the aforesaid judgment, on 25-3-1978, a notice was served on the respondents by the PHED stating that it wanted to get the land

1 Special Appeal Writ No. 270 of 2002 decided on 14-10-2003 (Raj)

back from the respondents which had been restored to them for its own use and the Order dated 23-4-1969 was sought to be recalled. It was also stated that the respondents are liable to be evicted from the land in question. The respondents filed objections against the notice for recalling the Order dated 23-4-1969.

5. Since the notice for recalling the Order dated 23-4-1969 had not been formally dropped, the respondents filed a suit in the Court of the Munsif and Judicial Magistrate, Jodhpur City, Jodhpur. The Munsif Magistrate, by an order dated 30-6-1982, decreed the suit restraining the State Government from making any alterations in the contract that has come into existence in pursuance of the Order dated 23-4-1969.

6. Notices were sent to the respondents to appear before the Revenue Minister as the revision petition for cancellation of the plot granted in the year 1969 was pending before him. The parties appeared before the Revenue Minister. By an Order dated 15-12-1992, the Revenue Minister cancelled the Order dated 23-4-1969. Challenging the order of the Revenue Minister, the respondents filed a petition being WP No. 1526 of 1993 before the High Court. The learned Single Judge of the High Court, by the order dated 19-3-2002[2], allowed the same.

7. Against the said judgment, the State filed DB Civil Special Appeal (W) No. 270 of 2002 and the respondents also filed cross-objections before the High Court. The Division Bench of the High Court, by the impugned judgment dated 14-10-2003[1], dismissed the appeal filed by the State and allowed the cross-objection filed by the respondents herein. Aggrieved by the said order of the Division Bench, the State Government filed these appeals before this Court by way of special leave petitions.

8. Heard Dr. Manish Singhvi, learned counsel for the appellants, Mr Dipankar Gupta, learned Senior Counsel for Respondents 1-6 and Ms Bhati, learned counsel for the intervener.

9. The main issue in these appeals is about the grant of 460.15 bighas of land on 23-4-1969 by the PHED to the respondents herein. As far as the remaining land of 143 bighas is concerned, even the Division Bench of the High Court, in the impugned order, remitted the matter to the Revenue Minister. Inasmuch as the issue of remaining land of 143 bighas raised by the respondents is pending before the Revenue Minister, the same is not relevant for our present consideration.

10. It is the contention of the learned counsel for the State that the Order dated 23-4-1969 about the grant of 603.16 bighas of land (including 460.15 bighas—the subject-matter of the present proceedings) was ex facie without jurisdiction as it was allotted by the PHED on flimsy and fallacious grounds about cancellation of patta way back in the year 1942 and the compensation sought in the year 1968. It is relevant to note that the same was cancelled way back in 1973. Inasmuch as opportunity of hearing was not given, the learned Single Judge of the High Court, by the order dated 24-11-1976, remanded

2 *Jeev Raj* v. *State*, Civil Writ No. 1526 of 1993 order dated 19-3-2002 (Raj)

back to the State Government for deciding the matter afresh after giving due opportunity of hearing to the respondents herein.

11. On behalf of the State, it was pointed out that it has legitimate grievance with the allotment dated 23-4-1969 by the PHED. The cancellation was made way back in the year 1942 for allotment made in the year 1941 on the ground of violation of lease conditions. The respondents have claimed a huge compensation for construction said to have been made during subsistence of lease in the year 1949 itself and filed an application for compensation with regard to the cancellation of patta in the year 1968. According to the State, the said application was barred by limitation and it was also filed before the wrong forum i.e. the PHED, when it should have been filed before the Land Revenue Department, which is the appropriate Department.

12. It is also the grievance of the State that the allotment dated 23-4-1969 was cancelled on 1-5-1973, however, the High Court set aside the same on 24-11-1976 on the limited ground that there was violation of natural justice and directed the State Government to decide it afresh after giving an opportunity of hearing. In those circumstances, the State wants to exercise its power under the Land Revenue Act* read with the orders passed by the learned Single Judge of the High Court dated 24-11-1976 and the Revenue Minister dated 15-12-1992.

13. It was highlighted that the judgment of the trial court dated 30-6-1982 is also a nullity since there was no discussion on merits with regard to the validity of allotment dated 23-4-1969. Though it was pointed out by the counsel for the respondents that it was hit by the principle of res judicata as clarified by the counsel for the appellants, the principle of res judicata shall only apply if there is discussion or finding on the same subject-matter. A perusal of the decree of injunction that had been passed on 23-4-1969 (*sic* 30-6-1982) shows that it did not advert to the merits of the case at all. It is also not in dispute that the subject-matter, namely, the validity of allotment dated 23-4-1969 has not been gone into.

14. It is also relevant to point out that by virtue of Section 259 of the Land Revenue Act, the jurisdiction of the civil court is ousted and if any decree is passed by the civil court contrary to the said provision, the same is a nullity in the eye of the law. If the decree is passed coram non judice, as in the present case, then it is a nullity in the eye of the law and it shall not operate as res judicata. This proposition has been enunciated in *Sabitri Dei* v. *Sarat Chandra Rout*[3] wherein this Court held that once a decree is held to be a nullity, the principle of constructive res judicata will have no application and its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in any collateral proceeding.

* **Ed.**: Rajasthan Land Revenue Act, 1956

3 (1996) 3 SCC 301

15. This proposition has been reiterated in *Sushil Kumar Mehta* v. *Gobind Ram Bohra*[4]. It was held in the aforesaid case that: (SCC p. 205, para 26)

> "*26.* Thus it is settled law that normally a decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a court without jurisdiction over the subject-matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a *coram non judice*. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings."

16. It is also relevant to note that the Order passed on 23-4-1969 was by the PHED whereas it was the Land Revenue Department which alone had the power under the Land Revenue Act to grant land to any person. Thus the allotment of land was also without jurisdiction as the PHED was not empowered to transfer such a huge chunk of 460.15 bighas of land which is now an integral part of the city of Jodhpur.

17. It is also not in dispute that the validity of the Order dated 23-4-1969 has not been adjudicated by any appellate/revisional forum and according to the learned counsel for the State, it wants to decide the validity of the Order dated 23-4-1969 on merits and, in that event, the respondents shall have full opportunity to put forth their case and objections, if any, available under the law. As rightly pointed out by the learned counsel for the State, the respondents cannot be conferred with such a huge benefit of 460.15 bighas of land without any proper adjudication on merits about the grant of allotment of land.

18. As pointed out earlier, the judgment and decree dated 30-6-1982 does not dwell upon the merits of the validity of the allotment dated 23-4-1969 but instead proceeds that such allotment on 23-4-1969 would entail the order of injunction. The learned Single Judge, on 24-11-1976, set aside the order of cancellation passed on 1-5-1973 and referred the matter back to the State Government to consider it on merits. The learned Single Judge, on 24-11-1976, has again remitted the matter to the State Government because no opportunity of hearing was given with regard to 460.15 bighas of land. However, the Division Bench of the High Court upheld the validity of the Order dated 23-4-1969 on the principle of res judicata.

19. As discussed and observed above, the principle of res judicata shall not apply inasmuch as neither the subject-matter of the validity of allotment dated 23-4-1969 was considered on merits by the Munsif Court nor the decree passed by the civil court was within its jurisdiction because the Land Revenue Act prohibits the jurisdiction of the civil court. This has led to the validity of the Order dated 23-4-1969 being left unexamined by the State

4 (1990) 1 SCC 193

Government despite the order of the learned Single Judge of the High Court dated 24-11-1976.

20. In view of the same, it is desirable that since the State Government is going to decide the allotment of 143 bighas of land in pursuance of the impugned judgment, we are of the view that let the State Government may as well decide the grant of the remaining 460.15 bighas of land allotted vide Order dated 23-4-1969 in accordance with law.

21. It is also to point out that even the Division Bench in its judgment dated 14-10-2003[1] has clearly recorded the fact that the land in question was part of the catchment area for canal and stone slabs were obstructing the flow of water and, therefore, "Bapi Patta" No. 14 granting 603.16 bighas of land was cancelled. The Division Bench has also recorded the stand of the State Government that soon after "bapi patta" was granted, it was realised that the same had been granted wrongly because the land fell under the catchment area of Kailana Lake and it was for this reason that subsequently in 1942, the said patta was cancelled and compensation of Rs 9377 was paid to the appellants therein for stone slabs which had been removed.

22. Further, the Revenue Minister, in his Order dated 15-12-1992, has clearly recorded that it came to the knowledge that "bapi patta" cannot be granted to the appellants therein inasmuch as the aforesaid land falls within the catchment area of the feeder canal of Kaliberi and, therefore, the patta was cancelled on 19-7-1942. Inasmuch as the land in question was being utilised as catchment area of potable water, grant of "bapi patta" was void ab initio and, therefore, it was cancelled. Even the learned Single Judge, in his order dated 19-3-2002[2], has recorded while narrating the facts that on 9-3-1978, the Chief Engineer of the PHED had issued notices to the respondents along with others mentioning that the land was falling in the feeder canal catchment area and, therefore, the PHED wanted back the complete land of 603 bighas.

23. We also accept the statement of Mangal Singh, the intervener, that in the larger public interest no land can be allotted or granted if it obstructs the flow of water. The above principle has been reiterated by this Court in several orders. We have already noted the prohibition i.e. entertaining a suit by the civil court in the Land Revenue Act. Further, the land in question belongs to the Revenue Department of the State of Rajasthan and the PHED had no jurisdiction whatsoever to restore 460.15 bighas of land in favour of the respondents herein. It is needless to mention that while passing fresh orders as directed above, the State Government has to issue notice to all the parties concerned and decide the same in accordance with law.

24. In view of the above discussion, factual materials, legal issues considering public interest, we set aside the impugned order passed by the High Court on 14-10-2003[1] and direct the Revenue Department of the State of Rajasthan to decide the matter afresh as discussed above and pass fresh orders within a period of four months from the date of receipt of this judgment after affording opportunity to all the parties concerned. Both the appeals are allowed on the above terms. No order as to costs.

(2015) 1 High Court Cases (Chh) 635 : 2015 SCC OnLine Chh 207

Chhattisgarh High Court

(BEFORE GOUTAM BHADURI, J.)

SARDAR SATPAL SINGH, S/O SARDAR LATE VIDYAL SINGH, AGED ABOUT 62 YEARS, R/O CHURCH ROAD, KEDARPUR TOWN AMBIKAPUR, DISTT. SURGUJA (CHHATTISGARH) . . Appellant;

Versus

1. SMT SAROJ SHUKLA, W/O LATE JAINATH SHUKLA, AGED ABOUT 75 YEARS, R/O MOHALLA ANANDNAGAR, RAIPUR, POST-RAIPUR, DISTT. RAIPUR (CHHATTISGARH)
2. SACHIN DEV SHUKLA, S/O LATE JAINATH SHUKLA, AGED ABOUT 51 YEARS, R/O MOHALLA ANANDNAGAR, RAIPUR, POST-RAIPUR, DISTT. RAIPUR (CHHATTISGARH)
3. JAIDEV SHUKLA, S/O LATE JAINATH SHUKLA, AGED ABOUT 48 YEARS, R/O MOHALLA ANANDNAGAR, RAIPUR, POST-RAIPUR, DISTT. RAIPUR (CHHATTISGARH) . . Respondents.

F.A. No. 220 of 2012, decided on August 3, 2015

Civil Procedure Code — S. 11, Or. 2 R. 2 — Bar to Suit — Effect of — Bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on same cause of action — Plea of Res Judicata raised by way of application and not in written statement — No issues framed on this aspect — Suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial — Held, trial court should have specifically framed a specific issue in that regard and plaintiff should be given opportunity to demonstrate that cause of action in subsequent suit is different — Hence case is remitted and Court below directed to frame issues to adjudicate matter afresh on merits to decide plea of res judicata

(Paras 10, 15 and 17)

Alka Gupta v. *Narender Kumar Gupta*, (2010) 10 SCC 141; *Coffee Board* v. *Ramesh Exports (P) Ltd.*, (2014) 6 SCC 424; *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810; *Ballu Ram Sahu* v. *Lata Sahu*, (2014) 3 CGLJ 99; *Madhukar D. Shende* v. *Tarabai Aba Shedage*, (2002) 2 SCC 85, *referred*

Advocates who appeared in this case:

Mr A.K. Prasad, Advocate, for the Appellant;

Mr B.P. Sharma with Mr Rahul Mishra, Advocate, for the Respondents.

Chronological list of cases cited	*on page(s)*
1. (2014) 6 SCC 424, *Coffee Board* v. *Ramesh Exports (P) Ltd.*	637, 640
2. (2014) 3 CGLJ 99, *Ballu Ram Sahu* v. *Lata Sahu*	637, 641
3. (2013) 1 SCC 625, *Virgo Industries (Engg.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.*	638
4. (2010) 14 SCC 596, *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit* v. *Ramesh Chander*	638
5. (2010) 10 SCC 141, *Alka Gupta* v. *Narender Kumar Gupta*	637, 639, 640
6. (2002) 2 SCC 85, *Madhukar D. Shende* v. *Tarabai Aba Shedage*	641
7. (1994) 2 SCC 14, *Sulochana Amma* v. *Narayanan Nair*	638
8. AIR 1964 SC 1810, *Gurbux Singh* v. *Bhooralal*	640

ORDER ON BOARD

1. This appeal is against the judgment and decree dated 6-10-2012 passed in Civil Suit No. 2-A/2012 by the Second Additional District Judge, Ambikapur, whereby, the suit filed by the appellant-plaintiff was dismissed with a finding that the suit filed is barred under the provisions of Section 11 and Order 2 Rule 2 CPC.

2. The brief facts of the case are that a civil suit for specific performance of contract for sale dated 4-7-1987 in respect of the land bearing Khasra Nos. 1245 and 1246 along with the superstructure was filed against the respondents. It was contended that pursuant to sell the entire sale consideration of Rs 55,000 has been paid to the respondents. The prayer made in such suit was for execution of the sale deed in terms of the agreement entered in between the parties. After issuance of notice, the written statement was filed wherein all the averments of the plaint were denied. In the plaint, the periodical payments of sale consideration were shown to be made at Para 5 from 4-7-1987 to 11-10-2004 and was stated that entire sale consideration was paid. The said averments however were denied to the extent that the amount was not paid in lieu of the sale consideration but was adjusted towards the rent proceed. On the basis of pleadings of parties, the learned Court below framed the issues, which reads as under:

- वाद विषय -

(आज दिनांक—27-8-2012 को पारित)

1. क्या वादी के पक्ष में स्व. जयनाथ शुक्ला ने वादग्रस्त भूमि का विक्रय करने हेतु विक्रय अनुबंधपत्र दिनांक— 4-7-1987 को निष्पादित किया है ?

2. क्या उक्त अनुबंध के संबंध में वादी ने स्व0जयनाथ शुक्ला को 55,000/— रू0 अदा किया है ?

3. क्या वादी और स्व0जयनाथ शुक्ला के बीच वादग्रस्त भूमि का प्रथम विक्रय अनुबंधपत्र दिनांक— 9-1-1985 को हुआ था ?

4. क्या वादी द्वारा प्रस्तुत वाद अवधि बाधित है ?

5. क्या वादी ने वाद का उचित मूल्यांकन कर उचित न्यायशुल्क अदा नहीं किया है ?

6. सहायता एवं वाद व्यय

3. During the course of trial, after framing of the issues, an application was preferred by the defendants-respondents under Section 11 read with Order 2 Rule 2 CPC. In such application, it was contended that earlier to the present

suit i.e. Civil Suit No. 2-A/2012, earlier a suit was filed before the Fifth Civil Judge Class II, Ambikapur, which was numbered as Civil Suit No. 20-A/2003 in respect of same agreement of sale. It was stated that the said civil suit was decided against the plaintiff, which was subject of First Appeal before the First Additional District Judge, Ambikapur. The said first appeal was decided on 10-2-2005 and subsequently the same was subject of challenge in the Second Appeal before the High Court and the Second Appeal was decided on 20-9-2011. Consequently, it was pleaded that earlier issues were decided in Civil Suit No. 20-A/2003 wherein the legality of agreement of sale was held in affirmative but relief for specific performance was not sought. Therefore, the subsequent Civil Suit No. 2-A/2012, the present suit, is barred as the judgment and decree passed in Civil Suit No. 20-A/2003 has attained its finality.

4. In reply to the application, the appellant-plaintiff denied the averments and stated that the earlier civil suit was with respect to the declaration and injunction and in such civil suit because of the pecuniary jurisdiction, the suit was dismissed. Thereby, the finding of such earlier Civil Suit No. 20-A/2003 would be an outcome of the result by a Court having no pecuniary jurisdiction. The trial Court thereafter on the basis of such application under Section 11 read with Order 2 Rule 2 CPC, passed the impugned order

dismissing the suit as barred and hence it is subject of challenge before this Court.

5. Mr A.K. Prasad, learned counsel for the appellant, would submit that the order passed by the Additional District Judge whereby it was held that the present suit is barred under Section 11 read with Order 2 Rule 2 CPC is without any substance on record as these facts were neither pleaded in the written statement by the defendants nor any issues were framed in this regard. He submits that in order to attract the provisions of bar under Section 11 read with Order 2 Rule 2 CPC, it should have been established on record on the basis of pleading and issues. Therefore without framing of issues the provisions of Order 2 Rule 2 CPC cannot be invoked. He placed his reliance in *Coffee Board* v. *Ramesh Exports (P) Ltd.*[1] and would submit that in order to attract the bar under Order 2 Rule 2 CPC it should have been pleaded by the defendant in the suit and the specific issues should have been made in this regard. He further placed his reliance in *Ballu Ram Sahu* v. *Lata Sahu*[2] and stated that since the res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, the same cannot be decided as has been done in the instant matter. He further placed his reliance in *Alka Gupta* v. *Narender Kumar Gupta*[3] and would submit that the plea of res judicata is a restraint on the right of a plaintiff to have an adjudication on his claim and therefore the suit cannot be short-circuited by deciding issues of fact without there proper pleading and issues. He therefore prays that the judgment and decree dated 6-10-2012 be set aside.

6. Per contra, Mr B.P. Sharma along with Mr Rahul Mishra, learned counsel appearing for the respondents vehemently opposed the argument. He would

submit that the pleading is not necessary in view of the fact that the decision of an earlier suit was admitted by the plaintiff in the reply to the application under Section 11 read with Order 2 Rule 2 CPC. He referred to Section 11 and explanation Clause 8 CPC and would submit that according to the provisions, even the adjudication is outcome of Court of limited jurisdiction, the finding would be within the ambit of Section 11. He placed his reliance in *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit* v. *Ramesh Chander*[4] and stated that in a suit for declaration of title and injunction when there is an omission to claim relief of specific performance of agreement to sell, it would amount to relinquishment of that part of claim. It is contended that in the earlier suit for declaration and injunction, no claim was made for specific performance of the agreement. He further placed his reliance in *Sulochana Amma* v. *Narayanan Nair*[5]. It was further contended that in a suit or proceeding, notwithstanding the fact that the Court with limited or special jurisdiction was not a competent Court to try the suit, the finding in such earlier suit would be a res judicata by application of Explanation VIII to Section 11. It is submitted that Section 11 aims to prevent multiplicity of the proceedings and accords finality to an issue, so that parties are not vexed twice and vexatious litigation would be put to an end. He lastly placed his reliance in *Virgo Industries (Engg.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.*[6] and would submit that in case the plaintiff omits to claim any relief or relinquishes a part of the claim in absence of any leave to obtain the same, the subsequently relief would be barred as in the instant case in the earlier round of litigation, the plaintiff has not reserved his right of leave to claim the relief as contemplated under Order 2 Rule 2 CPC. Therefore, the subsequent suit for specific performance is barred and the order is well-merited.

7. I have heard learned counsel appearing for the parties at length and perused the record.

8. Reading of the plaint would show that a suit for specific performance was filed before the Court of Additional District Judge, Ambikapur, which was numbered as Civil Suit No. 2-A/2012. In such suit, the averments were made to the extent that an agreement for sale dated 4-7-1987 was executed between the parties in respect of certain properties i.e. land bearing Khasra Nos. 1245 and 1246 along with the superstructure made therein at 1200 sq ft and further averments of the plaint would show that the entire sale consideration of Rs 55,000 having been paid, the prayer was made that the sale deed be executed in favour of the plaintiff and the decree be passed accordingly. In reply to plaint averments the pleadings were denied except the fact that with respect to the sale consideration. It was contended in written statement that the amount of sale consideration was not paid for the alleged agreement but the payments made were adjusted as against the oral rent agreement as with the lapse of time since the rent had increased.

9. At Para 15 of the written statement, faintly it was stated that after death of the original defendant, different litigations were pending in between the parties before the High Court and Supreme Court and false and vexatious litigation were proceeded. On reading of the plaint and the written statement, admittedly, there is no pleading to the fact that in respect of the same suit property, earlier civil suit was filed by the plaintiff for declaration and injunction wherein the plea for specific performance of the agreement was not claimed. Consequently, on the basis of the pleading of the parties when the issues were framed as has been shown at Para 2 the issue with respect to the fact that the suit is barred under Section 11 read with Order 2 Rule 2 CPC was not framed by the Court.

10. The documents would show that for the first time, an application was moved under Section 11 read with Order 2 Rule 2 CPC by the defendants wherein it was contended that on the earlier point of time in between the same parties a civil suit was filed bearing No. 20-A/2003 before the Fifth Civil Judge Class II, which was decided on 14-10-2004. The copy of the said order was also enclosed along with such application wherein perusal of such order of civil suit it reflects that an issue was also framed that whether an agreement to sell dated 4-7-1987 was executed in favour of the plaintiff or not. Further, the finding was also arrived at by the Court in affirmative. In such application, it was further contended that in view of the decision of the earlier Civil Suit No. 20-A/2003, the subsequent Civil Suit No. 2-A/2012 would be barred since no relief or prayer for specific performance was made in earlier suit.

11. Therefore, perusal of written statement and application under Section 11 read with Order 2 Rule 2 CPC would show that plea of res judicata and bar of suit was raised by way of application and not in the written statement. Therefore, no issues were framed on this aspect.

12. The object of Order 2 Rule 2 CPC is to ensure that no defendant is sued or vexed twice in regard to the same cause of action and second to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of

Order 2 Rule 2 CPC is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

13. It is a settled proposition that the plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea has to be clearly established. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. Reading of the written statement in this case would show that there is no pleading made with respect to the res judicata. It was only for the first time in the application under Section 11 read with Order 2 Rule 2 CPC such plea was raised by the defendants. As has been held by the Supreme Court in *Alka Gupta* v. *Narender Kumar Gupta*[7], the Court will not make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. The Court has specifically stated

that the suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.

14. In order to attract the bar under Order 2 Rule 2, it has to be specifically pleaded by the defendant in the suit and the trial Court should have specifically framed a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. Perusal of the case file of the Court below would show that along with the application under Section 11 read with Order 2 Rule 2 CPC, the order of the earlier Civil Suit No. 20-A/2003 was placed on record. The Supreme Court in *Coffee Board* v. *Ramesh Exports (P) Ltd.*[8], has reiterated the principles laid down in *Alka Gupta* v. *Narender Kumar Gupta*[9] and *Gurbux Singh* v. *Bhooralal*[10] and had reaffirm the proposition which reads as under:

> "*11*. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the trial court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in *Alka Gupta* v. *Narender Kumar Gupta*[11], which referred to the decision of this Court in *Gurbux Singh* v. *Bhooralal*[12], wherein it was held that:
>
> > "*13*. ...'*6*. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar'."

15. Therefore, necessarily in order to come to a finding and examining the cause of action pleaded by the plaintiff in the suit in between the suit filed

earlier whether was one and same, there should have been proper opportunity of hearing by framing the issue in this regard. If certain facts are not pleaded in the written statement, the same cannot be substituted by way of an application and take the place of pleading. Furthermore, as has been followed by this Court in *Ballu Ram Sahu* v. *Lata Sahu*[13] and held by the Supreme Court in *Madhukar D. Shende* v. *Tarabai Aba Shedage*[14] that the question of res judicata is a mixed question of law and fact and if the plea has not been raised by filing pleadings and the issues have not been framed, it cannot be held that the defendant has established the plea of res judicata by raising appropriate pleading. The plea therefore in the instant case cannot be considered on the basis of the application under Section 11 read with Order 2 Rule 2 CPC in absence of any issues.

16. The argument which has been advanced by the learned counsel for the defendants holds the sway on the merit of the case and the same cannot be applied in the facts when the pleading of res judicata was not made in the written statement. There is no dispute of legal proposition, which has been advanced by the respondents but the same can only be considered after framing of the issues by the learned Court below.

17. In the result, the appeal is allowed. The case is remitted back to the Court below and if the parties choose to amend their pleadings, if so advised, the Court may frame issue to adjudicate the matter afresh on merits to decide the plea of res judicata.

18. In facts of the case, no order as to cost.

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[1] (2014) 6 SCC 424

[2] (2014) 3 CGLJ 99

[3] (2010) 10 SCC 141

[4] (2010) 14 SCC 596

[5] (1994) 2 SCC 14

[6] (2013) 1 SCC 625

[7] (2010) 10 SCC 141

[8] (2014) 6 SCC 424

[9] (2010) 10 SCC 141

[10] AIR 1964 SC 1810

[11] (2010) 10 SCC 141

[12] AIR 1964 SC 1810

[13] (2014) 3 CGLJ 99

[14] (2002) 2 SCC 85

(2018) 16 Supreme Court Cases 228

(BEFORE ADARSH KUMAR GOEL AND ROHINTON FALI NARIMAN, JJ.)

CANARA BANK .. Appellant;

Versus

N.G. SUBBARAYA SETTY AND ANOTHER .. Respondents.

Civil Appeal No. 4233 of 2018†, decided on April 20, 2018

A. **Civil Procedure Code, 1908 — S. 11 — Res judicata — Non-applicability of — Exceptions to the principle of res judicata qua issues of law — What are — Erroneous decisions on questions of law — When operate as res judicata in a subsequent suit and when do not — Law on said question, surveyed in detail and summarised**

— In present case, the issue in the second suit filed herein was different from that in the first suit, so the principle of res judicata did not apply — Furthermore, the decision in the first suit erroneously decided the applicability of two statutory bars/prohibitions, hence could not operate as res judicata

— Held, the general rule, qua res judicata, is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties and that these would include issues of fact, mixed questions of fact and law, and issues of law — However, to this general proposition of law, there are certain exceptions when it comes to issues of law, namely:

— (i) Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding

— (ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to — This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter partes), as the public policy contained in the statutory prohibition cannot be set at naught

— (iii) When the matter in issue being an issue of law is different from that in the previous suit or proceeding e.g. when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding

† Arising out of SLP (C) No. 25649 of 2017. Arising from the Judgment and Order in *Canara Bank* v. *N.G. Subbaraya Setty*, 2017 SCC OnLine Kar 4030 (Karnataka High Court, Bengaluru Bench, First Appeal (RFA) No. 818 of 2016, dt. 31-7-2017)

— (iv) When the law is altered by a competent authority since the earlier decision

— R-1 availed a credit facility from petitioner Bank but defaulted in repayment and then in order to repay the dues of Bank, signed an assignment deed with Chief Manager of the Bank, for assignment of trade mark "EENADU" in respect of agarbathis (incense sticks) — Subsequently, however, Bank cancelled assignment deeds on the premise that as per Banking Regulation Act, the Bank could not be "patent right-holder" — R-1, then in 2004 filed a suit against the Bank challenging the cancellation of assignment deed and for recovery of Rs 2,16,000 with interest thereon for the period 1-10-2003 to 31-3-2004 as per the assignment deed, which suit was ultimately decreed in favour of R-1 — R-1, filed another suit in 2008 based on the assignment deed, against the Bank for recovery of a sum of Rs 17,89,915 with interest for the period 1-4-2004 to 30-4-2007 and this suit was decreed on the footing that the earlier judgment dt. 27-4-2013, not having been appealed against, was res judicata between the parties — Held, the subsequent suit of 2008 raised an issue which was different from that contained in the earlier suit filed by the same party in 2004, hence, principle of res judicata was erroneously applied — Further, in the earlier suit, issues as to two statutory bars to relief, namely, S. 45, Trade Marks Act, 1999 and Ss. 6 and 8 r/w S. 46(4), Banking Regulation Act, 1949, had arisen — Under the former unless assignment deed was registered, it could not be received in evidence by any court, and under the latter, Bank was interdicted from doing any business other than banking business — As these issues were wrongly decided in the previous suit, they could not operate as res judicata — Thus, assignment deed, being unregistered, could not have been admitted in evidence by court in proof of title to the trade mark by the assignment, unless the court itself directed otherwise — Also, referring to Ss. 6, 8 and 46(4) of the Banking Regulation Act, the bank could not have used the trade mark "EENADU" to sell agarbathis — Therefore, judgment of the trial court and the first appellate court set aside — Debt, Financial and Monetary Laws — Banking Regulation Act, 1949 — Ss. 6, 8 and 46(4) — Intellectual Property — Trade Marks Act, 1999, S. 45(2)

B. **Civil Procedure Code, 1908 — S. 11 — Res judicata — Pendency of review/appeal/non-expiry of limitation period for filing appeal/review and cases where limitation period for filing review or appeal has just expired i.e. where it could be condoned — Effect of, on invocation of principle of res judicata — Procedure to be adopted by court in such cases**

— Held, until limitation period for filing of an appeal is over, the res remains sub judice and after the limitation period is over, the res decided by the first court would then become judicata — However, if period of limitation for filing an appeal has not yet expired or has just expired, court hearing the second proceeding can ask the party who has lost the first round whether he intends to appeal and if the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding — If, however, a sufficiently long period has elapsed after limitation has expired, and

no appeal has yet been filed in the first proceeding, court hearing the second proceeding would be justified in treating the first proceeding as res judicata — Further, the entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding

Respondent 1 availed of a credit facility from the petitioner Bank sometime in 2001. Respondent 2, his son, stood as a guarantor for repayment of the said facility. As Respondent 1 defaulted in repayment of a sum of Rs 53,49,970.22, the petitioner Bank filed OA No. 440 of 2002 before the DRT, Bangalore, against Respondents 1 and 2. Respondent 1, in order to repay the dues of the Bank, signed an assignment deed dated 8-10-2003 with the Chief Manager, Basavanagudi Branch, Bangalore for assignment of the trade mark "EENADU" in respect of agarbathis (incense sticks) on certain terms and conditions.

Relevant clauses of the aforesaid assignment are set out hereunder:

"* * *

2. The assignee shall pay the sum of Rs 76,000.00 (Rupees seventy-six thousand only) per month payable for the period of first six years: i.e. from 1-10-2003 to 30-9-2009:

(*i*) Rs 40,000.00 shall be credited to the loan amount of the assignor every month; and

(*ii*) the balance of Rs 36,000.00 (Rupees thirty-six thousand only) to be paid to the assignor/permitted to be drawn by him until the expiry of first six years i.e. 1-10-2003 to 30-9-2009; and

3. The assignee shall pay the sum of Rs 83,600.00 (Rupees eighty-three thousand six hundred only) per month payable for the period of next four years i.e. from 1-10-2009 to 30-9-2013.

(*i*) Rs 40,000 shall be credited to the loan account of the assignor every month; and

(*ii*) the balance of Rs 43,600.00 (Rupees forty-three thousand six hundred only) to be paid to the assignor/permitted to be drawn by him until the expiry of next four years i.e. from 1-10-2009 to 30-9-2013.

* * *"

By a letter dated 27-1-2004, the Chief Manager wrote to Respondent 1 stating that:

"We have been informed by our higher authorities that as per the Banking Company's Regulation Act, 1949, the Bank cannot be "patent right-holder".

Hence, please note that we are not interested in holding the patent right of EENADU and as such by this letter, we are cancelling the above assignment deed dated 8-10-2003."

On 15-4-2004, Respondent 1 filed O.S. No. 2832 of 2004 against the Bank challenging the cancellation of the said assignment deed and for recovery of Rs 2,16,000 with interest thereon for the period 1-10-2003 to 31-3-2004. On 17-9-2004, the petitioner Bank filed O.S. No. 7018 of 2004 for a declaration that the assignment deed entered into between it and Respondent 1 is vitiated by mistake,

undue influence and fraud and that, therefore, the said deed is unenforceable in the eye of the law.

a The two suits as aforestated were consolidated and disposed of by a common judgment dated 27-4-2013. Issues were framed separately in both suits and it was found that the assignment deed was not vitiated by fraud, misrepresentation or undue influence. Consequently, the Bank had no right to cancel or rescind the aforesaid assignment deed. Respondent 1's claim for a money decree for Rs 2,16,000 was dismissed. It was also held that the civil court had jurisdiction to entertain the suits, despite the pendency of DRT proceedings. The Bank's suit b came to be dismissed.

Respondent 1 filed a review petition, being Miscellaneous Petition No. 324 of 2013, seeking review of the aforesaid judgment to the extent that his prayer for payment of Rs 2,16,000 was rejected. On 16-3-2015, this petition was allowed, and OS No. 2832 of 2004 filed by Respondent 1 was fully decreed against the Bank, including the prayer for payment. Against the aforesaid review judgment c dated 16-3-2015, an appeal was filed by the Bank on 4-1-2016 with an application for condoning the delay of 175 days. This appeal was stated to be still pending.

Meanwhile, Respondent 1, on the basis of the assignment deed, filed another suit, being OS No. 495 of 2008, against the Bank for recovery of a sum of Rs 17,89,915 with interest for the period 1-4-2004 to 30-4-2007. By a judgment dated 30-10-2015, this suit was decreed on the footing that the earlier judgment dated 27-4-2013, not having been appealed against, was res judicata between the d parties. An appeal filed against this judgment met with the same fate in that, by the impugned judgment dated 31-7-2017, the High Court dismissed the appeal filed by the Bank on the self-same ground of res judicata. On 14-7-2017, the hearing of the appeal, which culminated in the impugned judgment, was concluded and judgment was reserved. It was only after this that the petitioner Bank, for the first time on 26-7-2017, filed a review petition against the judgment dated 27-4-2013 with a condonation of delay application of 1548 days. This review petition was e also stated to be pending.

The petitioner Bank, contended that no issue was struck as to res judicata as the same had not specifically been pleaded in the plaint of the suit of 2008. It was also inter alia contended that on the assumption that the said plea could be gone into, there were two statutory bars to relief, namely, Section 45 of the Trade Marks Act, 1999 and Sections 6 and 8 read with Section 46(4) of the Banking Regulation f Act, 1949. It was contended that the first statutory bar made it clear that unless the assignment deed was registered, it could not be received in evidence by any court. It was also contended that Sections 6 and 8 of the Banking Regulation Act interdicted the Bank from doing any business other than banking business and that, therefore, the assignment deed which enabled the Bank to trade in goods and to earn royalty from an assignment of the trade mark would be hit by the aforestated provisions and, therefore, would be void in law.

g The issue involved in this appeal was whether the subsequent suit, being OS No. 495 of 2008, against the Bank for recovery of a sum of Rs 17,89,915 with interest for the period 1-4-2004 to 30-4-2007, could have been decreed on the footing that the earlier judgment dated 27-4-2013, not having been appealed against, was res judicata between the parties?

Answering in negative, the Supreme Court

h

Held :

One of the pillars of Roman law is contained in the maxim *res judicata pro veritate accipitur* (a thing adjudicated is received as the truth). This maxim of Roman law is based upon two other fundamental maxims of Roman law, namely, *interest reipublicae ut sit finis litium* (it concerns the State that there be an end to law suits) and *nemo debet bis vexari pro una at eadem causa* (no man should be vexed twice over for the same cause). (Para 2)

Sheoparsan Singh v. *Ramnandan Singh*, 1916 SCC OnLine PC 13 : (1915-16) 43 IA 91 : AIR 1916 PC 78, *relied on*

Two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. (Para 3)

Daryao v. *State of U.P.*, (1962) 1 SCR 574 : AIR 1961 SC 1457, *relied on*

Duchess of Kingston case, In re, (1776) 2 Smith LC 644 (13th Edn.) : 168 ER 175 : (1776) 1 Leach 146, *cited*

Abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. (Para 4)

Virgin Atlantic Airways Ltd. v. *Zodiac Seats UK Ltd.*, 2014 AC 160 : (2013) 3 WLR 299 : (2013) 4 All ER 715 (SC), *relied on*

Henderson v. *Henderson*, (1843) 3 Hare 100 : 67 ER 313; *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.*, 1975 AC 581 : (1975) 2 WLR 690 (PC); *Johnson* v. *Gore Wood & Co.*, (2002) 2 AC 1 : (2001) 2 WLR 72 (HL); *Vervaeke (formerly Messina)* v. *Smith*, (1983) 1 AC 145 : (1982) 2 WLR 855 (HL), *cited*

Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the court takes place. However, there are certain notable exceptions to the application of the doctrine. One well-known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. This case is concerned with the application of the last mentioned exception to the rule of res judicata. (Para 5)

Though an issue as to res judicata was not struck between the parties, both parties argued the matter based upon the pleadings and the judgment contained in the two suits of 2004. It is only after full arguments on both sides that the trial court in the judgment dated 30-10-2015 accepted the respondent's plea of res judicata. Even before the appellate court, the point of res judicata was argued by both parties without adverting to the aforesaid objection. It is obvious, therefore, that this ground raised for the first time before the Supreme Court, cannot non-suit the respondents. (Para 15)

V. Rajeshwari v. *T.C. Saravanabava*, (2004) 1 SCC 551, *distinguished*

A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely:

(*i*) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(*ii*) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(*iii*) The parties must have litigated under the same title in the former suit;

(*iv*) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(*v*) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further Explanation I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. (Para 17)

Sheodan Singh v. *Daryao Kunwar*, (1966) 3 SCR 300 : AIR 1966 SC 1332, *relied on*

When the judgment of a court of first instance upon a particular issue is appealed against, that judgment ceases to be res judicata and becomes res sub judice. (Para 18)

Balkishan v. *Kishan Lal*, 1888 SCC OnLine All 8 : ILR (1889) 11 All 148, *approved*

Kakarlapudi Suriyanarayanarazu Garu v. *Chellamkuri Chellamma*, (1870) 5 MHCR 176; *Doe* v. *Wright*, (1839) 10 Ad & E 763 : 113 ER 289; *Nilvaru* v. *Nilvaru*, ILR (1882) 6 Bom 110, *cited*

Where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res adjudicata as between the same parties. (Para 19)

S.P.A. Annamalay Chetty v. *B.A. Thornhill*, 1931 SCC OnLine PC 53 : AIR 1931 PC 263, *relied on*

Our law, therefore, is different from the American law — a decree from which an appeal lies and has in fact been filed would render the matter res sub judice and not judicata. (Para 20)

Chengalavala Gurraju v. *Madapathy Venkateswara Row Pantulu Garu*, 1916 SCC OnLine Mad 455 : AIR 1917 Mad 597; *Parshotam Parbhudas* v. *Bai Moti*, 1962 SCC OnLine Guj 57 : AIR 1963 Guj 30; *Bhavani Amma* v. *Narayana Acharya*, 1962 SCC OnLine Kar 119 : AIR 1963 Mys 120; *Satyanarayan Prosad Gooptu* v. *Diana Engg. Co.*, 1951 SCC OnLine Cal 195 : AIR 1952 Cal 124; *Venkateswarlu* v. *Venkata Narasimham*, 1956 SCC OnLine AP 180 : AIR 1957 AP 557; *Balkishan* v. *Kishan Lal*, 1888 SCC OnLine All 8 : ILR (1889) 11 All 148; *Baijnath Karnani* v. *Vallabhadas Damani*, 1933 SCC OnLine Mad 89 : AIR 1933 Mad 511, *approved*

Gobind Chunder Roy v. *Guru Churn Kurmokar*, ILR (1888) 15 Cal 94; *Dinonath Ghose* v. *Shama Bibi*, 1900 SCC OnLine Cal 249 : ILR (1901) 28 Cal 23; *Sukhdeo Prasad* v. *Jamna*, 1900 SCC OnLine All 11 : ILR (1901) 23 All 60; *Settappa Goundan* v. *Muthia Goundan*, 1908 SCC OnLine Mad 67 : ILR (1908) 31 Mad 268; *Esdaile* v. *Payne*, (1889) LR 40 Ch D 520 (CA), *cited*

Until the limitation period for filing of an appeal is over, the res remains sub judice. After the limitation period is over, the res decided by the first court would then become judicata. (Para 23)

Chandra Singh Dudhoria v. *Midnapore Zemindari Co. Ltd.*, 1941 SCC OnLine PC 35 : (1941-42) 69 IA 51; *Indra Singh & Sons Ltd.* v. *Shiavax C. Cambata*, 1947 SCC OnLine Bom 43 : ILR 1948 Bom 346, *considered*

If the period of limitation for filing an appeal has not yet expired or has just expired, the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as res judicata. No hard-and-fast rule can be applied. The entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding. Many factors have to be considered before exercising this discretion—for example, the fact that the appeal against the first judgment is grossly belated; or that the said appeal would, in the ordinary course, be heard after many years in the first proceeding; or, the fact that third-party rights have intervened, thereby making it unlikely that delay would be condoned in the appeal in the first proceeding. As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case. (Para 24)

In the present case, a belated review petition was filed after arguments were heard and judgment reserved by the appellate court. Would the Supreme Court have to await the outcome of the said review petition before deciding whether the judgment dated 27-4-2013 is res judicata? Obviously not. It is clear that a review petition filed long after the judgment dated 27-4-2013, with a condonation application for a delay of over four years, could not possibly be held to be anything but an abuse of the process of the court. (Para 25)

Mathura Prasad Bajoo Jaiswal v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613, *relied on*

Dossibai N.B. Jeejeebhoy v. *Hingoo Manohar Missar*, Civil Revision Application No. 233 of 1955, decided on 28-9-1955 (Bom), *held, reversed*

Dossibai N.B. Jeejoebhoy v. *Khemchand Gorumal*, (1962) 3 SCR 928 : AIR 1966 SC 1939, *referred to*

Tarini Charan Bhattacharya v. *Kedar Nath Haldar*, 1928 SCC OnLine Cal 172 : AIR 1928 Cal 777; *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*, 1926 AC 94 (PC), *cited*

Where there is an inherent lack of jurisdiction, which depends upon a wrong decision, the earlier wrong decision cannot be res judicata. (Para 28.1)

Sushil Kumar Mehta v. *Gobind Ram Bohra*, (1990) 1 SCC 193, *relied on*

A court which has no jurisdiction in law cannot be conferred with jurisdiction by applying the principle of res judicata, as it is well settled that there is no estoppel on a pure question of law which relates to jurisdiction. (Para 28.2)

Mathura Prasad Bajoo Jaiswal v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613; *Isabella Johnson* v. *M.A. Susai*, (1991) 1 SCC 494, *relied on*

Nand Kishore v. *State of Punjab*, (1995) 6 SCC 614 : 1996 SCC (L&S) 57; *Moti Ram Deka* v. *North East Frontier Railway*, (1964) 5 SCR 683 : AIR 1964 SC 600; *Gurdev Singh Sidhu* v. *State of Punjab*, (1964) 7 SCR 587 : AIR 1964 SC 1585 : (1964) 2 Cri LJ 481, *considered*

State of Punjab v. *Nand Kishore*, 1974 SCC OnLine P&H 126 : AIR 1974 P&H 303, *held, overruled*

Mohanlal Goenka v. *Benoy Kishna Mukherjee*, 1953 SCR 377 : AIR 1953 SC 65; *Nand Kishore Vaid* v. *State of Punjab*, 1962 SCC OnLine P&H 47 : PLR (1962) 64 P&H 469, *referred to*

Quinn v. *Leathem*, 1901 AC 495 (HL); *State of Orissa* v. *Sudhansu Sekhar Misra*, AIR 1968 SC 647, *cited*

When the previous decision was found to be erroneous on its face, such judgment cannot operate as res judicata, as to give effect to such judgment would be to counter a statutory prohibition. (Para 31)

Allahabad Development Authority v. *Nasiruzzaman*, (1996) 6 SCC 424, *relied on*

Earlier decree based on judgments that were overruled cannot operate as res judicata. (Para 32)

Shakuntla Devi v. *Kamla*, (2005) 5 SCC 390; *Nand Kishore* v. *State of Punjab*, (1995) 6 SCC 614 : 1996 SCC (L&S) 57, *relied on*

V. Tulasamma v. *Sesha Reddy*, (1977) 3 SCC 99, *referred to*

The general rule on res judicata is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law. To this general proposition of law, there are certain exceptions when it comes to issues of law:

(*i*) Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a court competent to try such suit. When read with Explanation I to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a court cannot clothe that court with jurisdiction where it has none. Obviously, a civil court cannot send a person to jail for an offence committed under the Penal Code. If it does so, such a judgment would not bind a Magistrate and/or Sessions Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Penal Code. Equally, for instance a civil court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special court with jurisdiction to decide such suits. As an example, under Section 28 of the Bombay Rent Act, 1947, the Small Cause Court has exclusive jurisdiction to hear and decide proceedings between a

landlord and a tenant in respect of rights which arise out of the Bombay Rent Act, and no other court has jurisdiction to embark upon the same. In this case, even though the civil Court, in the absence of the statutory bar created by the Rent Act, would have jurisdiction to decide such suits, it is the statutory bar created by the Rent Act that must be given effect to as a matter of public policy. An erroneous decision clothing the civil court with jurisdiction to embark upon a suit filed by a landlord against a tenant, in respect of rights claimed under the Bombay Rent Act, would, therefore, not operate as res judicata in a subsequent suit filed before the Small Cause Court between the same parties in respect of the same matter directly and substantially in issue in the former suit.

(*ii*) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter partes), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. The public policy contained in statutory prohibitions, which need not necessarily go to jurisdiction of a court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.

(*iii*) Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding.

(*iv*) Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different. (Paras 26 to 34)

Natraj Studios (P) Ltd. v. *Navrang Studios*, (1981) 1 SCC 523, *relied on*

Insofar as Section 45 of the Trade Marks Act is concerned, it is clear that plea regarding unregistered assignment deed was raised throughout both the proceedings. Insofar as the suits of 2004 are concerned, the judgment dated 27-4-2013 expressly recorded the aforesaid plea taken on behalf of the Bank, but turned it down. Equally, insofar as the trial court judgment in the second suit of 2008 is concerned, the said plea was expressly raised and turned down. (Paras 36 and 37)

Both the trial court and the first appellate court were entirely wrong in treating the statutory prohibition contained in Section 45(2) of the Trade Marks Act as res judicata. It is obvious that neither court has bothered to advert to Section 45 and/or interpret the same. The second proceeding contained in OS No. 495 of 2008 prayed for payment of a sum of Rs 17,89,915 along with interest thereon for the period 1-4-2004 to 30-4-2007. Para 8 of the plaint in the said suit reads as under:

"8. The plaintiff has already filed a suit in OS No. 2832 of 2004 against the first defendant for the recovery of the amount payable by it under the said assignment deed till the end of 31-3-2004. The cause of action for the present suit claim had not arisen by then as the amount had not become payable by then i.e. for the period 1-4-2004 to 30-4-2007." (Para 39)

Clearly, therefore, the subsequent suit of 2008 raises an issue which is different from that contained in the earlier suit filed by the same party in 2004. Also, the earlier decision in the judgment dated 27-4-2013 has declared valid a transaction which is prohibited by law. A cursory reading of Section 45(2) of the Trade Marks Act makes it clear that the assignment deed, if unregistered, cannot be admitted in evidence by any court in proof of title to the trade mark by the assignment, unless the court itself directs otherwise. It is clear, therefore, that any reliance upon the assignment deed dated 8-10-2003 by the earlier judgment cannot be sanctified by the plea of res judicata, when reliance upon the assignment deed is prohibited by law. (Para 40)

Equally, a reference to Sections 6, 8 and 46(4) of the Banking Regulation Act would also make it clear that a bank cannot use the trade mark "EENADU" to sell agarbathis. This would be directly interdicted by Section 8, which clearly provides that notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the selling of goods, except in connection with the realisation of security given to or held by it. Also, granting permission to third parties to use the trade mark "EENADU" and earn royalty upon the same would clearly be outside Section 6(1) and would be interdicted by Section 6(2) which states that no bank shall engage in any form of business other than those referred to in sub-section (1). (Para 41)

Natraj Studios (P) Ltd. v. *Navrang Studios*, (1981) 1 SCC 523, *considered*

Canara Bank v. *N.G. Subbaraya Setty*, 2017 SCC OnLine Kar 4030, *reversed*

Appeal allowed VN-D/60461/S

Advocates who appeared in this case :

K.V. Viswanathan (Amicus Curiae) and Dhruv Mehta, Senior Advocates (Abhishek Kaushik, Srigesh M.K., Ravi Raghunath, Dhananjay B. Ray, Siddhant Busy, Ms Vrinda Bhandari, Mukunda Rao, Jaishree Viswanathan, Rajesh Kumar I, Gaurav Singh, Anant Gautam, Aakash Sehrawat, V. Govinda Ramanan, Soumu Palit, Shanth Kumar V. Mahale, R.P. Kulkarni and Rajesh Mahale, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

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48. (1776) 2 Smith LC 644 (13th Edn.) : 168 ER 175 : (1776) 1 Leach 146, *Duchess of Kingston case, In re* 240*b*

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Leave granted.

2. *Roma locuta est; causa finita est.* Rome has spoken, the cause is ended. Rome spoke through her laws. One of the pillars of Roman law is contained in the maxim *res judicata pro veritate accipitur* (a thing adjudicated is received as the truth). This maxim of Roman law is based upon two other fundamental maxims of Roman law, namely, *interest reipublicae ut sit finis litium* (it concerns the State that there be an end to law suits) and *nemo debet bis vexari pro una at eadem causa* (no man should be vexed twice over for the same cause). Indeed, that this maxim is almost universal in all ancient laws, including ancient Hindu texts, was discussed by Sir Lawrence Jenkins in *Sheoparsan Singh* v. *Ramnandan Singh*[1], at AIR pp. 80-81 as follows: (SCC OnLine PC)

> "There has been much discussion at the Bar as to the application of the plea of res judicata as a bar to this suit. In the view their Lordships take, the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them, their Lordships desire to emphasise that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time.
>
> 'It hath been well said," declared Lord Coke, "*interest reipublicae ut sit finis litium*, otherwise great oppression might be done under colour and pretence of law".' (6 Coke, 9A.)
>
> Though, the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: 'If a person though defeated at law sue again he should be answered, "You were defeated formerly". This is called the plea of former judgment.' (See "*The Mitakshara (Vyavahara)*" Bk. II, Ch. I, edited by J.R. Gharpure, p. 14, and "the Mayuka", Ch. I, Sec. 1, p. 11 of Mandlik's edition.) And so the

1 1916 SCC OnLine PC 13 : (1915-16) 43 IA 91 : AIR 1916 PC 78

application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

3. This Court in *Daryao* v. *State of U.P.*[2], put it very well when it said: (SCR pp. 583-84 : AIR p. 1462, para 10)

"*10.* In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William De Grey (afterwards Lord Walsingham) in the leading *Duchess of Kingston case*[3] pp. 644-45. Said William De Grey, (afterwards Lord Walsingham) "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, 'the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation'. [*Halsbury's Laws of England*, 3rd Edn., Vol. 15, Para 357, p. 185]'. Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (p. 187, Para 362). "Res judicata", it is observed in *Corpus Juris*, "is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — *interest reipublicae ut sit finis litium*; the other, the hardship on the individual that he should be vexed twice for the same cause — *nemo debet bis vexari pro eadem causa*" [*Corpus Juris*, Vol. 34, p. 743]. In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel. 'Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law' [*Ibid* p. 745]. Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted."

4. The link between the doctrine of res judicata and the prevention of abuse of process is very felicitously stated in *Virgin Atlantic Airways Ltd.* v. *Zodiac Seats UK Ltd.*[4] (at All ER pp. 730-31) as follows: (AC p. 184 C-G)

2 (1962) 1 SCR 574 : AIR 1961 SC 1457
3 *Duchess of Kingston case, In re*, (1776) 2 Smith LC 644 (13th Edn.) : 168 ER 175 : (1776) 1 Leach 146
4 2014 AC 160 : (2013) 3 WLR 299 : (2013) 4 All ER 715 (SC)

"*24.* ... The principle in *Henderson* v. *Henderson*[5] has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung case*[6]. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson* v. *Gore Wood & Co.*[7], in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiffs claim should have been made in an earlier action on the same subject-matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone, L.C. in *Vervaeke (formerly Messina)* v. *Smith*[8], AC at p. 157 that the principle in *Henderson* v. *Henderson*[5] was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p. 31 as follows: (AC p. 31 A-B)

> '... *Henderson* v. *Henderson*[5] abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole'."

5. Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the court takes place. However, there are certain notable exceptions to the application of the doctrine. One well-known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. This case is concerned with the application of the last mentioned exception to the rule of res judicata. The brief facts necessary to appreciate the applicability of the said exception to the doctrine of res judicata are as follows. In the present case, Respondent 1 availed a credit facility from the petitioner Bank sometime in 2001. Respondent 2, his son, stood as a guarantor for repayment of the said facility. As Respondent 1 defaulted in repayment of a sum of Rs 53,49,970.22, the petitioner Bank filed OA No. 440 of 2002 before

5 (1843) 3 Hare 100 : 67 ER 313
6 *Yat Tung Investment Co. Ltd.* v. *Dao Heng Bank Ltd.*, 1975 AC 581 : (1975) 2 WLR 690 (PC)
7 (2002) 2 AC 1 : (2001) 2 WLR 72 (HL)
8 (1983) 1 AC 145 : (1982) 2 WLR 855 (HL)

the DRT, Bangalore, against Respondents 1 and 2. Respondent 1, in order to repay the dues of the Bank, signed an assignment deed dated 8-10-2003 with the Chief Manager, Basavanagudi Branch, Bangalore for assignment of the trade mark "EENADU" in respect of agarbathis (incense sticks) on certain terms and conditions.

6. Clauses 1 to 7 of the aforesaid assignment are set out hereunder:

"Now this deed of assignment of trade mark "EENADU" witnesseth as follows:

1. The assignor hereby grants, transfers and assigns upon the assignee upon the terms and conditions mentioned hereunder, the exclusive use and all benefits of the aforesaid trade mark "EENADU" in relation to the agarbathis (incense sticks) for a period of TEN years from the date of this agreement i.e. 1-10-2003 to 30-9-2013.

2. The assignee shall pay the sum of Rs 76,000.00 (Rupees seventy-six thousand only) per month payable for the period of first six years: i.e. from 1-10-2003 to 30-9-2009:

(*i*) Rs 40,000.00 shall be credited to the loan amount of the assignor every month; and

(*ii*) the balance of Rs 36,000.00 (Rupees thirty-six thousand only) to be paid to the assignor/permitted to be drawn by him until the expiry of first six years i.e. 1-10-2003 to 30-9-2009; and

3. The assignee shall pay the sum of Rs 83,600.00 (Rupees eighty-three thousand six hundred only) per month payable for the period of next four years i.e. from 1-10-2009 to 30-9-2013.

(*i*) Rs 40,000 shall be credited to the loan account of the assignor every month; and

(*ii*) the balance of Rs 43,600.00 (Rupees forty-three thousand six hundred only) to be paid to the assignor/permitted to be drawn by him until the expiry of next four years i.e. from 1-10-2009 to 30-9-2013.

4. The aforesaid payments shall be unconditionally made by the assignee continuously and uninterruptedly for the aforesaid period of TEN years.

5. The assignee shall have the right to use the trade mark "EENADU" on its own and shall also be entitled to grant permission to third party/parties to use the same, subject to the said parties agreeing to maintain the good quality and reputation of the trade mark "EENADU" during the period of validity of assignment (the abovesaid ten years i.e. 1-10-2003 to 30-9-2013).

6. The assignee shall be entitled to collect "royalty" from the permitted users during the period of validity of assignment (the abovesaid ten years).

7. The period of assignment granted under this deed shall come to an end on the expiry of the period of ten years from the date of this agreement i.e. on 30-9-2013 and the agreement shall stand terminated without any notice in relation thereto and the licences, permissions, etc. granted by the assignee to the third parties in respect of the trade mark of the assignor "EENADU" shall also come to an end simultaneously, without such notice."

7. By a letter dated 27-1-2004, the Chief Manager wrote to Respondent 1 stating that:

"We have been informed by our higher authorities that as per the Banking Company's Regulation Act, 1949, the Bank cannot be "patent right-holder".

Hence, please note that we are not interested in holding the patent right of EENADU and as such by this letter, we are cancelling the above assignment deed dated 8-10-2003."

8. On 15-4-2004, Respondent 1 filed OS No. 2832 of 2004 against the Bank challenging the cancellation of the said assignment deed and for recovery of Rs 2,16,000 with interest thereon for the period 1-10-2003 to 31-3-2004. On 17-9-2004, the petitioner Bank filed OS No. 7018 of 2004 for a declaration that the assignment deed entered into between it and Respondent 1 is vitiated by mistake, undue influence and fraud and that, therefore, the said deed is unenforceable in the eye of the law.

9. Meanwhile, the Chief Manager who signed the assignment deed on behalf of the Bank, namely, one N.V. Narayana Rao, was dismissed from service pursuant to disciplinary proceedings taken against him on 26-5-2005.

10. The two suits as aforestated were consolidated and disposed of by a common judgment. Issues were framed separately in both suits and it was found that the assignment deed was not vitiated by fraud, misrepresentation or undue influence. Consequently, the Bank had no right to cancel or rescind the aforesaid assignment deed. Respondent 1's claim for a money decree for Rs 2,16,000 was dismissed. It was also held that the civil court had jurisdiction to entertain the suits, despite the pendency of DRT proceedings. The Bank's suit came to be dismissed. The ultimate order passed in the two suits is as follows:

"OS No. 2832 of 2004 is hereby decreed in part, granting a relief in favour of the plaintiff as against the first defendant Bank, declaring that the unilateral cancellation of the assignment agreement dated 8-10-2003 by the first defendant Bank vide Letter No. LPD/SSI/1034/2004 dated 27-1-2004, is illegal and unsustainable.

The further prayer of the plaintiff seeking money decree against the first plaintiff Bank, directing to pay him Rs 2,16,000.00 together with interest at 18% p.a. is hereby rejected.

OS No. 7018 of 2004 is hereby dismissed, thereby the prayer of the plaintiff Bank to declare that the assignment agreement dated 8-10-2003 entered into between the Bank and the first defendant, as vitiated by virtue

of undue influence, fraud and misrepresentation, practised by the first defendant on the Bank, is hereby rejected."

11. Respondent 1 filed a review petition, being Miscellaneous Petition No. 324 of 2013, seeking review of the aforesaid judgment to the extent that his prayer for payment of Rs 2,16,000 was rejected. On 16-3-2015, this petition was allowed, and OS No. 2832 of 2004 filed by Respondent 1 was fully decreed against the Bank, including the prayer for payment. Against the aforesaid review judgment dated 16-3-2015, an appeal was filed by the Bank on 4-1-2016 with an application for condoning the delay of 175 days. We are informed that this appeal is still pending. Meanwhile, Respondent 1, on the basis of the assignment deed, filed another suit, being OS No. 495 of 2008, against the Bank for recovery of a sum of Rs 17,89,915 with interest for the period 1-4-2004 to 30-4-2007. By a judgment dated 30-10-2015, this suit was decreed on the footing that the earlier judgment dated 27-4-2013, not having been appealed against, was res judicata between the parties. An appeal filed against this judgment met with the same fate in that, by the impugned judgment dated 31-7-2017[9], the High Court of Karnataka dismissed the appeal filed by the Bank on the self-same ground of res judicata. It may be noted that on 14-7-2017, the hearing of the appeal, which culminated in the impugned judgment, was concluded and judgment was reserved. It was only after this that the petitioner Bank, for the first time on 26-7-2017, filed a review petition against the judgment dated 27-4-2013 with a condonation of delay application of 1548 days. This review petition is also stated to be pending.

12. Shri Dhruv Mehta, learned Senior Advocate appearing on behalf of the petitioner Bank, has argued that no issue was struck as to res judicata as the same had not specifically been pleaded in the plaint of the suit of 2008. Indeed, the judgment dated 27-4-2013 came long after the pleading in the second suit, and no amendment of the plaint was sought so as to incorporate the plea of res judicata. No issue having been raised, it was impermissible, according to the learned Senior Advocate, to have gone into this plea at all. It was also argued that on the assumption that the said plea could be gone into, there were two statutory bars to relief, namely, Section 45 of the Trade Marks Act, 1999 and Sections 6 and 8 read with Section 46(4) of the Banking Regulation Act, 1949. The first statutory bar made it clear that unless the assignment deed was registered, it could not be received in evidence by any court. Sections 6 and 8 of the Banking Regulation Act interdicted the Bank from doing any business other than banking business and that, therefore, the assignment deed which enabled the Bank to trade in goods and to earn royalty from an assignment of the trade mark would be hit by the aforestated provisions and, therefore, would be void in law. For this purpose, he relied strongly upon the judgment of this Court in *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*[10], and various other judgments which have followed the law laid down by the aforesaid judgment. According to him, therefore, these two statutory prohibitions being pure questions of law, which are unrelated to facts which give rise to a right, cannot be res judicata between the parties. According

9 *Canara Bank* v. *N.G. Subbaraya Setty*, 2017 SCC OnLine Kar 4030
10 (1970) 1 SCC 613

to the learned Senior Advocate, both points had been raised before the courts below with no success. Indeed, the very letter dated 27-1-2004 cancelling the assignment deed would itself show that the plea of the assignment deed being contrary to the Banking Regulation Act was the very reason for cancelling the aforesaid deed. He also referred to and relied upon the fact that the Bank Manager responsible for signing the said deed had been dismissed from service by an order dated 26-5-2005. Shri Mehta also strongly relied upon a judgment dated 29-1-2011, by the Sessions Court in Bangalore, by which the Chief Manager, one A. Sheshagiri Rao, who was made Accused 1 in a special criminal case filed by CBI and Respondents 1 and 2, who were made Accused 2 and 3 respectively, were each sentenced to 6 months, three years and two years respectively by the learned Sessions Judge, having been convicted under Sections 120-B and 420 of the Penal Code, 1860. Accused 1 was also convicted of an offence under Section 13 of the Prevention of Corruption Act, 1988. According to the learned Senior Advocate, therefore, the doctrine of res judicata cannot be stretched to allow perpetuation of a fraud committed upon the Bank.

13. Shri Shanth Kumar Mahale, learned advocate appearing for Respondents 1 and 2, on the other hand, defended the judgments of the courts below. According to the learned counsel, the judgment dated 27-4-2013 was delivered long after the Chief Manager was dismissed and after the Sessions Judge's judgment dated 29-1-2011 convicting Respondents 1 and 2. This judgment specifically held that there was no fraud played, that the Bank itself sought the assignment from Respondents 1 and 2, and that since there was no misrepresentation, undue influence, etc., the assignment deed was valid in law, the cancellation of the said deed being illegal. This judgment is final between the parties and has never been challenged, except by way of a review which was filed belatedly after hearing both parties in the appeal. The said review petition, which is obviously an abuse of process with huge delay, could not possibly render the res sub judice so as to affect the judgments of the courts below. According to the learned counsel, neither Section 45 of the Trade Marks Act nor Sections 6 and 8 of the Banking Regulation Act are capable of only one obvious interpretation so that, on their application, the assignment deed becomes illegal in law.

14. We had appointed Shri K.V. Viswanathan, learned Senior Counsel, as Amicus Curiae to guide us in this matter. He has referred to a large number of judgments and has rendered invaluable assistance to this Court in order that we arrive at a proper and just conclusion in this matter. He has argued that the review petition that is filed belatedly against the judgment dated 27-4-2013, being grossly belated with no chance of success, would not take away the res judicata effect of the judgment dated 27-4-2013. According to the learned Senior Counsel, the case law makes it clear that if an appeal is filed within limitation, the res never becomes judicata. In fact, until the limitation for filing an appeal is over, the res remains sub judice. It is only also when the limitation period is over that the res can be considered to be judicata. Depending upon the length of time for which delay is sought to be condoned, the Court can either proceed with the matter and consider the case on the footing of res judicata or stay further proceedings in order to await the outcome of the proceedings in

the appeal in the other case. The test, according to the learned Senior Counsel, is whether the delay in filing the appeal can be considered by the Court to be without sufficient cause and, therefore, an abuse of process. It is also important to find out whether third-party rights have arisen in the meanwhile. He has cited a large number of judgments before us, including the position in the UK and US Interestingly, he cited judgments to show that in the United States, res judicata attaches the moment a judgment is pronounced, despite the fact that an appeal may be filed against the said judgment.

15. We may first deal with the preliminary point urged by Shri Mehta. He pressed into service the judgment in *V. Rajeshwari* v. *T.C. Saravanabava*[11] for the proposition that a plea of res judicata not properly raised in the pleadings or put in issue at the stage of trial could not be permitted to be taken. A closer look at the said judgment shows that the judgment dealt with such a plea not being permitted to be raised for the first time at the stage of appeal. In the present case, though an issue as to res judicata was not struck between the parties, both parties argued the matter based upon the pleadings and the judgment contained in the two suits of 2004. It is only after full arguments on both sides that the trial court in the judgment dated 30-10-2015 accepted the respondent's plea of res judicata. Even before the appellate court, the point of res judicata was argued by both parties without adverting to the aforesaid objection. It is obvious, therefore, that this ground raised for the first time before this Court, cannot non-suit the respondents.

16. The doctrine of res judicata is contained in Section 11 of the Code of Civil Procedure, 1908, which, though not exhaustive of all the facets of the doctrine, delineates what exactly the doctrine of res judicata is in the Indian context. Section 11 reads as under:

> "**11.** ***Res judicata.***—No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> *Explanation I.*—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> *Explanation II.*—For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.
>
> *Explanation III.*—The matter abovereferred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> *Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

11 (2004) 1 SCC 551

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.—An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

17. This Court in *Sheodan Singh* v. *Daryao Kunwar*[12] has stated with some felicity the conditions that need to be satisfied in order to constitute a matter as res judicata. This Court held: (SCR pp. 304-305 : AIR p. 1334, para 9)

"9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—

(*i*) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(*ii*) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(*iii*) The parties must have litigated under the same title in the former suit;

(*iv*) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

(*v*) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further *Explanation I* shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied."

18. As to what happens when an appeal is filed against a judgment in the first proceeding, a Full Bench of the Allahabad High Court in *Balkishan* v.

12 (1966) 3 SCR 300 : AIR 1966 SC 1332

Kishan Lal[13] (at ILR pp. 159-61), is most instructive. Mahmood, J., speaking for the Full Bench, referred to Explanation IV to Section 13 of the Code of Civil Procedure, as it then stood. The learned Judge referred to the said Explanation in the following terms: (SCC OnLine All)

> "... The latter part of Explanation IV of that section has been framed in somewhat unspecific language, and runs as follows:
>
> 'A decision liable to appeal may be final within the meaning of this section until the appeal is made.'
>
> The language of the section is silent as to what happens when an appeal has been preferred; and no doubt much depends upon the interpretation of two vague words "*may*" and "*until*" as they occur in the sentence which I have just quoted. I may perhaps say that more has been aimed at by that sentence than the few words of which that sentence consists could convey. What has been left unsettled by that sentence is the difficulty pointed out by a juristic Judge of such eminence as Mr Justice Holloway of Madras in *Kakarlapudi Suriyanarayanarazu Garu* v. *Chellamkuri Chellamma*[14] when that learned Judge said:
>
> 'In the lower court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was pending. This is not in accordance with English law, as the judgment on the rejoinder in *Doe* v. *Wright*[15] shows. It would, however, be perfectly sound doctrine in the view of other jurists (*Unger Oct. Priv. Recht*, II, 603, *Sav. Syst.*, 297, *Seq. Waihier*, II, 549). As an Englishman I should be sorry to invite a comparison between the reasons given by these great jurists for their and those embodied in the English cases for the contrary doctrine.'
>
> * * *
>
> I hold that the views thus expressed by Pothier and, as Mr Justice Holloway has indicated, adopted by other continental jurists as to the doctrine of res judicata, are consistent with the interpretation which I place upon Explanation IV of Section 13 of the Code of Civil Procedure in relation to the authority of judgments still liable to appeal. Such judgments are not *definitive* adjudications. They are only provisional, and not being final cannot operate as res judicata. Such indeed seems to be the view adopted by the learned Judges of the Bombay High Court when they said, in *Nilvaru* v. *Nilvaru*[16]: (ILR p. 112)
>
> '...We consider that when the judgment of a court of first instance upon a particular issue is appealed against, that judgment ceases to be res judicata and becomes res sub judice....'

13 1888 SCC OnLine All 8 : ILR (1889) 11 All 148
14 (1870) 5 MHCR 176
15 (1839) 10 Ad & E 763 : 113 ER 289
16 ILR (1882) 6 Bom 110

In this case, therefore, both the courts below were wrong in law in holding that the previous judgment of 10-3-1886, which at the date of the institution of this suit was still liable to appeal, and which at the date of the decision of this suit by the first court, as also at the date of the decision by the lower appellate court, was the subject of a second appeal pending in this Court (SA No. 973 of 1886) could operate as res judicata in favour of the plaintiff in regard to his title as to the malikana."

19. The Privy Council, in an early judgment in *S.P.A. Annamalay Chetty* v. *B.A. Thornhill*[17] (at AIR p. 264), was faced with the question as to whether the filing of an appeal would by itself take away the res judicata effect or whether a matter heard and finally decided by the first court was res judicata until it was set aside on appeal. The Privy Council held: (SCC OnLine PC)

> "Section 207 of the Civil Procedure Code, 1889, provides as follows:
>
> 'All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall be non-suited.'

The appellant maintained that, under this provision, no decree, from which an appeal lies and has in fact been taken, is final between the parties so as to form res judicata, while the respondent contended that such a decree was final between the parties and formed res adjudicata until it was set aside on appeal. In their Lordships' opinion the former view is the correct one, and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res adjudicata as between the same parties. The opinion of the learned Judges of the Supreme Court clearly inclined to the same view, and their Lordships have a difficulty in appreciating why the learned Judges found it unnecessary to decide this point, for this view still leaves it open to the Court to see that the appellant does not get decree twice over for the same sum, and it is inconsistent with the other ground expressed by them for their decision that the appellant's cause of action had been merged into the decree in Action No. 4122, since, according to this view, that decree was not final. Their Lordships regret that the second action was not adjourned pending the decision of the appeal in the first action, as that would have simplified procedure and saved expense."

20. Our law, therefore, is different from the American law — a decree from which an appeal lies and has in fact been filed would render the res sub judice and not judicata. This judgment of the Privy Council has been repeatedly followed by the High Courts in this country. See, *Parshotam Parbhudas* v. *Bai Moti*[18] at para 8, *Bhavani Amma* v. *Narayana Acharya*[19]

17 1931 SCC OnLine PC 53 : AIR 1931 PC 263
18 1962 SCC OnLine Guj 57 : AIR 1963 Guj 30
19 1962 SCC OnLine Kar 119 : AIR 1963 Mys 120

at para 2, *Satyanarayan Prosad Gooptu* v. *Diana Engg. Co.*[20] at para 10 and *Venkateswarlu* v. *Venkata Narasimham*[21] at para 3.

21. In *Chengalavala Gurraju* v. *Madapathy Venkateswara Row Pantulu Garu*[22] at AIR pp. 599-600, a Division Bench of the Madras High Court referred to and relied upon *Balkishan*[13]. The Court then held: (*Chengalavala case*[22], SCC OnLine Mad paras 8 & 10)

> "8. Explanation 4 to Section 13 of the Civil Procedure Code of 1882 which enacted that a decision liable to appeal may be final within the meaning of the section until the appeal is made has been omitted in the present Code (of 1908) and the omission (which was in all probability made in view of the decision in *Balkishan* v. *Kishan Lal*[13] removes any doubts or difficulties in dealing with the question and it is not necessary to speculate on the class of cases to which this explanation can be applied if a judgment liable to appeal is only held to be provisional and not operative as res judicata. In dealing with Section 52 of the Transfer of Property Act it has been held that a person who purchases property between the date of the disposal of the suit and the filing of the appeal would be bound by the rule of lis pendens: *Gobind Chunder Roy* v. *Guru Churn Kurmokar*[23], *Dinonath Ghose* v. *Shama Bibi*[24], *Sukhdeo Prasad* v. *Jamna*[25], *Settappa Goundan* v. *Muthia Goundan*[26]. If the appeal is only a continuation of the original proceedings and the suit is, for the purpose of Section 52 of the Transfer of Property Act, regarded as pending between the date of the decree and that of the filing of an appeal, it is difficult to see why the same rule should not apply when dealing with Section 11 of the Civil Procedure Code. ...
>
> * * *
>
> *10.* ... As regards appeals filed out of time and after independent rights between the parties have ripened, it is unlikely that courts would excuse the delay, if during the interval other rights come into existence, which would render it inequitable that questions disposed of should be re-opened at the instance of a party who seeks the indulgence of the court: *Esdaile* v. *Payne*[27]. Following the decision in *Balkishan* v. *Kishan Lal*[13] we are of opinion that the Sub-Collector was wrong in holding that the decision passed by him in Suits Nos. 466 of 1909 and 276 of 1910 had the force of res judicata during the interval between the date of his decree and the time allowed by law for filing the appeal."

20 1951 SCC OnLine Cal 195 : AIR 1952 Cal 124
21 1956 SCC OnLine AP 180 : AIR 1957 AP 557
22 1916 SCC OnLine Mad 455 : AIR 1917 Mad 597
13 *Balkishan* v. *Kishan Lal*, 1888 SCC OnLine All 8 : ILR (1889) 11 All 148
23 ILR (1888) 15 Cal 94
24 1900 SCC OnLine Cal 249 : ILR (1901) 28 Cal 23
25 1900 SCC OnLine All 11 : ILR (1901) 23 All 60
26 1908 SCC OnLine Mad 67 : ILR (1908) 31 Mad 268
27 (1889) LR 40 Ch D 520 (CA)

22. This judgment was followed in *Baijnath Karnani* v. *Vallabhadas Damani*[28], at AIR p. 514.

23. The conspectus of the above authorities shows that until the limitation period for filing of an appeal is over, the res remains sub judice. After the limitation period is over, the res decided by the first court would then become judicata. However, questions arise as to what is to be done in matters where the hearing in the second case is shortly after the limitation period for filing an appeal in the first case has ended. At least two judgments, one of the Privy Council and one of the Bombay High Court, have referred to the fact that, in appropriate cases, the hearing in the second case may be adjourned or may be stayed in order to await the outcome of the appeal in the first case. See, *Chandra Singh Dudhoria* v. *Midnapore Zemindari Co. Ltd.*[29] at IA pp. 58-59 and *Indra Singh & Sons Ltd.* v. *Shiavax C. Cambata*[30] at ILR p. 352.

24. If the period of limitation for filing an appeal has not yet expired or has just expired, the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as res judicata. No hard-and-fast rule can be applied. The entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding. Many factors have to be considered before exercising this discretion — for example, the fact that the appeal against the first judgment is grossly belated; or that the said appeal would, in the ordinary course, be heard after many years in the first proceeding; or, the fact that third-party rights have intervened, thereby making it unlikely that delay would be condoned in the appeal in the first proceeding. As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case.

25. In the present case, a belated review petition was filed after arguments were heard and judgment reserved by the appellate court. Would this Court have to await the outcome of the said review petition before deciding whether the judgment dated 27-4-2013 is res judicata? Obviously not. It is clear

28 1933 SCC OnLine Mad 89 : AIR 1933 Mad 511
29 1941 SCC OnLine PC 35 : (1941-42) 69 IA 51
30 1947 SCC OnLine Bom 43 : ILR 1948 Bom 346

that a review petition filed long after the judgment dated 27-4-2013, with a condonation application for a delay of over four years, could not possibly be held to be anything but an abuse of the process of the Court. This being so, we proceed to examine whether the judgment dated 27-4-2013 can be considered to be res judicata in the second proceeding in this case, namely, the suit of 2008 filed by Respondent 1. We now come to the argument of Shri Dhruv Mehta based on the application of the principles contained in *Mathura Prasad*[10].

26. In *Mathura Prasad*[10], a question arose as to whether an erroneous judgment on the jurisdiction of the Small Cause Court in relation to a proceeding arising out of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would be res judicata. The view[31] expressed by the High Court was overruled in *Dossibai N.B. Jeejoebhoy* v. *Khemchand Gorumal*[32] by this Court in 1962, by which time the trial Judge and the High Court of Bombay rejected an application filed by the appellant for an order determining standard rent of the premises. This Court laid down: (*Mathura Prasad case*[10], SCC pp. 617-18, paras 5-11)

> "*5.* But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. *A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue*. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. *A decision on an issue of law will be as res judicata in a subsequent proceeding between the same*

10 *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613
31 *Dossibai N.B. Jeejeebhoy* v. *Hingoo Manohar Missar*, Civil Revision Application No. 233 of 1955, decided on 28-9-1955 (Bom)
32 (1962) 3 SCR 928 : AIR 1966 SC 1939

parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

* * *

7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties: *Tarini Charan Bhattacharya case*[33]. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

8. In a case relating to levy of tax a decision valuing property or determining liability to tax in a different taxable period or event is binding only in that period or event, and is not binding in the subsequent years, and therefore the rule of res judicata has no application: See *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*[34].

9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C.J., observed in *Tarini Charan Bhattacharya case*[33]: (SCC OnLine Cal)

> '... The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided.'

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. *But, where the decision is on a question of law i.e. the interpretation of a statute,*

33 *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*, 1928 SCC OnLine Cal 172 : AIR 1928 Cal 777
34 1926 AC 94 (PC)

it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the Code of Civil Procedure means the right litigated between the parties i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land." (emphasis supplied)

27. Ultimately, the Court in *Mathura Prasad case*[10] held that since the decision of the Civil Judge that he had no jurisdiction to entertain the application of standard rent, in view of the judgment of the Supreme Court, was plainly erroneous, the decision in the previous proceedings cannot be regarded as conclusive. The appeals were, therefore, allowed and the orders passed by the High Court and the Court of Small Causes were set aside and the proceedings were remanded to the court of first instance.

28. This judgment has been followed in a number of cases:

28.1. In *Sushil Kumar Mehta* v. *Gobind Ram Bohra*[35], the aforesaid judgment was referred to in paras 20 and 21 and followed, holding that where there is an inherent lack of jurisdiction, which depends upon a wrong decision, the earlier wrong decision cannot be res judicata.

28.2. Similarly, in *Isabella Johnson* v. *M.A. Susai*[36], this Court, after setting out the law contained in *Mathura Prasad*[10], stated that a court which has no jurisdiction in law cannot be conferred with jurisdiction by applying the principle of res judicata, as it is well settled that there is no estoppel on a pure question of law which relates to jurisdiction.

29. An instructive Full Bench decision of the Punjab and Haryana High Court was cited before us by Shri Viswanathan, *State of Punjab* v. *Nand Kishore*[37] at AIR pp. 308-309, which further explained the ratio of *Mathura Prasad*[10]. What troubled the Full Bench, after referring to *Mathura Prasad*[10], was as to whether an issue of law decided inter partes could be held to be res judicata in a subsequent proceeding between the same parties. After referring to *Mohanlal Goenka* v. *Benoy Kishna Mukherjee*[38], which held that even an erroneous decision on a question of law operates as res judicata between parties, and various other Supreme Court judgments, the Full Bench of the Punjab and Haryana High Court, by a majority decision, went on to hold: (*Nand Kishore case*[37], SCC OnLine P&H paras 17 & 18)

10 *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613
35 (1990) 1 SCC 193
36 (1991) 1 SCC 494
37 1974 SCC OnLine P&H 126 : AIR 1974 P&H 303
38 1953 SCR 377 : AIR 1953 SC 65

"*17*. What exactly then is the ratio decidendi in *Mathura Prasad case*[10]? It is manifest that the sole issue in the appeal was as to the jurisdiction of the Court of Small Causes for determining the standard rent of premises constructed in pursuance of a building lease of an open site. Therefore, the authority is a precedent primarily on the limited issue of the jurisdiction of a Court. What directly arose for determination therein and what has been specifically laid down by their Lordships is — that a patently erroneous decision (directly contrary to a Supreme Court judgment) in a previous proceeding in regard to the jurisdiction of a Court could not become res judicata between the parties. The weighty reason for so holding was that such a result would create a special rule of law applicable to the parties in relation to the jurisdiction of the Court in violation of rule of law declared by the legislature. It is manifest that this enunciation was an engrafted exception to the general principle noticed in the judgment itself i.e. a question of law including the interpretation of a statute would be res judicata between the same parties where the cause of action is the same. I am inclined to the view that it is unprofitable and indeed unwarranted to extract an observation and a sentence here and there from the judgment and to build upon it on the ground that certain results logically follow therefrom. Such a use of precedent was disapproved by the Earl of Halsbury, L.C. in *Quinn* v. *Leathem*[39]. Approving that view and quoting extensively therefrom their Lordships of the Supreme Court in *State of Orissa* v. *Sudhansu Sekhar Misra*[40] have categorically observed as follows: (AIR p. 651, para 13)

> '*13*. ... A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.'

18. In strictness, therefore, the ratio decidendi of *Mathura Prasad case*[10] is confined to the issue of jurisdiction of the Court but is equally well-settled that the obiter dicta of their Lordships is entitled to the greatest respect and weight and is indeed binding if it can be found that they intended to lay down a principle of law. The issue, therefore, is as to what else, apart from the ratio, was sought to be laid down by the Supreme Court in this case. The very closely guarded language used by their Lordships in the body of the judgment leads me to conclude that they wished to confine their observations within the narrowest limits. The expression used (which is sought to be extended on behalf of the respondent) is "a pure question of law unrelated to the right of the parties to a previous suit". It is very significant that their Lordships, with their meticulous precision of language, have nowhere laid down in the judgment that a pure question of law can never be res judicata between the parties. Indeed it has been said to

10 *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613
39 1901 AC 495 (HL)
40 AIR 1968 SC 647

the contrary in terms. The emphasis, therefore, in the expression abovesaid is on the fact that such a pure question of law must be unrelated to the rights of the parties. It stands noticed that a decision by a Court on a question of law cannot be absolutely dissociated from the decision on the facts on which the right is founded. Consequently what was exactly to be connoted by the expression "a pure question of law unrelated to the rights of the parties" was itself expounded upon by their Lordships. Without intending to be exhaustive, the Court has indicated specifically the exceptional cases in which special considerations apply for excluding them from the ambit of the general principle of res judicata. The principle of law which their Lordships herein have reiterated is that a pure question of law including the interpretation of a statute will be res judicata in a subsequent proceeding between the same parties. To this salutary rule, four specific exceptions are indicated. Firstly, the obvious one, that when the cause of action is different, the rule of res judicata would not be attracted. Secondly, where the law has, since the earlier decision, been altered by a competent authority. Thirdly, where the earlier decision between the parties related to the jurisdiction of the Court to try the earlier proceedings, the same would not be allowed to assume the status of a special rule of law applicable to the parties and therefore, the matter would not be res judicata. Fourthly, where the earlier decision declared valid a transaction which is patently prohibited by law, that is to say, it sanctifies a glaring illegality."

On facts, the majority judgment of the Full Bench held that the earlier decision inter partes was res judicata as it was on a question of law which was not unrelated to the rights of the parties. Sharma, J. dissented with this view, and held that the decision rendered in the earlier case was erroneous and related to the jurisdiction of the Court. Since a wrong decision on a point of jurisdiction could not operate as res judicata, the learned Judge dissented.

30. An appeal from the Division Bench judgment pursuant to the Full Bench decision[37] resulted in the decision in *Nand Kishore* v. *State of Punjab*[41]. A brief resume of the facts shows that the appellant had been compulsorily retired, having completed only ten years' qualifying service in pursuance of Rule 5.32(*b*) of the Punjab Civil Services Rules, Vol. II. A writ petition that was moved by the appellant against the compulsory retirement order was dismissed on 2-2-1962. The appellant had not questioned the validity of Rule 5.32(*b*) in the aforesaid writ petition. However, in *Moti Ram Deka* v. *North East Frontier Railway*[42], this Court held that if the compulsory retirement rule permitted an authority to retire a public servant at a very early stage of his career, such rule might be constitutionally invalid. The appellant, spurred by the decision in *Moti Ram Deka*[42], filed a suit in 1964 for a declaration that Rule 5.32 of the aforesaid Rules was constitutionally invalid. A pari materia rule to that of Rule 5.32 was struck down by this Court in *Gurdev Singh Sidhu* v. *State of*

37 *State of Punjab* v. *Nand Kishore*, 1974 SCC OnLine P&H 126 : AIR 1974 P&H 303
41 (1995) 6 SCC 614 : 1996 SCC (L&S) 57
42 (1964) 5 SCR 683 : AIR 1964 SC 600

Punjab[43]. However, since a writ petition had been filed by the appellant earlier, the State of Punjab, in its written statement to the suit filed by the appellant, took up the plea of constructive res judicata. This plea found favour with the Full Bench of the High Court on 8-5-1974[37], following which a Division Bench allowed the appeal of the State of Punjab on 13-8-1974. It is from this judgment that an appeal landed up before this Court, as is stated hereinabove. This Court, on 6-12-1990, advised the appellant to file a special leave petition from the order of the High Court dismissing his writ petition dated 15-2-1962[44], with an appropriate application for condonation of delay. The delay was condoned by this Court in the interest of justice in the special circumstances of this case under Article 142, and the said belated appeal was allowed following *Gurdev Singh*[43] and striking down the order of compulsory retirement of the appellant. Despite having so decided, this Court went into the doctrine of constructive res judicata and decided that the constitutionality of a provision of law stands on a different footing from other questions of law. As there is a presumption of constitutionality of all statutes, the "might and ought" rule of constructive res judicata cannot be applied. Instead what was applied by this Court was that part of the decision in *Mathura Prasad*[10] which stated that when the law has, since the earlier decision in the appellant's writ petition, been altered by a competent authority, res judicata cannot apply. The Full Bench of the Punjab High Court was expressly overruled on the point that a "competent authority" can also be a court. Hence, a changed declaration of law would also fall within an earlier decision being altered by a competent authority. This Court, therefore, held that since this Court itself had altered the law when it declared the pari materia rule as unconstitutional, the doctrine of res judicata could not apply.

31. In *Allahabad Development Authority* v. *Nasiruzzaman*[45], this Court held that (at SCC p. 427, para 6) when the previous decision was found to be erroneous on its face, such judgment cannot operate as res judicata, as to give effect to such judgment would be to counter a statutory prohibition. On the facts of that case, it was held that in a land acquisition case, after vesting has taken place in favour of the State, obviously, the lapse of a notification under Section 6 of the Land Acquisition Act, 1894 could not possibly arise.

32. In *Shakuntla Devi* v. *Kamla*[46], this Court held that in view of the changed position in law consequent to a contrary interpretation put on Section 14 of the Hindu Succession Act, 1956 by *V. Tulasamma* v. *Sesha Reddy*[47], the earlier decree based on judgments that were overruled cannot operate as res judicata. This is in consonance with the law laid down by this Court in *Nand Kishore*[41].

43 (1964) 7 SCR 587 : AIR 1964 SC 1585 : (1964) 2 Cri LJ 481
37 *State of Punjab* v. *Nand Kishore*, 1974 SCC OnLine P&H 126 : AIR 1974 P&H 303
44 *Nand Kishore Vaid* v. *State of Punjab*, 1962 SCC OnLine P&H 47 : PLR (1962) 64 P&H 469
10 *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613
45 (1996) 6 SCC 424
46 (2005) 5 SCC 390
47 (1977) 3 SCC 99
41 *Nand Kishore* v. *State of Punjab*, (1995) 6 SCC 614 : 1996 SCC (L&S) 57

33. Since *Mathura Prasad*[10] followed the Full Bench judgment of the Calcutta High Court in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*[33] (at AIR pp. 781-82), it is important to set out what the Full Bench said in answer to the question posed by it—namely, whether an erroneous decision on a pure question of law operates as res judicata in a subsequent suit where the same question is raised. The answer given by the Full Bench is in four propositions set out hereinbelow: (*Tarini Charan Bhattacharya case*[33], SCC OnLine Cal)

> "(*1*) The question whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances, the court shall not try a suit or issue, but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances, it must necessarily be wrong for a court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not accordingly, as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that, therefore, it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.
>
> (*2*) In India, at all events, a party who takes a plea of res judicata has to show that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and also that it has been heard and finally decided. This phrase "matter directly and substantially in issue" has to be given a sensible and businesslike meaning, particularly in view of Explanation 4, Section 11 of the Code of Civil Procedure which contains the expression "grounds of defence or attack". Section 11 of the Code says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. As a rule, parties do not join issue upon academic or abstract questions but upon matters of importance to themselves. The section requires that the doctrine be restricted to matters in issue and of these to matters which are directly as well as substantially in issue.
>
> (*3*) Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The court and the public have an interest. When plea of res judicata is raised with reference to such matters, it is at least a question whether special considerations do not apply.
>
> (*4*) In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such court, the

10 *Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613
33 1928 SCC OnLine Cal 172 : AIR 1928 Cal 777

principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision can be attacked on a particular point. On the other hand, it is plain from the terms of Section 11 of the Code that what is made conclusive between the parties is the decision of the court and that the reasoning of the court is not necessarily the same thing as its decision. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

34. Given the conspectus of authorities that have been referred to by us hereinabove, the law on the subject may be stated as follows:

34.1. The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

34.2. To this general proposition of law, there are certain exceptions when it comes to issues of law:

34.2.1. Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a court competent to try such suit. When read with Explanation I to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a court cannot clothe that court with jurisdiction where it has none. Obviously, a civil court cannot send a person to jail for an offence committed under the Penal Code. If it does so, such a judgment would not bind a Magistrate and/or Sessions Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Penal Code. Equally, a civil court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special court with jurisdiction to decide such suits. As an example, under Section 28 of the Bombay Rent Act, 1947, the Small Cause Court has exclusive jurisdiction to hear and decide proceedings between a landlord and a tenant in respect of rights which arise out of the Bombay Rent Act, and no other court has jurisdiction to embark upon the same. In this case, even though the civil court, in the absence of the statutory bar created by the Rent Act, would have jurisdiction to decide such suits, it is the statutory bar created by the Rent Act that must be given effect to as a matter of public policy. [See, *Natraj Studios (P) Ltd.* v. *Navrang*

Studios[48], at SCR p. 482]. An erroneous decision clothing the civil court with jurisdiction to embark upon a suit filed by a landlord against a tenant, in respect of rights claimed under the Bombay Rent Act, would, therefore, not operate as res judicata in a subsequent suit filed before the Small Cause Court between the same parties in respect of the same matter directly and substantially in issue in the former suit.

34.2.2. An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter partes), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in *Natraj Studios*[48], it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.

34.3. Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different.

35. On the facts of this case, Shri Mehta referred us to the statutory prohibition contained in the Trade Marks Act and the Banking Regulation Act. The relevant provisions are Section 45 of the Trade Marks Act and Sections 6 and 8 of the Banking Regulation Act read with Section 46(4) thereof. The aforesaid statutory provisions are set out hereinbelow:

"***Trade Marks Act, 1999***

45. ***Registration of assignments and transmissions.***—(1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall, on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods or services in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register:

48 (1981) 1 SCC 523 : (1981) 2 SCR 466

Provided that where the validity of an assignment or transmission is in dispute between the parties, the Registrar may refuse to register the assignment or transmission until the rights of the parties have been determined by a competent court.

(2) Except for the purpose of an application before the Registrar under sub-section (1) or an appeal from an order thereon, or an application under Section 57 or an appeal from an order thereon, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section (1), shall not be admitted in evidence by the Registrar or the Appellate Board or any court in proof of title to the trade mark by assignment or transmission unless the Registrar or the Appellate Board or the court, as the case may be, otherwise directs."

"***Banking Regulation Act, 1949***

6. ***Forms of business in which banking companies may engage.***—(1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:

(*a*) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundies, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(*b*) acting as agents for any government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent or secretary and treasurer of a company;

(*c*) contracting for public and private loans and negotiating and issuing the same;

(*d*) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(*e*) carrying on and transacting every kind of guarantee and indemnity business;

(*f*) managing, selling and realising any property which may come into the possession of the company in satisfaction or part-satisfaction of any of its claims;

(*g*) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(*h*) undertaking and executing trusts;

(*i*) undertaking the administration of estates as executor, trustee or otherwise;

(*j*) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing monies for charitable or benevolent objects or for any exhibition or for any public, general or useful object;

(*k*) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(*l*) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(*m*) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;

(*n*) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(*o*) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).

* * *

8. ***Prohibition of trading.***—Notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in clause (*i*) of sub-section (1) of Section 6:

Provided that this section shall not apply to any such business as is specified in pursuance of clause (*o*) of sub-section (1) of Section 6.

Explanation.—For the purposes of this section, "goods" means every kind of movable property, other than actionable claims, stocks, shares, money, bullion and specie, and all instruments referred to in clause (*a*) of sub-section (1) of Section 6.

* * *

46. ***Penalties.***—(1)-(3) * * *

(4) If any other provision of this Act is contravened or if any default is made in—

(*i*) complying with any requirement of this Act or of any order, rule or direction made or condition imposed thereunder, or

(*ii*) carrying out the terms of, or the obligations under, a scheme sanctioned under sub-section (7) of Section 45,

by any person, such person shall be punishable with fine which may extend to one crore rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where a contravention or default is a continuing one, with a further fine which may extend to one lakh rupees for every day, during which the contravention or default continues."

36. Insofar as Section 45 of the Trade Marks Act is concerned, it is clear that this plea was raised throughout both the proceedings. Insofar as the suits of 2004 were concerned, the judgment dated 27-4-2013 expressly recorded the aforesaid plea taken on behalf of the Bank, but turned it down in paras 44 and 56 as follows:

"*44*. The Bank has also taken further steps by virtue of the assignment deed dated 8-10-2003 obtained by them from N.G. Subbaraya Setty and filed an application to the Trade Mark Registry as per Ext. D-ext. 2, seeking for registration of the assignment of the trade mark obtained by them from N. Subbaraya Setty, the registered owner of the trade mark, and the Bank has also paid Rs 5000.00 towards the registration fee. But the Trade Mark Registry returned the said application contending that deficit registration fee is payable by the assignee and the assignor/registered owner of the trade mark has to file an affidavit confirming the assignment of the trade mark in favour of the Bank. Subsequently, it appears no further steps have been taken by the Bank to comply with the objections raised by the Trade Mark Registry, and hence the said assignment of the trade mark in favour of the Bank, could not be registered with the Trade Mark Registry.

* * *

56. So far as Issues 1 and 2 raised in OS No. 7018 of 2004 is concerned, since the plaintiff Bank, has miserably failed to establish the allegations of misrepresentation, fraud and undue influence alleged to have been played, by N.G. Subbaraya Setty on the Bank, the plaintiff Bank cannot escape from the legal consequences of assignment deed obtained by them dated 8-10-2003 and it cannot be held that the assignment deed obtained, by the Bank from N.G. Subbaraya Setty is unenforceable. Therefore, I answer both Issues 1 and 2 raised in OS No. 7018 of 2004 in the negative."

(Issue 2 in OS No. 7018 of 2004 read as follows: Whether the plaintiff proves that the deed of assignment of trade mark, entered into between the plaintiff and the first defendant is not enforceable in law?)

37. Equally, insofar as the trial court judgment in the second suit of 2008 is concerned, the said plea was expressly raised and turned down in the following manner:

> "... Defendant 1 himself has produced the original assignment deed and in this case Defendant 1 himself has taken up the contention that said assignment deed is not registered as per the Trade Marks Act and as such, the said document cannot be considered. There are certain procedures that within 5 days the assignor file an affidavit to the Trade Mark Authority in respect of change of user of the trade mark and Defendant 1 himself has moved application by paying Rs 5000 DD for registering the document. In spite of that the Trade Mark Authorities have not registered the trade mark and as such, the learned counsel for Defendant 1 vehemently argued that the said trade mark "EENADU" is not registered in accordance with law and as such, same cannot be considered for any of the purposes. Further, it is contended that the assignment deed is not registered in accordance with laws. But when the assignment deed has been relied upon in the earlier judgments and parties have accepted the execution of the document, then Defendant 1 cannot again contend that the said assignment deed is not registered and cannot be considered for any of the purposes, does not hold good. It is nothing but res judicata as contended by the plaintiff in the decisions cited above."

38. The impugned judgment dated 31-7-2017[9] also records the aforesaid submission and turns it down stating: (*Canara Bank case*[9], SCC OnLine Kar para 13)

> "*13.* ... Indisputably, the grounds regarding insufficiently stamped assignment deed and non-registration of the trade mark were argued by the Bank which were considered and addressed by the trial court in OS No. 2838 of 2004 and OS No. 7018 of 2004. In such circumstances, raising the very same grounds in the second round of proceedings, the issue in which the matter directly and substantially has been heard and finally decided in a former suit between the same parties, litigating under the same title amounts to res judicata. Defendant 1 Bank is precluded from raising the same objection in the present proceedings which is finally decided holding the assignment deed as legal and binding on Defendant 1 Bank...."

39. We are of the opinion that both the trial court and the first appellate court were entirely wrong in treating the statutory prohibition contained in Section 45(2) of the Trade Marks Act as res judicata. It is obvious that neither court has bothered to advert to Section 45 and/or interpret the same. The second proceeding contained in OS No. 495 of 2008 prayed for payment of a sum of

9 *Canara Bank* v. *N.G. Subbaraya Setty*, 2017 SCC OnLine Kar 4030

Rs 17,89,915 along with interest thereon for the period 1-4-2004 to 30-4-2007. Para 8 of the plaint in the said suit reads as under:

> "8. The plaintiff has already filed a suit in OS No. 2832 of 2004 against the first defendant for the recovery of the amount payable by it under the said assignment deed till the end of 31-3-2004. The cause of action for the present suit claim had not arisen by then as the amount had not become payable by then i.e. for the period 1-4-2004 to 30-4-2007."

40. Clearly, therefore, the subsequent suit of 2008 raises an issue which is different from that contained in the earlier suit filed by the same party in 2004. Also, the earlier decision in the judgment dated 27-4-2013 has declared valid a transaction which is prohibited by law. A cursory reading of Section 45(2) of the Trade Marks Act makes it clear that the assignment deed, if unregistered, cannot be admitted in evidence by any court in proof of title to the trade mark by the assignment, unless the court itself directs otherwise. It is clear, therefore, that any reliance upon the assignment deed dated 8-10-2003 by the earlier judgment cannot be sanctified by the plea of res judicata, when reliance upon the assignment deed is prohibited by law.

41. Equally, a reference to Sections 6, 8 and 46(4) of the Banking Regulation Act would also make it clear that a bank cannot use the trade mark "EENADU" to sell agarbathis. This would be directly interdicted by Section 8, which clearly provides that notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the selling of goods, except in connection with the realisation of security given to or held by it. Also, granting permission to third parties to use the trade mark "EENADU" and earn royalty upon the same would clearly be outside Section 6(1) and would be interdicted by Section 6(2) which states that no bank shall engage in any form of business other than those referred to in sub-section (1).

42. Shri Shanth Kumar Mahale, however, exhorted us to read Sections 6(1)(*f*) and (*g*) as permitting the sale of goods under the trade mark and/or earning royalty from a sub-assignment thereto. We are of the view that the trade mark cannot be said to be property which has come into the possession of the Bank in satisfaction or part-satisfaction of any of the claims of the Bank. We are further of the view that the trade marks are not part of any security for loans or advances that have been made to the first respondent, or connected with the same. It is thus clear that the assignment deed dated 8-10-2003 is clearly hit by Section 6(2) and Section 8 read with the penalty provision contained in Section 46(4) of the Banking Regulation Act.

43. The appeal is allowed and the judgments of the trial court and the first appellate court are set aside. Consequently, OS No. 495 of 2008 filed by Respondent 1 will stand dismissed.
