DOCTRINE OF RES-JUDICATA

THE THESIS TO BE SUBMITTED

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STATEMENT :-

The title of this Thesis is regarding Doctrine, Therefore the title is taken as specified by civil procedure code law sec.11 i.e. Doctrine of Res judicata.

Infact this is an original research work. It reflects the real situation of the law, parties and courts.

Actually the term Res judicata is derived from the Roman law and its most obvious and general meaning. This doctrine is accepted by the world.

This doctrine depends upon and expressed in the maxim " Nemo debet eadem causa"

Once court pronounce the judgement. If one of the party is aggrieved by the said judgement, they have to approach to upper court.

There are different stages in the court. It is very material point to show that at what stage court has decided that point regarding Res judicata. Sometimes parties wave this legal aspect at proper stage buy later on party took this legal aspect, at that time how far its effect to the case.

I have tried as my best level to consider this doctrine.

I hereby declare that for the above thesis no Degree or Diploma or Distinction has been conferred on me either by this University or any other University.

Rajkot

Date :- ----------

(Lata Karia)

C E R T I F I C A T E

This is to certify that the present work has been carried out by Miss. L.T.KARIA under my supervision. I recommend it for being submitted to the examiners for the award of Ph.D.degree in law.

Rajkot
Date :- /11/2007

Dr.N.R.Jani Researh Guide
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P R E F A C E

I feel greatly honored on having been asked by my guide Dr. N. R. Jani for the current topic the subject chosen by them is the doctrine of Res judicata. This is a subject in which I have a deep abiding interest. Actually when I was practicing in the court I prefer civil side. Once upon a time a complicated case we have faced, there was a puzzle in my mind to understand the hairline difference between the Doctrine of Estoppel and Doctrine of Res judicata, but after the discussion with my senior late Shri D. K. Nanavaty, I got clear picture since then I thought to high light this topic and it prompted me to undertake this venture.

It is well known that any subject or topic in law is as vast as an ocean, still I have made all efforts to deal with the various sides and sights.

L. T. KARIA

A C K N O W L E G E M E N T

I am extremely obliged and great full to the Respected Shri N. R. Jani, who had been extremely kind enough to contribute a useful forward guide line to me.

My sincere thanks are due to Mr. N.R. Vekaria the president of Junagadh Junior Chamber Education Trust Law College is one of the branch trough this branch I am here Shri Nanjibhai has appreciated my subject and encouraged me by guiding about my subject.

I am heartily thankful of my husband Twarit J. Joshipura. When I was in puzzle after my two chapters, but from the initiation inspired me to give the justice with my subject.

I am really thankful to the Dr. D. G. Modi and will always remain indebted to him for my subject. He discussed and enlighten the subject. It gives me delight to humbly place the name of JMFC. Paresh Parmar for

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(My sincere thanks to Shri P.N.Makati for his valuable suggestions incessant encouragement and un-failing co-operation). I must express thanks to Advocate Mr. Mukeshbhai Upadhyay for his valuable time and suggestions. This preface would be indeed be incomplete without expressing my gratitude to the computer programmer Mr. Rajesh B. Tank and Mr. Kirit C. Thumar for decently as also quickly computerized and also to Mr. Nalin Zala for accurate proof reading.

L. T. KARIA

C O N T E N T S

CHAPTER

CHAPTER – 1 -- H I S T O R Y

The rule of res judicata has a very ancient history. It was well understood by Hindu lawyers and Mahomedan jurists. It was known to ancient Hindu Law as *Purva Nyaya* (Formar Judgement). The plea has been illustrated in the text of Katyayan thus "If a person though at law sues again, he should be answered "You were defended formarly". Under the roman law, a defedent would repel the plaintiff's claim by means of *execeptio* res judicata or a plea of previous judgment. it was recognized that "One suit and one decision was enough for any single dispute' and that "a matter once brought to trial should not be tried accept, of course, by way of appeal". Julian defined the principle thus "And generally the plea of former judgment is a bar whenever the same question of right is renewed between the same parties by whatever form of the action." The doctrine has been adopted by the countries of the European continent which had modeled their civil law on the Roman pattern. In France, the doctrine is known as 'Chose jugee' (thin adjudged). 'The principle of preclusion of relitigation, or

conclusiveness of judgment, has struck deep roots in Anglo American Jurisprudence and is equally well known in the Commonwealth country which have drawn upon the rules of Common Law.

The spirit of the doctrine of res judicata is succinctly expressed in the well known common law maxim *debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause). The principle has been recognized in all civilized societies. Lord Coke declared :"it has well been said *interest republicae ut sit finis litium* (interest of the state is that there should be limit of law suits), otherwise great oppression might be done under colour and pretence of law. As observed by the Privy council in *Soorojomonee v suddanund,* the rule has been enunciated in England. The doctrine had long been recognized in India even prior to enactment of the Code of civil procedure 1859.

At times, the rule worked harshly on individuals. For instants when the former decision obviously erroneous. But its working was justified on the great principle of public policy, which required that there must be an end to every litigation. The basis of the

doctrine of res judicata is public interest and not absolute justice. The argument *ab inconvnienti* might be admissible if the meaning of statute is ambiguous or obscure, but if the language is clear and explicit, its consequences are for the Legislature and not for the Courts to consider. In that event, as was remarked by Coleridge, J. in *Garland v Carlisie,* "the suffering must appeal to the law-giver and not to the lawyer."

In the celebrated decided in AIR 1916 PC 78 *Sheoparsan Singh v. Rammandan Singh.* Sir Lawrence Jenkins stated :

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 Nilkantha include the plea of a former Judgment among those allowed by law, each citing for this purpose the text of Katyayana, who ascribes the plea thus: If a person though defeated at law sue's again he should be answered, "You were defeated formerly." This is called the plea of former judgment.

CHAPTER – 2

INTRODUCTION

DOCTRINE OF RES JUDICATA

S Y N O P S I S

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1.Derivatin. -

The Term *res judicata* is derived from the Roman law, and, its most obvious and general meaning, it signified at Rome, as it signified in England and in America, that a matter in dispute had been considered and settled by a competent court of justice.

2. Unit No.1-Application of the doctrine. – A.I.R. 1942 All. 302 (D.B.)

The doctrine of *res judicata* is of universal application and “in fact a fundamental concept in the organization of jural society”. Justice requires that every cause should be once fairly tried and having been tried once, all litigati9on about it should be concluded for ever between the parties.” It is a rule common to all civilized systems of jurisprudence that the solemn and

deliberate sentence of the law upon a disputed fact or facts pronounced that after a proper trial by its appointed organs should be regarded as a final and conclusive determination of the question litigated and should for ever set the controversy at rest.

3.Spirit of the doctrine.-

A.I.R. 1946 Outha 33(F.B.):

A.I.R. 1956 Raj.166 (D.B.)

A.I.R. 1960 S.C.941 held that....

The spirit of the doctrine is succinctly expressed in the well-known maxim *nemo debet eadem causa* (no one shall be twice vexed for the same ezuse.) At time the rule worked harshly on individuals (e.g. when the former decision was obviously erroneous) but its working was justified on the great principle of public policy *interest reipublicaeut sit finis litium* (it is for the public good that there be an end of litigation)

4.Designed for the protection of the public and the individual. –

The doctrine of *res judicata* is designed for the protection of the public and the

individual from repeated and useless litigation of the same cause of action. The protection of the individual against double vexation has been included as one element of policy underlying the doctrine of *res judicata,* although the primary purpose of the doctrine is said to be the protection of society, although the primary purpose of the doctrine is said to be the protection of society, and the protection of the individual is said to be secondary. It is clear that a Person against whom a judgment has been rendered in a court of competent jurisdiction will not be allowed to relitigate the same cause of action, and thus undoubtedly and adverse decision in a plaintiff’s action of trover or trespass bars subsequent possessor action.

5. Res judicata distinguished from estoppel.-

The plea of *res judicata* as a bar to an action belong to the province of adjective law, *ad litis ordinationem,* but difference of option prevails among *jurists* as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as

furnishing a ground of estoppels. In England, and I may say also in for there judgments in *personam* which operate as *res judicata,* are as often treated as falling under the category of estoppels by record. Sir Fitz James Stephen, the distinguished jurist who framed our Indian Evidence Act (1 of 1872), and whose views have been accepted by our Indian Legislature in framing Sec.40 of that Act, adopted what seems to me the only logical and juristic classification by treating the rule of res judicata as falling beyond the proper region of law of evidence, and appertaining to procedure properly so called. That the effect of the plea of *res judicata may*, in the result, operate like an estoppel by preventing a party to a litigation from denying the accuracy of the former adjudication cannot be doubted. But here the similarity between *Res judicata & Estoppel* equally clear that the ratio upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res judicate* is founded. The essential features of estoppel are those which have found formulation in Sec.115 of the Evidence Act, the provisions of which proceed

upon the doctrine of equity that he who, by his declaration, act, of omission, has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in chapter VIII of the Evidence Act relating to the estopeel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicate* does not owe its origin to any such principle, but is founded upon the maxim *nemo debet bis vexari pro una et eadem causa* – a maxim which is itself an outcome of the wider maxim *interest reipublicae ut sit finis litium.* The principle of estoppel, as I have already said, proceeds upon different grounds, and I think the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res judicate* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe, the difference between the plea of *res judicate* and an estoppels, is to say that whilst the former *prohibits* the Court from entering into an

inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who relying upon those alterations or acts, altered his position. In other words, *res judicate* prohibits an inquiry *in limine,* which at estoppel is only a piece of evidence. Further, the theory of *res judicate* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst " an estoppel", to use the words of Lord Coke, is where a man is concluded by his own act or acceptance to say the truth, which means, he is allowed, in contradiction of his former self, to prove what he now chooses to call the truth. Thus the plea of *res judicate* proceeds upon grounds of public policy so called, whilst an estoppel is simply the application of equitable principles between man and man—two individual parties to litigation.

6. Early Hindu notion of the doctrine.-

The doctrine of *res judicate* which treats the final decision of a competent tribunal as “ *irrefragable truth* “ was well understood by Hindu lawyers. One of the four kinds of effective answers to suit was “ a plea by former judgment“. It was laid down by Katyayana that “ one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by the plea of *purva nyaya* or former judgment “. The Hindu Jurisprudence recognizes the doctrine by laying down that “ the plaintiff should be non-suited if the defendant avers: in this very affair, there was litigation between his and myself previously, and it is found that the plaintiff had lost his case”.

7. Mohammedan law-givers’ view.-

Among Mohammedan law givers similar effect was given to the plea of *Niza-I-munfasta* of *Amar Mania taqrir mukhalif.*

8. View of Raman law.-

Under Roman law, as administered by the Praetor's Court, a defandant could repel the plaintiff's claim by means of *ex-ceptio res judicata* or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and the general principle recognized 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."

9. Early English notion of the doctrine.-

The doctrine has long been recognized in England with greater or less distinctness. "The rule of the ancient common law", is that where one is barred in any action real or personal by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature, for the same thing for ever. Brown L. J. in *Brunsden v. Hamphrey.* It has probably never been better laid down than in *Gregory V.Molesworth* in which Lord Hardwicke held, that where a question was necessarily decided in effect, though not in express terms, between parties to the suit,

they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greatr part of which will be found noticed in the very able notes of Mr. Smith, to the case of the *Duchess of Kingdom.*

10. Limited operation of the rule.-

A.I.R.1958 Andh.Pr. 363 (F.B.) held that…..…

Systems, however, the operation of the rule was confined to cases in which the plaintiff put forward his claim to " the same subject-matter with regard to which his request had already been determined by a competent court and had passed into judgment." In other words, it was what is described as the plea of " estoppel by judgment" or " estoppel by record" which was recognized and given effect to. In several European continental countries even now the rule is still subject to these qualifications, e.g. in the Civil Code of France, it is said " The authority of the thing adjudged (chose jugee) has place only in regard to that which has constituted the object of a judgment. it is necessary that the thing

demanded be the same; that the demand be founded upon the same causes; that it be between the same parties and found by and against them in the same capacity.”

11. Development of the rule.-

In other countries, and notably in England, the doctrine has developed and expanded, and the bar is applied in a subsequent action not only to cases where claim is laid to the same property but also to the same matter as was directly and substantially in dispute in the former litigation. In other words, it is the identity of the issue, which the already been necessarily tried” between the parties and on which a finding has been given before, and not the identity of the subject-matter which attracts the operation of the rule. Put briefly, the plea is not limited to “estoppel by judgment “ but is also extended to what is described as “ estoppel by verdict “. The earliest authoritative exposition of the law on the subject in England is by Chief Justice Degrey in the *Duchess of Kingston’s* case which has formed the basis of all subsequent judicial pronouncements in England,

America and other countries the jural systems of which are based on or inspired by British Jurisprudence. In that case a number of propositions on the subject were laid down, the first of them being 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."

12. Adoption of the English doctrine in British India.-

The substance of the rule as enunciated and recognized in England was, however, approved of and acted upon in numerous cases by the Judges, and imported, almost *res integra,* in this country. Long before the enactment of a complete Code of Civil Procedure in India it was laid down as a general rule, that " a court cannot entertain any cause which shall appear to have been heard and determined by any Judge before " Even after the enactment of the Civil Procedure Code of 1859, their Lordships of the Privy Council acted expressly upon the English rule observing that the term

“cause of action” is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct their Lordships are of opinion that this clause in the Code of Procedure by no means prevent the operation of the general law relating to *res judicata,* founded on the principle *nemo debet bis vexari pro eadem causa.* This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in *Gregory v. Molesworth* in which Lord Hardwicke held that wherea questionwas necessarily decided, in effect though not in express terms, between parties to the suit, they could not raise the same question as between in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess*

of Kingston in *Soorjomounce Dayee v. Suddamund.* They referred to that rule with approval in *Krishna Behari Roy v. Brojeswari* observing that " by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent court, as to the status of one of them in relation to the other, it cannot, in their opinion be again tried in another suit between them ". And in *Khugowalie Singh v. Hussain Bux* their Lordships observed, as to the statement of the rule in the *Duchess of Kingston's* case, that there was nothing " technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil Law and it is perfectly consistent with Sec.2 of the Civil Procedure Code of 1859.

13. Introduction of the rule of res judicata in British India.-

In British India the rule of *res judicata* seems to have been first introduced by Sec.16 of the Bengal Regulation III of 1793, which prohibited the Zilla and City Courts " from entertaining any cause, which from the production of a former decree or the record of

the Court, shall appear to have been heard and determined by any Judge or any superintendent of a court having competent jurisdiction. The earliest legislative attempt at codification of the law on the subject was, however, made in 1859, when the first Civil Procedure Code was passed. Section z of the Code barred the cognizance by courts of suits based on the same cause of action, which an been heard and determined before by courts of competent jurisdiction. It will be seen that this was only a partial recognition of the English rule in so far as it embodied the principles relating to estoopel by judgment only and did not extend to " estoppel by verdict ". In 1877 when the Code was revised, the operation of the rule, was extended to Sec.13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action but the prohibition equally applied against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent court. The section has been amended and amplified twice again and has assumed its present form in Sec.11 of the Code of 1908, the principle amendments which have a

bearing on the question before us, being (a) that the expression “former suit” was defined as instituted and (b) that the competence of a court is not regulated by the course of appeal of the former suit but its capacity to try the subsequent suit as an original Court.

14. History of the legislative attempts at codification of the law of res judicata in British India.-

The first product of the earliest legislative attempt was Act VIII of 1859. Its Sec.2 ran thus :

> “The civil courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a court of competent jurisdiction, in a former suit between the same parties, or between the parties under whom they claimed.”

From the reading of this provision it is quiet clear that this enactment provided only for that portion of the doctrine of *res judicata* which relates to what is designated “bar by judgment”, which really imports “the

bar of a suit by a judgment on the merits in a former suit on the same cause of action".

(a) *Bar by verdict.* – Section 2 left unnoiced and ignored the remaining protion of the doctrine, the portion relating to the "bar of the trial of an issue by judgment on that issue," the portion that has often, though not quite correctly, been indicated by the expression "bar by verdict". The gist of that branch of the doctrine is that an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause and for any purpose or object. This distinction has been held to be of great practical importance, especially by American lawyers, and there is no doubt but that confusion has sometimes resulted from an inadvertence to it. It was explained clearly in the judgment of the United states Supreme court *Cromwell* v.*sac.*

(b) bar by verdict acted upon in India : This defect in the rule enacted by Sec.2 was made up by the courts continuing on general principles, to act upon the rule of the conclusiveness of judgments as to issues also. Mr. Justice Mahmood pointed out in

Tamaitunnissa V. Lutfunnissa that in “section 2 the principle of *res judicata* was embodied only to a limited extent; but in interpreting the section, the Privy Council holding that, apart from legislative enactment, the principle of res judicata was an essential part of the law of procedure in every civilized country, applied that principle to the trial of issues as well as to the trial of suits.”

(C)*Causes of the alteration in the statute* : The expression “cause of action” gave rise to a number of difficulties. Its vague character produced a crop of cases. According to an eminent authority it means and includes every fact which it is material to be proved to entitle the plaintiff to succeed, every fact on which the plaintiff bases his title to the relief asked by him. Sir M.E.Smith in delivering the decision of their Lordships of the Privy Council in *Soorjomonee Dayee* v. *Suddanund* expressed it as their opinion that the term “cause of action” it to be construed with reference rather to the substance than to the form of action. In *Krishna Behari Ropy V.Brojeswari* he further expressed it as the Lordship opinion that in sec.2”the expression

cause of action cannot be taken in its literal and most restricted sense.” In Chand Kaur V Pratap Singh Load Waston in delivery their Lordship decision said,”the cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.” In Naro Hari V. Anpurnabai Mr. Justice West in delivering the judgment of the Bombay High said with reference to that expression of opinion, that their Lordships”would not allow a matter once disposed of, to be litigated again in a suit framed so as to differ formally from the previous one”; and by substances they seem to mean the aggregate of circumstances on which the former suit proceeded or ought to have proceeded with reference to the relief sought to be obtained... His (Plaintiff’s) cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on fac5ts

which are integrally connected with those upon which a right and infringement of the right and infringement of the right have already been once asserted as a ground for the Court's interference.... This is the principle involved in Lord Westbury's decision in the case of Hunter V. Steward, which has been adopted in recent decisions of this Court, but without any conscious departure from the rule that matters naturally connected with each other so as to be proper for investigation together ought to be brought forward at the same time, and are to be considered as forming but a single cause of action. The enactment of Civil Procedure Code of 1859, Sec 2, was therefore very considerably modified in the following form as Sec.13 of Act X of 1877 :

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

Explanation I.- The matter above referred to must, in the former suit, have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.- Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly or substantially in issue in such suit.

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

Explanation IV – A decision is final within the meaning of this section when it is such as the court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V- Where person litigate bona fide in respect of a private right

claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI – Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

(d) *The genesis of Sec.13,ActX of 1877* .- The principle clause and first explanation are founded on the definition in Livingstone's code of Evidence for the state of Lousiana, Sec. 192. The Second, Third, Fourth and fifth explanation rest on decisions of English or Indian Courts. The Sixth is taken from Livingstone's code, Sec.198 In fact the Chief alteration made by Sec.13 is the statutory recognition of the principle of "bar by verdict".

(e) *Estoppel against defendant.-* As a matter of fact Sec.2 was amended in order to provide for estoppel against defendant, and this object was attained apparently by introducing the work “issue”. Section 13 of Act X of 1877 deals with two matters, first, the trial of suits, and second, the trial of issues. It is founded on a long course of judicial decisions, and especially on the dicta of the Privy Council, and has formulated in express terms of the rule, which previously was only expressed in part by legislative enactment, that the principal of res judicata applies both to the trial of suits and to the trial of issues. The distinction between the two things appears to me to be clear. A suit in a finding; and the rule contained in Sec.13 goes the length of saying that not only is a suit, which has once been tried and determined, not again maintainable, but an issue which has once been directly and substantially raised and decided shall not be litigated a second time. The reason of the maxim *nemo debet bis vexari pro eadem causa* seems to me to apply as much as to the trial of issues as to the trial of suits for in either case the harassment to litigants

would be similar if matters could be reagitated after having been once duly adjudicated upon.

15. Explanation II criticized. –

While conceding that the " bar by verdict " has met with general approval, its extension by Explanation 2 to the cases of mere constructive verdict has been often condemned as unsuitable of India; but this is due to some extent, to its being forgotten that the said explanation has now introduced any novel principle, and is, in fact, in accordance with a rule as recognized and acted upon in England and in the United States. The explanation has often been justified on principle of expediency and public policy.

16. Extention of the rule to foreign judgment –

Another material alteration made by Sec.13 was the express extension of the doctrine of *res Judicata* with certain limitations to foreign judgments, the limitations being enacted by Sec.14 which in the Civil Procedure Code of 1882 stands as follows :

“No foreign judgment shall operate as a bar to a suit in British India-

(a) if it has not been given on marits of the case;

(b) if it appears on the face of the proceedings to be founded on a incorrect view of International law or of any law in force in British India;

(c) if it is in the opinion of the Court before which it is produced contrary to natural justice;

(d) if it has been obtained by fraud;

(e) if it sustains a claim founded on a breach of any law in force in British India.

A proviso was added to the section by act VII of 1888, thus restricting the operation of the rule. The proviso thus added was in the following terms :

“Where a suit is instituted in British India on the judgment of any Foreign Court in Asia or Africa except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Councillor court established by an order of Her Majesty in Council, the

Court in which the suit is instituted shall not be precluded from inquiry into the marits of the case in which the judgment was passed."

(f) Indian rule of *res Judicata* as enacted in the Civil Procedure a Sec.13 of Act X of 1877 was re-enacted in the Civil Procedure Code of 1882 in the following terms :

> "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 of jurisdiction 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 matter above referred to must in the former suit have been alleged by one party and either

denied or admitted, expressly or impliedly, by the other.

Explanation II – 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.

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Explanation V – Where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right right shall, for the purpose of this

section, be deemed to claim under the persons so litigating.

Explanation VI – Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on record; but such presumption may be removed by proving want of jurisdiction.'

> "From the perusal of the re-enacted section it is quite clear that it has not been materially altered and that it is as a re-production of the old rule of law.'

Incomplete character of Sec.13 in Civil Procedure Code of 1882. The section even in its present form is not complete or exhaustive of the effect of *res Judicata*. It does not deal with the case of judgment in rem, nor with that of parties represented by, thought not claiming under, the parties to the former suit.

Where res Judicata applies only to a trial by a court of original jurisdiction

or even by an appellate Court.- The Calcutta High Court in *Abdul Majid V. Few Narain Mahato,* held that a trial by an original court only is contempted, and that the section has no application to the disposal of an appeal; and that when there is no *res Judicata* a the time of the trial of the original suit, the appellate Court is bound to decide the appeal on the merits. The contrary was held, however, by a Full Bench of Allahabad High Court in Balkishan V. Kisjanlal (A.I.R. 1947 Nag.248 (D.B.); Krishnan Nair V Kambi, A.I.R.1937 Mad.544:1937) in which a decision of the High Court in a suit for rent of 1292 F. was held to be *res Judicata* in a second appeal, presented prior to that decision, in a suit for rent of 1293 F. Mr. Justice Mahmood (with whom Sir John Edge,<J. and Straight, J.concurred) said that, 'the doctrine, so far as it relates to prohibiting the trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The rule contained in

Sec. 13 is not limited to the courts of first instance, it applies equally to the procedure of the first and second appellate court by reason of secs.582 and 587 (Civil Procedure Code), respectively and indeed, even to miscellaneous proceedings by reason of Sec.647.' The Panjab Chief Court also held the same in Nur Muhammad V. Jamun, in which case the plaintiffs had first sued for a declaration as to the invalidity of a gift of certain property, and while an enquiry was being held into it on remand, the donor died and the plaintiffs brought another suit for possession of the same property, and the appeals in both the suits were disposed of by the lowe appellate Court on the same day. The decision in the declaration suit had not been appealed from and was therefore held to have become final and to constitute *res Judicata* in the suit for possession in which an appeal was presented to the Chief court.

(g) The law of res Judicata,as embodied in Sec.11 of Act V of 1908 is

not exhaustive.- The provisions of Sec.13 in Civil Procedure Code of 1882 have, as largely modified, been re-enacted in Sec.11of the present Code, namely Act V of 1908. It is interesting to see that although of Act V of 1908 is not exhaustive.- The provisions of Sec.13 in Civil Procedure Code of 1882 have, as largely modified, been re-enacted in Sec.11of the present Code, namely Act V of 1908. It is interesting to see that although of Act V of 1908 is not exhaustive.- The provisions of Sec.13 in Civil Procedure Code of 1882 have, as largely modified, been re-enacted in Sec.11of the present Code, namely Act V of 1908. It is interesting to see that although the Indian Legislature has from 1859 onwards made several attempts to codify the law on the subject and the present Sec.11 is a largely modified and improved form of the original Sec.2 of Act VIII of 1859, it must be borne in mind that the section, as even now enacted, is not exhaustive of the law on the subject, and the, and the general principle of *res*

> *Judicata* apply to matter on which the section is silent and also govern proceedings to which the section does not in terms apply. In soorjomonee Dayee v.Suddamund Mahapattar, their Lordship of the Judicial Committee said : 'We are of opinion that Sec.2 of the Code of 1859 would by no means prevent the operation of their general law relating to *res Judicata* founded on the principle *nemo debet bis vexari pro eadem causa*.' *Ram Kirpal V. Rum Kauri* clearly shows that the pleas of *Res Judicata* still remains apart from the limited provisions of the Code.

In the words of Sri Barness Peacock:

"The binding force of such a judgment in such a case as to present depends not upon Sec.10 Act X 1877" Snow repealed by Code of Civil Procedure)"but upon the general principles of law. If it were not binding there would be no end to litigation."

The matter was considered in Hook V. Administration of Bengal when theif Lofship once again laid down 'that Sec.11 of the Code is not exhaustive of the circumstances in which an issue is *res Judicata*. Although the section

did not in terms apply, the plea of *res Judicata* still remained, apart from the limited provisions of the Code, and it was that plea which the respondents had to eet in the present caswe.” This dictum was reaffirmed by Lord Buckmaster in Ramchandra Rav V. Ramchandra Rao where it was remarked that the principle which prevents the same cause being twice agitated is of general application and is not limited by the specific words of the code in this respect.’

(h) *Burden of Proof*- Any party, who is desirous of setting up *res Judicata* way of estoppel, must establish (except as to any of them which may be expressly or impliedly admitted) each and every of the following :

(i) that the alleged judicial decision was what in law is deemed such; (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;(ii) that the Judicial Tribunal renouncing the decision had competent jurisdiction in that behalf; (iv) that the judicial decision was final;(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in

which the estoppel is raised; (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the edstoppel is raised, or their privies, or hat the decision was conclusive in rem.”(A.I.R.1954 (T.C.)43-45)

The expression “cause of action” can be reasonably used in connection with proceedings other than suits and it must be construed with reference rather to substance than the form of action.

A.I.R.1949 Pat.270, held that.....

“Cause of action” however, is wrongly the infringement of the right at a particular moment. The expression “cause of action” and part of the cause of action must be taken as meaning respectively the material facts and any material fact in the case for the plaintiff.

CHAPTER - 3

SCOPE AND APPLICABILITY OF THE LAW OF *RES JUDICATA*

Section 11, C.P.C.- 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 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 above referred 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.

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 purpose of this section, be deemed to claim under the person so litigating.

S Y N O P S I S

1. Scope of the law of *res Judicata*.
2. Applicability (general) – Essential conditions of re judicata.
3. Applicability of doctrine of *res Judicata*.
4. Section 11, C.P.C.-If exhaustive.

5. Distinction between *res Judicata* and estoppel.
6. Doctrine of *res Judicata* and *lis pendens.*
7. Whether *res Judicata* a technical rule or is based on public policy.
8. Plea of *res Judicata*.
   -(A) Scope of the plea of *res Judicata*
   -(B) Mode of pleading.
   -(C) Mode of Proof
   -(D) Stage at which plea of *res Judicata* may be
   allowed to be raised.
   -(E) Waiver of the plea *res Judicata*
9. Plea of *res Judicata* if can be waived.
10. Judgments in tem and judgment in *personam.*
11. Judgment *not inter* or in *rem.*

Change made in the section -

This section corresponds with Sec.13 of the code of 1882 except in the following particulars:

(1) Explanation I is new and has been inserted on the suggestions of Sir Bhahyam Iyengar to remove a conflict of authority as to the meaning of the expression “firner suit”.

(2) Explanation is also new and is intended to affirm the view that the competence of the jurisdiction of a court does not depend on the right of appeal from its decision.

(3) The words *"public* right" in Explanation VI are new. They are intended to give due effect to suits relating to public nuisances (sec.91)

(4) Explanation IV to Sec.13 of 1882 code has been omitted altogether. The reason of the omission is stated to be that it was liable to misconstruction and that the law is well established apart from the explanation.

(5) Explanation VI to Sec.13 of 1882 Code now stands as Sec-14, with some modifications.

1. Scope of the law of res judicata. -

A.I.R. 1960 S.C.941 (1961)1 S.C.A. 10; (1960) 3 S.C.R. 590 held that....

The principles and doctrine of res judicata have been enunciated in a nut-shell by their Lordship of the Supreme Court in a recent decision in *Satyadhyan V.Smt.Deorajini Debi,* in the following words:

“The Principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res judicata it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter whether on a question of fact, or on a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court orbecause the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties ot canvass the matter again. The principle of res judicata is embodied in relation to suits under Sec.11 C.P.C but even where Sec.11 C.P.C does not apply, principle of res judicata has been applied by court for the purpose of achieving finality in litigation. The result of this is that the original Court as well as he higher court must in any future litigation proceed on the basis that the previous decision is correct.”

A.I.R.1949 All.596: 1949 All.L.J.33; Jint Ram V. Jagar Nath Ram. A.I.R.1959 Pat.489 held that...

Under the old code of Civil Procedure, 1859 bar of res judicata depended on the identity of causes of action whereas in the present code the bar of res judicata depends upon the *identity of the issues* in the two suits. Moreover the old Code did not include the rule of constructive res judicat, whereas sec.11 C.P.C. has been enacted (in the present code) to give statutory recognition to the rule of constructive res judicata also by appending Explanation IV to Sec.C.P.C.

The object of res judicata is toavoid unnecessary suits and the principle is one of convenience and rest and not of absolute justice. It is founded on two maxims of Roman Jurisprudence, one maxim is *"interest republicae ut sit finis litium"* (it is in the interest of State that there should be an end of litigation) and the other maxim is *"Nemo debet bis vexari pro una et eadem cause"* (no man should be vexed twice over for the same cause).

A.I.R.1946 Oudh 22(F.B.):20 Luck,339.

A.I.R.1956 Raj.166 (D.B.)

A.I.R.1953 Bom.393

A.I.R.1963 All.210 (F.B.)

held that.....

The bar which law imposes on subsequent litigation is created by the existence of a previous judgment whereby the matter has once already been fully canvassed and fairly and finally decided between the parties by a competent court of law.

A.I.R.1916 P.C.78 held that....

The rule of res judicata while founded on ancient precedent is dictated by a wisdom which is for all time. “It has been will said” declared Lord Coke *“interest republicae ut sit finis litium* (it concern state that there be an end to litigation), otherwise great oppression might be done under colour and pretence of law.

Though the rule of the code amy be traced to English source it embodies a doctrine in no way opposed to the spirit of Hindu law as exposed by other Hindu commentators. Vijhanesvara and Nilkantha include the pleas of former judgment among those allowed by law each citing for the purpose the text of Katyana who describes the plea thus: If a person though

defeated at law sue again he should be answered: “Your were defeated formerly”. This is called the plea of former judgement. There must be some finality to litigation and the rule that a title once settled by a decision should not be questioned again between the same parties is intended not only to prevent a new decision but also o prevent a new investigation so that the same person may not be harassed again and again in various proceedings upon the same question. The rule of res judicata ousts the jurisdiction of the Court and has, therefore, to be construed carefully with reference to the parties, competency of the Court and the issue on which the parties joined in the previous litigation.

A.I.R.1927 All. 189 held that

The rule of res judicata so far as it relates to the trial of an issue refers not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue.

A.I.R.1937 Mad.545, 1937 M.W.N.299 held that....

It is plain from the terms of Sec.11 C.P.C. that it is equally well settled that

the competence of a court for the purpose of Sec.11 of the Civil Procedure code is to be determined irrespective of any provision as to a right of appeal for the decision of such Court.

A.I.R.1928 Cal.777 (F.B.),
A.I.R.1949 Cal.430 (F.B.),
A.I.R.1951 Pat.370
A.I.R.1954 All.215
A.I.R.1963 Mys.120
held that....

What is made conclusive between the parties is the decision of the court and that reasoning of the Court is not necessarily the same thing as its decision or in other words what is res judicata is the point directly decided and not the reasoning thereof on which such decision is based. The object of the doctrine of res judicata is not to fasten upon the 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 depends, and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or re-contesting that which has been

finally decided. Although the rule of res judicata is cardinal principle of legal systems of most civilised countries and many eoulogiums have been lavished upon this doctrine said to be most salutary the application of the rule of res judicata should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

A.I.R. 1936 P.C.46,
A.I.R. 1957 All.575
A,I.R. 1963 Punj.178
held that.....

The law does not compel the Court trying the latter suit to hold without trial that the decision in the earlier suit was correct; it merely estops the parties to the earlier suit and privies from showing that it is incorrect. The Judge trying the latter suit must give effect to the decision but he is not bound to hold that it is right. A decision even on question of law operates as res judicata between the parties. Thus an erroneous decision of law in a former suit or proceeding is as much binding on the parties as a correct decision of law.

A.I.R.1928 Cal.777 (F.B.) held that....

The law courts are in no way authorised to alter the rights of the parties. They profess at all events to ascertain the law and if the binding character of a decision upon a concrete question of law as to the particular terms of a finding is to fluctuate with every alteration in the current of authority, the court will become an instrument for the unsettlement of rights rather than for ascertainment thereof. The Legislature may be statute alter the right of the parties and when it does so, it makes provision as it thinks fit and proper to prevent injustice. A decision will continue to operate as res judicata unaffected by any change in the current of authorities on the point. Similarly a question once decided earlier against a party Court has enunciated a rule different from what was recognised in previous cases. Therefore in it, should not be ignored, unless, indeed, the express words of the stature clearly contradict those principles.

A.I.R.1955 S.C.481

A.I.R.1960 M.P.250 held that....

It is important to note that a decision may not amount to res judicata yet it may operate as a judicial precedent and may throw a heavy burden on a party challenging it. Thus where the Privy Council had construed a document a will operate as res judicata against a person who was not a party to the previous litigation yet it operate as judicial precedent.

This section aims at enunciating the whole rule of res judicata, and the aim has been substantially achieved,

A.I.R.1924 All.815 (F.B.) held that....

but it is not exhaustive as to the effect of a res judicata. It does not deal at all with the case of judgments in rem, nor with that of parties represented by, though not claiming under the parties to the former suit. Accordingly it has been maintained at Allahabad that the section does not embody the entire rule of res judicata, and that a suit might be barred by that rule, even if all the conditions laid down in the section were not present. The same view has been taken also by the Bombay High Court. But the reasoning adopted by the

Allahabad Court as to applicability of the general principle of res judicata based on the ground that the present section is not exhaustive on the subject with which it deals, is applicable only to cases falling outside the terms of the section. Therefore, in interpreting the section the fundamental principles of the rule embodied in it should not be ignored, unless, indeed, the express words of the statute clearly contradict those principles. It would, however seem that this section con not be applied quite literally; if it could then the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant.

A.I.R.1927 Mad.450 held that....

It would not be right on the part of a court extend the section to cases which can not be brought within the four corners of it.

A similar rule is enacted in Sec.10. But it does not form part of the rules, however, is vast. The rule in Sec.10 relates to matters *sub judice,* whilst the rule in this section relates to matters which have passed into *rem judicatam*. The one bars only a “suit”;

the other bars both the trial of a “suit” and of an “issue” subject to their respective conditions. Those conditions are not all the same in Sec.10 as they are in this section, and the working of the two sections as to the distinction is so clear that it is not easy to confound the two rules.

2. Applicability (general) Essential Conditions of res judicata. –

To constitute a matter as res judicata all the conditions enumerated in Sec.11, C.P.C. must be satisfied. The essential conditions for the application of the doctrine of res judicata are :

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which is directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been between the same parties or between parties under whom they or any of them claim.

(3) The parties must have litigated under the same title in the former suit.

(4) The court which decides the former suit must have been a court competent to try the subsequent suit in which such issue is subsequently raised.

(5) A.I.R. 1958 Andh.Pra.363 (F.B.) held that.....

The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court of the first suit.

It is necessary that the cause of action on which both the suits are based should be the same. Thus res judicata can not come into operation where the suject matter of the two suits as also the capacities in which they were brought are altogether different and the causes of action of the two suits are also not the same.

3. Applicability of the doctrine of res Judicata. –

A plea of res judicata founded on the general principles of law may be available to cases not strictly covered by Sec.11, C.P.C., but in cases strictly falling under Sec.11

C.P.C., it will certainly be wrong to ignore the specific conditions prescribed by the section and to sustain the plea of res judicata merely on general principle. To do so, would be to defeat the purpose and intention with which the Legislature enacted the section.

Section 1, C.P.C. does not in terms apply to appeals, though the word *"suit"* is often used as including appeals, it con not be so interpreted in Sec.11 as the section would thereby the inconsistent with Explanation Ii which was introduced as late as 1908 in the Code of Civil Procedure, yet in the light of general principles of res judicata the appeals are also barred by res judicata if there is a previous final judgment between the parties.

A.I.R.1937 Mad.544 held that.....

Thus the rule of res judicata is not only limited to courts of first instance but it applies equally to the prcedure of first and second appellate courts and indeed to miscellaneous proceedings by reason of the general principles.

A.I.R.- 1942 Mad.421(D.B.)

A.I.R.- 1939 Sind.329 held that.....

Where after the commencement of the trial of an issue and during the pendency of its appeal a final judgment of the same issue is pronounced by a court of competent jurisdiction in another case (which remains unchallenged by way of ppeal or revision), it operates as res judicata.

A.I.R.- 1938 All. 635(D.B.)held that.....

In an Allahabad case it has been heod by their Lordships that the trial Court was wrong in ignoring the prior judgment of the High Court in second apeal between the same parties for the same controversy in a subsequent suit because a Letters Patent Appeal against the judgment of the second appeal was still pending and not yet decided, their Lordship held that the finding of second appeal was binding under Sec.11 C.P.C.

A.I.R.- 1948 Oudh.270

A.I.R.- 1961 All.278 (D.B.)

A.I.R.- 1932 All.416

held that.....

The decision in an earlier suit on the same question will not operate as res judicata in a subsequent suit when a different law is in force.

A.I.R.- 1938 Lah.369 (F.B.)

held that.....

But a change of procedure embodied in the statute after the decision of the suit will not materially affect the binding nature of the former decision. Thus where the suit was tried according to the procedure then in force and was taken to the highest Court of appeal, the mere fact that the procedure then in force was of a summary character will be immaterial for the purposes of Sec.11 C.P.C.

A.I.R.- 1928 Cal.777 (F.B.)

A.I.R.- 1923 Cal.629 (F.B.)

held that.....

Similarly any change of current of authorities pronounced by courts of law will not affect the previous decisions base3d on former view of law nor any question decided earlier against a party can be reagitated merely because a special Bench of the High Court has enunciated different rule of law.

A.I.R.- 1935 Pat.59 (D.B.)

held that.....

Although ordinarily it is not open to a litigant to have recourse to two different proceedings for the enforcement of his right,

there are cases in which different concurrent remedies may be pursued without trenching upon the rule of res judicata or the doctrine of the election of remedies, this is, however, subject to the restriction that if the party aggrieved is successful in one proceeding, the judgment absorbs all his other judicial remedies.

A.I.R.- 1932 Mad.254 (D.B.)

held that.....

Although civil suit and criminal prosecution may be based exactly on the same cause of action the parties are, strictly speaking, not the same, the burden of proof is differently placed, and different consideration may come in. the result may, therefore, be a conflict in decision. The risk of such a conflict is one that is inherent in the division of causes into civil and criminal. The judgment of neither is binding on the other and each must decide the case on the evidence before it. If they arrive at different conclusions, it is regrettable but unavoidable.

A.I.R.- 1925 Lah.160 (D.B.)

held that.....

A finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not operate as res judicata in a subsequent suit relating to the same matter if the other requirements of the law laid sown in Se.11, C.P.C., have been fulfilled.

A.I.R.- 1959 A.P. 448 (D.B.)

held that.....

Where is subject-matter of the two suits as also the capacities which they were brought was altogether different and the cause of action on which both the suits were based were not the same, the bar of res judicata can not come into operation in such a case.

A.I.R.- 1927 Cal. 421 (D.B.)

held that.....

Similarly if a man fights a case on false statements and does not call necessary evidence in support of his own statements, he cannot afterwards gain any advantage for his omissions. He must be considered to be as much bound by the decisions as he should have been if he put forward a true case and called all the available evidence.

A.I.R.- 1929 Lah. 769

held that.....

On a question having been raised whether the decisions as to custom in one locality between the same parties is binding on them *qua* the custom followed by them in other localities. It was held that custom in Punjab is primarily trial and at any rate in the case of two villages situate within a few miles of each other it is not possible to contend that the decision given on the question of custom in a suit about the property situate in one village is not res judicata in a suit brought about property situate in a neighbouring village.

A.I.R.- 1922 Sind. 6

A.I.R.- 1937 Mad. 544

A.I.R.- 1956 All. 237(D.B.)

held that.....

The use of the word “suit” in Secs.10 and 11, C.P.C., do not restrict its applicability to suits only but extends to civil miscellaneous proceedings also by virtue of Sec.141, C.P.C. Hence the rule of res judicata is applicable to Civil Miscellaneous proceedings also by virtue of Sec.141, C.P.C.,

as well as on general principles of res judicata.

A.I.R.- 1938 Lah. 369 (F.B.)

A.I.R.- 1952 All. 48

held that.....

Decisions which are contemplated to operate as res judicata under Sec.11, C.P.C. are those which are given after a complete observance of law and not those which are more or less orders passed in an executive capacity.

A.I.R.- 1924 Pat. 362 (D.B.)

held that.....

Accepting the decision under protest and acting in accordance with it does not take away the binding effect of res judicata.

The rule of res judicata does not in term apply to execution proceedings but on general principles of res judicata, it has been applied to executing proceedings also with a view to give finality to litigation.

A.I.R.- 1953 Cal. 765 (D.B.)

A.I.R.- 1962 Ker. 15

A.I.R.- 1962 Orissa. 54

held that.....

Similarly the rule of constrictive res judicata has been applied to the execution

proceedings on the ground that constructive res judicata is founded on the public policy to give finality to litigation.

A.I.R.- 1938 Bom. 173

held that.....

The rule of res judicata has been made applicable to foreign judgments also pronounced by courts of competent jurisdiction by virtue of Sec.13 of the code of Civil Procedure subject to the six limitations in the aforesaid section and also subject to other conditions included in Sec.11 of the code of Civil Procedure.

A.I.R.- 1928 Mad. 327

held that.....

Under Sec.13 C.P.C. res judicata will apply to any matter directly *adjudicated upon* by foreign judgment while sec.11 C.P.C., refers to the decision of issues. Thus decision of every issue in a foreign judgment is not binding on courts in India but the foreign judgment will have3 to be scrutinized to see what matters have been directly adjudicated and what particular reliefs have been granted or refused.

A.I.R.- 1929 Lab. 627

A.I.R.- 1964 Ker. 4 (F.B.)

held that.....

If a court pronounces judgment upon title or possession toland situate outside its jurisdiction, the courts of the country where the land is situate and also the courts of any other country are justified in refusing to recognize it or to be bound by it.

A.I.R.- 1936 Pat. 268 (D.B.)

A.I.R.- 1960 s.c. 941

A.I.R.- 1958 All. 54 (D.B.)

A.I.R.- 1962 H.P. 43 (D.B.)

held that.....

The rule of res judicata has been made applicable to the two stages of the same suit or proceeding. If in the earlier stage of the same suit a matter in issue has been finally adjudicated upon, then the defeated party will not be allowed to reagitate the same matter at the later stage of the same suit on the principle of constructive res judicata and also by reason of the general policy of law. The parties aggrieved by the earlier order may

pursue their remedy by way of review or by appeals according to law.

A.I.R.- 1953 S.C. 33

A.I.R.- 1954 All. 801 (D.B.)

A.I.R.- 1927 All. 189

A.I.R.- 1959 All. 764

held that.....

The decisions of courts exclusive jurisdiction like revenue courts, land acquisition courts, administration courts, etc. operate as res judicata on the general principles of res judicata. A subsequent suit in the civil Court on the same ground or for the same relief between the same parties which may have the effect of setting aside the decree of the Court of exclusive jurisdiction is not maintainable and is barred by res judicata.

A.I.R.- 1933 Nag. 373

A.I.R.- 1937 Lah. 4

A.I.R.- 1959 All. 764

held that.....

The principle of res judicata apply to insolvency proceedings also. Under the Provincial Insolvency Act, the insolvency courts have concurrent jurisdiction with the

civil courts to try questions of title to property alleged to belong to the insolvent, although Sec.11 C.P.C. does not in term apply to insolvency proceedings yet under the general principles of the res judicata the finding of insolvency courts will be binding

A.I.R.- 1952 Punj. 99
A.I.R.- 1921 P.C. 11
A.I.R.- 1922 p.c. 80
held that.....

The rule of res judicata also applies to company matters under the Indian Companies Act.

A.I.R.- 1956 Pat. 182 (D.B.)
A.I.R.- 1962 Panj. 498
held that.....

The rule of res judicata on the general principle has been applied to the filing of successive writ petitions on the same cause of action by the same person (Party) on grounds which could have been taken in the earlier application have been discouraged so that the opposite-party may not be unnecessarily harassed on more than one occasion in respect of the same matter.

4. Section 11. C.P.C. – if exhaustive.-

A.I.R.- 1941 Cal. 104

A.I.R.- 1921 P.C. 11

held that.....

Section 11, C.P.C. does not codify or crystallize the entire law regarding the doctrine of res judicata. It deals with some of the circumstances under which a previous decision will operate was res judicata, but not with all. Where other circumstances than those provided for in Sec.11 C.P.C., exist, principle of res judicata may be invoked without recourse to the provisions of that section.

A.I.R.- 1921 P.C. 498

held that.....

Plea of res judicata still remains apart from the limited provisions of the Code.

A.I.R.- 1922 P.C. 80

A.I.R.- 1957 A.P. 841

held that.....

The principle which prevents the same cause being twice litigated is of general application and is not limited by the specific words of the Code in this respect.

A.I.R.- 1932 P.C. 161

held that.....

Their Lordships of the Privy Council have laid down that it is well settled that the statement of the doctrine of res judicata is not exhaustive and that recourse may properly be had to decision of the English courts for the purpose of ascertaining the general principles governing the application of the doctrine of res judicata.

A.I.R.- 1941 Cal. 498

held that.....

But on matters which clearly fall within the explicit provisions of Sec.11,C.P.C., the section can not beflouted or over ridden and the prohibitions and the limitations prescribed in the section cannot be ignored.

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not in the province of a judge to go outside the letter of the enactment according to its true constructions.

A.I.R.- 1954 Raj. 4 (D.B.)

A.I.R.- 1935 Cal. 792 (D.B.)

A.I.R.- 1952 Mad. 384 (D.B.)

held that.....

Any other interpretation in Sec.11`C.P.C. will render the section nugatory and indeed meaningless.

A.I.R.- 1953 Cal. 765

A.I.R.- 1956 All. 237 (D.B.)

held that.....

General principles of res judicata as well as constructive res judicata apply to proceedings, *other than suits*, including execution proceedings. Conditions of applicability of principles of res judicata actual or constructive contained in Sec.11, C.P.C. must be complied with as far as possible.

5. Distinction between res judicata and estoppel.-

Res judicata costs the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estopple never means anything more than that a persons shall not be allowed

to say one thing at one time and the oppsite of it at another time; while res judicata means nothing more than that a person shall not be heard to say the same thing twice over.

The doctrine of res judicata no doubt resembles with the doctrine of estopple in some respects but the two are materially different. The distinction between the two doctrines was explained by Mahmood J.,in the following words:

> “The effect of the pleas of res judicata may, in the result, operate like an estopple by preventing a party to a litigation from denying the accuracy of the former adjudication can not be denied.
>
> “but here the similarity between the two rules virtually ends.
>
> “Perhaps the shortest way to describe the difference between the plea of res judicata and an estoppel is to say that while the former prohibits the Court from enteing into an enquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the enquiry has already been entered upon from proving anything which would contradict his own declaration or act to the

> prejudice of another party who relying up[on those declaration or acts, has altered his position. In other words, res judicata prohibits an *enquiry in limine*, whilst an estoppel is only a piece of evidence."

A.I.R.1942 Cal.92(98)(D.B.) held that.....

The doctrine of *res judicata* chiefly differs from estppel inasmuch as the former results from the *decision of the Court* while the latter results from an *act of party himself.*

The plea of *res judicata* is not merely a plea of estoppel. It amounts to an ascertion that the very legal rights of the parties are such as they have been determined to be by the judgment of a competent court and no other Court should proceed to determine this again. A matter once formerly decided is decided once for all as between the parties to the decision or as between those claiming under them. That which has been delivered in judgment must be taken for established truth. In all probability it is true in fact even if it is not expedient that it should be held as true non-the-less.

The operation of the doctrine is thus the transformation of a question of fact into a question of law.

On the other hand, in case of estoppel there is no doubt that the express admission of a party to the suit or admission implied from his conduct, are evidence and strong evidence against him, he is not estoppel or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is *estoppel from disputing their truth* with respect to that person and those claiming under him and that transaction.

A.I.R.1942 Cal.92,(D.B.) held that.....

It is well-established rule of law that estoppel binds parties and privies and not strangers.

A.I.R.1958 All.54,(D.B.) held that.....

Now there is no doubt that estoppel by conduct is of the very essence of the rules of estoppel embodied in Sec. 115,116 and 117 of the Indian Evidence Act but since the acts of the parties which come in for consideration in a litigation the acts, that is of the party

sought to be estoppel and those of the other who has been led thereby to change his position and who therefore pleads the bar of estoppel against the former must necessarily be acts performed prior to the commencement of the litigation, so that the conduct of a party in the course of the litigation while it may affect the question of costs, should be wholly irrelevant for judging those acts.

A.I.R.1952 Mad.384,

A.I.R.1921 Mad.248,(F.B.)

held that.....

Since estoppel results from the acts or conducts of the parties consequently the decision of a court for which a party is not responsible and which might be erroneous cannot operate as an estoppel. If it is a judgment in rem, it is binding on all persona whether parties or not. If it is any other kind of adjudication it binds the parties if it falls within Sec.11 C.P.C. or the general principle of *res judicata* recognised by the decision. Estoppel by record is what is provided for in Sec. 11 C. P. C. It is not within the province of any court to introduce another kind of

estoppel by judgment not covered by Sec.11 C.P.C.or the general principles of *res judicata*.

A.I.R.1951 Pat.595,(D.B.)

held that.....

Similarly it was also held by Patna High Court that Sec.11 C.P.C. has not the effect of doing away with the estoppel by record which still exists.

A.I.R. 1930 Bom.135,(D.B.)

held that.....

There can be no estoppel against an Act of Parliament or against an Act of Legislature and the principle of estoppel cannot be invoked to defeat the plain privisions of the stature.

A.I.R. 1957 Tripura 11,(F.B.)

held that.....

A plea of estoppel not having been raised in the pleadings and no evidence given on the point was not allowed to be raised in the second appeal.

The essence of estoppel by judgment is that a party cannot be allowed to say any one

thing at one time and another at later time. It will be seen that the estoppel pleaded and upheld by the Supreme Court was an estoppel between the parties to the prior action. There was no question of that judgment being pleaded as an estoppel against third parties. A judgment could be an estoppel only as between the parties to it, unless it is a judgment in rem which is binding against all the world. In *srinivasa Aiyangar V. Srinivasa Aiyangar* and *Ramamurthi Dhava V. Secretary of State*

A.I.R.1914 Cal.281,

held that.....

following certain observations in Bigelow on Estoppel and certain dicta of Lord Coke, it was held that judgments in personam could also create an estoppel against strangers. Those decisions were dissented from in Peari Mohan Shaha V. Durlavi Dassaya

A.I.R.1921 Mad.248,(F.B.)
held that.....

and they were expressly overruled by the Full Bench of the Madras High Court in Secretary of State V. Sayed Ahmad Badsha Sahib Bahadur.

A.I.R. 1959 Andh.Pra.280, at p. 284(D.B.)

held that.....

That judgment in personsam cannot be construed as being conclusive against persons not parties thereto is borne out by the scheme of the Indian Evidence Act from Sec. 40 to 44. Only judgments referred to in sec. 41 constitute conclusive proof of what they contain and sec. 43 in terms provides that judgments not judgments is a fact in issue or relevant under some other provision of the Act. Even if they are relevant this would not be conclusive. And a subsequent suit not between the parties to the prior litigation but between some of the parties thereto and strangers no question of estoppel can therefore arise.

A.I.R.1954 S.C. 82,(F.B.)

held that.....

Now it may be convenient to quote the observations of his Lordship Bhagwati J. who delivered the judgment of the Supreme Court in *Sunderbai V. Devaji Shanker Deshpande* “Estoppel is a rule of evidence and the general rule is enacted in Sec.115 of the Evidence Act which

lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thign to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. This is the rule of estoppel by conduct as distinguished from an estoppel by record, which constitute the bar of *res judicata.* ”

At another place in the same judgment it was contended before their Lordships that on a true construction G had agreed not to adopt a son to her deceased husband S, that the matter had passed from the stage of mere representation into an agreement and that, therefore, it would be a case of breach of contract, if any. Their Lordships observed : “ We are afraid this position cannot avail him. Even though the matter may have passed from the stage of a representation into an agreement there are cases where the courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of actin. Authority for this position is to be found in the

following passage from Bigelow on Estoppel, 6th Ed., pp.639-40:"

> "Situation may arise in which a contract should be held an estoppel, as in certain cases where only an adequate right of action would, if the estoppel were not allowed, exist in favour of the injured party. In such a case the estoppel may sometimes be available to prevent fraud and a circuit of action"

6. Doctrine of res judicata and lis pendens.-

The doctrine of *lis pendens* forms no part of the rule of *res judicata* the reason upon which it is based is in some respects similar in principle to the doctrine of *res judicata.* The rule of *lis pendens* though analogous yet is not co-extensive with the doctrine of *res judicata.*

A.I.R.1949 Bom.367,(372)(D.B.) held that.....

The distinction between the two doctrines, viz. *res judicata* and *lis pendens* has been very ably pointed out in detail in a very

illuminating judgment by his Lordship Bhagwati J., as he then was to the effect that *res judicata* means a matter adjudicated upon or a matter on which judgment has been pronounced. The rule has been put on two grounds, one the hardship to the individual for not being vexed twice for the same cause and the other public policy that there should be an end to litigation. The rule is based on the principle that the cause of action which would sustain the second suit having been merged in the decision of the first, does not survive any more. And it is well established that every suit has got to be sustained by a cause of action and there is no longer a cause of action after the decision of the first suit. Up to the decision of the first suit it would be possible to bay that there is a cause of action which could sustain both the suits. This is the doctrine of *res judicata.*

Lis pendens is an action pending and the doctrine of lis pendens is that an alience pendente lite is bound by the result of the litigation. It is a doctrine common to court both of law and equity and rests upon this foundation that it would plainly be impossible

that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevails. The palintiff would be liable in every case to be defeated by the defendant’s alienation before the judgment. Ordinarily a decree of a court binds only the parties and the privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. Where there is a real and fair purchaser without notice, the rule may operate very hardly. But it is a rule founded upon the public policy, the effect of which is not to annual the conveyance but only to render it subservient to the rights of the parties in litigation. As to the rights of these parties the conveyance is treated as if it never had any existence and it does not vary them.

It is also settled law that in absence of fraud or collusion the doctrine of lis pendens applies to a suit which is decided ex parte or by compromise. If the compromise will not operate as lis pendens. This is the doctrine of lis pendens.

Now the distinction between the doctrine of res judicata and the doctrine of lis pendens is that although both have the same end in view, viz. finality in litigation, the former that between the same parties or their privies once the decision is reached in a suit the same question shall not be canvassed in any other suit, and the latter that whatever the party may chose to do by way of transfers, pendete lite, the transferee pendente lite shall be bound by the result of the litigation; there is however this difference that the res judicata is concerned with more actions than one whereas lis pendens is concerned with the very same suit during the pendency of which there is an alienation of right, title and interest of one of the parties thereto.

In the case of res judicata the same cause of action may sustain various actions (suits) simultaneously but once the cause of action is merged in the judgement pronounced in a previously decided suit, there is no cause of action left to sustain the second suit. Whereas in the case of lis pendens, however, the cause of action continues as it was sustaining the suit for the adjudication of the rights of the

parties and the doctrine applies during rhe pendency of that suit sustained on that cause of action. Whatever be the litigation irrespective of whatever has happened between his transferor and himself.

A.I.R.1949 Bom.367,(D.B.)

held that.....

Once, however, even in the case where the doctrine of lis pendens applies a judgment is pronounced and the cause of action is merged in the judgment, that judgment is the final pronouncement which binds not only the parties to the suit but also transferees pendente lite from them, and the transferees would legitimately be treated as the representative-in-interest of the parties to the suit. Then there would be no lis or action which would survive. This lis or action can only be sustained by a cause of action and the cause of action having can only be sustained by a cause of action and the cause of action having merged in the judgment pronounced by a competent court, there would be no more occasion for any lis to continue pending and if it is in the same suit in which the doctrine of lis pendens

applies there would be no question of the applicability of the res judicata. The rule of res judicata would come into operation only if the judgment was pronounced in another suit which came to be decided earlier thatn the one in which the doctrine of lis pendens applied. But once that judgment was pronounced it would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of lis pendens applied would be merged in the judgment duly pronounced in what may be described as the previously decided suit. Thus the rule of res judicata prevails over the doctrine of lis pendens and binds not only the parties thereto but also transferees pendente lite from them.

A.I.R.1934 Cal.552,(D.B.)

held that.....

A similar view was expressed by their Lorships of the Calcutta High Court that in case of conflict between the two doctrines of res judicata and lis pendens, the former prevails over the latter.

In Faiyaz Hussain Khan V. Prag.Narain Lord Machnaghten quotes with approval the statement of the doctrine by Cranworth, L.C. as being :

> Pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent”

The principle of lis pendens enforced in England both by courts of law and equity is embodied in sec.52 of the Transfer of Property Act. The section does not declare that all the transfers made during the pendente lite are null and void; but what is provided for is that such transfers will be subject to the decree or order passed or made in the suit. In other words, the transfers will be subservient to the decree or order.

A.I.R.1928 Mad.635,(D.B.)

A.I.R.1947 Mad.18,

A.I.R.1943 Cal.18,

A.I.R.1938 Cal.1,

held that....

In Rangaswami Nadar V.Sundrapandia Thavar,

it was held that with regard to alienation pendente lite the rule is not that the alienation is absolutely void, but the matter

will not affect the rights of any party thereto under any decree or order which may be made in the suit. In other workds the trnasfer will be available and valid subject, however, to the result of the suit during the pendency of which the transfer is made. To the same effect are the observations in Nachappa Goundan V. Samiappa Goundan, Muhammad Juman Mia V.Akali Mudiani and alos in Ramdhone V. Kedar Nath.

A.I.R.1959 A.P.280

held that....

It follows that the decree or order does not create a right in any party in respect of any specific property transferred, no question of lis pendens can possibly arise.

7. Whether res judicata a technical rule or is based on public policy.-

A.I.R.1961 S.C.1457

held that....

On the question whether the rule of res judicata is merely a technical rule or is based on high public policy it will be of advantage to quote the observations of his Lordship Gajendragadkar J., who delivered the judgment

of a recent Supreme Court decision in Daryao V. State of U.P.:

> “Now the rule of res judicata as indicated in Sec.11 C.P.C., 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 decision 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.....
>
> “In considering the essential elements of res judicata one inevitable harks back to the judgment of 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 the Court of exclusive jursdiction, directly upon the point, is in like manner conclusive upon the same mater, 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 record; it is a fundamental doctrine of all courts that there must be an end of litigation. Hulsbury also adds that the doctrine applies equally inall courts and it is immaterial in what Court the former proceeding was taken, provided only that it was a court of a competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (page 187, para.362). Res judicata it is observed in Corpus Juirs, jurisprudence, and is put upon two grounds, embodied in various 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 eaden causa*. 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 on maxims which are taken from the Roman Law. Therefore, the argument that res judicata is a technical rule ... can not be accepted."

8.Plea of res judicata. -

A plea of *res judicata* is often said and sometimes even held to affect jurisdiction but is really only a plea in bar of a trial of a suit or an issue, as the cas mya be, and does not affect the jurisdiction of the Court. Thus the hearing of suit, notwithstanding a valid objection on the ground of *res judicata* or the dismissal of a suit as barred by *res judicata* may be a wrong exercise of jurisdiction; but is neither usurping of jurisdiction nor a denial of its exercise. It is clear, however, that the plea of *res judicata* going to the root of the

case, like the plea of bar by Limitation Law, may be raised at any stage and even for the first time on second appeal notwithstanding the provisions of O.VIII r.2. But the Court will not listen to the plea at such a late stage where is would be necessary to take evidence before deciding the question. The punjab Chief Court thus held on that ground, that the person raising the plea for the first time on appeal cannot allege in support of it facts not already on the record. The case of ***muhammad Ismail V. Chattar Singh*** in which the countlrary view was taken seems to be doubtful authority. It goes without saying that a plea of ***res judicata*** depending on a finding of fact which has not been challenged in the lower appellate Court cannot be maintained. It must also be observed that a plea of ***res judicata***, unless raised in defence, cannot be decided by the Court be, a plea of estoppel by ***res judicata*** can prevail even where the result of giving statue. But a plea of ***res judicata*** must be based on the grounds of the decision actually stated but do not justify the decision, it is not proper or competent of the parties to find a plea of ***res judicata.*** In all such cases it

lies upon favour in another proceeding and this he may do by producing such documents as will bring the case under the section. A party cannot by manipulation of the form of plaint get round the bar of *res judicata*. But the plea of *res judicata* being as stated above, one in bar of a trial of a suit or an issue, and not affecting the jurisdiction of the Court, may be waived by a party. A decision in a former suit that the issue between the parties is barred by the rule of *res judicata* is in itself a decision, which operates as *res judicata* in a subsequent suit.

The plea of *res judicata* which prevents the same cause being, twice litigated is of general application and is not limited by the specific words of Sec.11, C.P.C. The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded as bar this right must be strictly construed. The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have opportunity of putting forward his contentions against such

a decision. In the absence of such noticed the order that may follow cannot be regarded as an implied adjudication.

The plea of *res judicata* presupposes that there is decree or judgment, which has legal existence or validity. If the decree is nullity and non-existent in the eye of law, no plea of *res judicata* can be founded upon it the defendant in the suit in which the decree was passed is just as much as any stranger to the suit, being free under Sec.44 of the Indian Evidence Act to show that it is so.

(A)Scope of the plea of res judicata : As already stated that the plea of *res judicata* is not confined to the provisions of Sec.11 C.P.C. but has a wider application under the general principles. But where it is contended than an issue should not be retried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question has to be determined upon the provisions of Sec.11, C.P.C. and it is not open to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from those provisions. A party cannot by manipulation of the ground that the plaintiff

could not establish his contention bars a subsequent suit on the same contention in another form. A plea of estoppel by *res judicata* can prevail even where the result of giving will be to sanction what is illegal in the sense of being prohibited by statue. The plea of *res judicata* is not dependent upon the merits of the reason given for a particular conclusion- the conclusion whether right or wrong is binding upon the parties. The theory of *res judicata* requires the position and the case of the been given is not permitted to show that it is erroneous whether as plaintiff or as defendant in a subsequent proceeding but not a party in whose favour it was rendered. The latter may be prevented from doing so, if to permit is will contravene the principle of not allowing a person derive an equitable benefit by adopting inconsistent position. A plea in bar can be allowed to succeed only where is the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis.

Normally *res judicata* pleaded in bar to the bearing of the whole suit or some issue in

it. When so pleaded all the grounds in support of the plea must be urged once for all. But when no issue as to *res judicata* is raised but only a particular decision is incidentally considered as a bar by one Court and no bar by the appellate Court, the plea is not wholly excluded thereby, especially when the whole suit is directed to be tried on fresh evidence. A plea of *res judicata* is only a plea of estoppel by judgment. If a party is unable to make out one species of estoppel but the circumstances disclosed on the record make out a case of another species of estoppel yet the party is entitled to rely on such species of estoppels proved from record. The plea of *res judicata* can not be raised for the first time in second appeal.

(B)mode of pleading : It is not correct to say from the statement in the plaint that the suit is barred by *res judicata* inasmuch as all the conditions requisite for the application of rule of *res judicata* are not stated in the plaint and it is impossible to say that on face of the plaint that the suit is barred by *res judicata*. In pleading *res judicata* it is not necessary to set out the

ploeading in earlier suit at length. In determining the question whether the issue which it is sought to be raised in subsequent suit was fairly raised between the parties in the former suit, it is permissible to look into the pleadings, though in some cases the statement as to the pleading of the parties contained in the judgment of the Court is considered sufficient, the proper course is to produce the written statement(or the plaint, as the case may be). The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision.

(C)Mode of proof : The question as to whether certain matters are or not *res judicata* between the parties is a question peculiar to the facts and circumstances surrounding each particular case and is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work and judgment operates as a bar as regards all the findings essential to sustain the judgment. A person who set up the plea of *res judicata* must

produce such document as will bring the case under Sec.11, C.P.C. or under the general principles of *res judicata*. Similarly a party who relies upon certain judgment operating as *res judicata* has the burden of proving all the facts necessary to make his plea effective.

A decree does not show on what ground the case has been decided and does not afford any information as to the matters which were in issue or have been decided and is not sufficient evidence to support an estoppel by record. The decree is only to state the relief granted or other determination of the suit. The determination may be on various grounds but the decree does not show on what grounds and does not afford any information as to the matters, which were in issue or have been decided. Thus where a decree is expressed in general terms the judgment may be looked into to see what the real issues were, where and how far the decree operated as *res judicata*. A plea of *res judicata* has to be established by the production of the judgment and decree in the previous suit; in the absence of such judgment and decree the admitted facts cannot take the place of estoppel by record. A decision on a

particular point was obtained in the trial Court and it was upheld by the High Court on appeal. The same point arose in a subsequent suit but no copy of the High Court judgment had been filed in the subsequent suit. It was held that it was not possible to ascertain on what ground that decision of the trial Court was upheld. In these circumstances, the contention that the said decision should be taken as operating as *res judicata* was not accepted. The Privy Council has held that a plea of *res judicata* taken on the ground that the quest5ion in issue in the suit was formaly in issue in probate proceedings cannot be given effect to when the said proceedings are not in evidence and there is thus no sufficient evidence to support the plea. A judgment passed in the previous proceedings showing what the Judge understood to have been the question for decision in those proceedings was not enough to support such a plea. The court cannot give effect to the plea unless it can say for itself that the matters in issue in the Council affirmed that where the High Court declined to allow the appellant to go into the question of *res judicata* on the ground that it had not been

properly raised by the pleadings or in the issues particularly. It seemed to necessary for the appellant if he were going to make use of the judgment in the suit of 1900 as *res judicata* to identify the subject in dispute in the subsequent case with the subject with that of the previous case.

Their Lordships of the Privy Council yet in another case refused to uphold a plea of *res judicata* on the ground that the summary of the plaint as set out in the decree was ambiguous and the original pleadings should have been filed. The Privy Council refused to allow the appellant to put in evidence the documents in support of the plea when the appellant was remiss in spite of the objection taken in the courts below to the defect in the record. Therefore to determine the question of *res judicata* it is essential what were right in dispute between the Parties and what were alleged between them and this must be done not merely from the decree but also from pleadings and judgment.

A.I.R.1944 Odh. 139

held that....

However where the pleadings in the previous suit which was not before the Court, which was trying the subsequent suit the pleadings in the previous suit were sufficiently incorporated in the judgment in that suit and it could be known what the issues before the Court were and it was evident from the judgment in the previous suit that the genuineness of the will was the main question before the Court and the will was held to be genuine. It was held that absence of the pleadings in the previous suit could not debar the defendants from raising the plea that the question or the genuineness of the will was barred by *res judicata.*

(D)Stage at which plea of res judicata may be allowed to be raised : The plea of *res judicata* must be raised at the earliest opportunity in the first court. A plea of *res judicata* was, however, allowed to be raised in the High Court for the first time in first appeal where the judgment of the High Court (in another case) sought to be pleaded as a bar was delivered after the decision of the trial Judge and no further facts were to be brought on the record.

A.I.R.1941 Mad.815

held that....

Ordinarily a plea of *res judicata* is not allowed to be raised for the first time in appeal but when the final finding on which the plea rests was given while the appeal was pending, the Appellate Court is not only justified but bound to take notice of the final judgment arrived at between the parties and give effect to the same and is justified in permitting the judgment to be produced before it.

A.I.R.1948 Mad.54

held that....

The plea of *res judicata* being one of law and the judgment of prior suit being already on the record was allowed to be raised for the first time in second appeal.

A.I.R.1936 P.C..258

held that....

In a Full Bench decision of Allahabad High Court it was held that in second appeal that where plea of res judicata was not urged in the two court below or in memo of appeal and raised for the first time in second appeal it must be considered and determined either upon

record as it stood or after remand of finding of fact. But in view of decision of Privy Council in Jagdish Chandra V. Gour Hari Mohato,

A.I.R.1931 All.35

held that....

it is no longer necessary to remand the case tolower court for a finding. In another Full Bench decision of Allahabad High Court, in Ram kinker Rai V. Tufaini Aihir, it has been held that plea of res judicata limitation and jurisdiction could be raised for the first time in second appeal. An Appellate Court can consider the plea of res judicata for the first time even thought it has not been raised before it by the party concerned. The bare fact that the plea was not raised in the trial Court, is no ground for holding that it must be deemed to have been deliberately waived, the lower appellate Court could consider it even though not raised in the trial Court.

A.I.R.1934 Mad.551(D.B.)

held that....

But the plea of res judicata though a question of law, it can not be raised for the

first time in second appeal where the basis for the plea was not laid in the lower courts by establishing the judgments relied upon as constituting the bar.

A.I.R.1934 All.770

held that....

A plea of res judicata can not be allowed to be taken for the first time in second appeal requiring remand to the Court below for investigation and determination of certain facts.

A.I.R.1929 Mad.775

A.I.R.1957 Tripura 11

held that....

The mere fact that a point is res judicqta can not be allowed for the fist time in second appeal, if it has not been taken in the written statement of the defendant nor has any issue been raised on it nor has it been discussed in that light by courts below. Where the question of res judicata was decided by the lower Court in favour of plaintiff but suit was dismissed on other ground and on appeal by the plaintiff the High Court reversed the finding

of the lower Court and the case was remanded. It was then open to the defendants to support the order of dismissal on the ground of res judicata. They did not do so with the result that Court instead of dismissing the suit, remanded it to be heard on merits. In view of that order at a previous occasion it was held that it was too late to say that the suit was barred by res judicata. The point as to res judicata not raised in the Court below cannot below be raised in revision.

(E) *waiver of the plea of res judicata* –

The plea of res judicata is one in bar of a trial of a suit or an issue, and does not affect the jurisdiction of the Court may be waived by the party. The effect of the waiver is the same whether it was omitted to be taken by mistake, accident or design. If a party does not put forward a plea of res judicata he must be taken to have waived it and to have intentionally invited the Court to decided the case on the merits.

9.plea of res judicata if can be waived.–

indeed it can not be that objection based on the rule of res judicata can be waived.

A.I.R.1929 Cal. 163 (D.B.)

A.I.R.1935 All. 11

held that....

The effect of not pleading the previous decree in answer to a plaintiff's claim in a suit stand on the same footing as if the defence was raised by the defendant and disallowed by the court. It cannot be put on a higher footing on any reasoning based upon commonsense or law. The bar of res judicata being one which does not affect the jurisdiction of the Court, but is a plea in bar which a party is at liberty to waive. If a party does not put forwarded his plea of *res judicata* he must be taken to have waived it, or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue. The party omitting to plead *res judicata* intentionally invites the Court to decide the case on merits and having failed to

secure a decision on merits should not be allowed to go behind the last adjudication and ask for the trial of an issue which he could have raised at the previous trial. Similarly if the plea of *res judicata* is abandoned or not put forward by a party it must be deemed to have decided against him. But as already stated that a plea of *res judicata* being a question of law and not having been raised in the courts below can very well be taken in the appellate Court and may not be deemed to have been waived when all the necessary papers essential for the determination of the issue are before appellate Court. Therefore in other words it can be said that a plea of *res judicata* even if waived by a party in the courts below he can revive it in the appellate stage, if it does not require fresh investigation of facts not proved from the record.

As a broad proposition of law when there are two conflicting decrees the last one should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to and henceforth be regarded as dead. Where a

mistake, however, in the decree has arisen out of the mistake of the scribe in copying out the list of properties attached to the written statement it will not hit the bar of *res judicata* and the entire proceedings of the previous litigation may be looked into determine the real issue decided.

10. judgements in rem and judgment in Personam. –

There are some cases in which the decision although between different parties, can set up as an absolute bar to the suit, independently of this section; of this nature are judgments in *rem,* such as operate to bind all the world on the question as to what is a judgment in *rem*. It has already been pointed out that a judgment, as a rule, affects only parties and privies. Judgements in *rem* form an exception to this rule, and are valid not only *inter parles* but *inter omnes* or against all the world. Judgments in *rem* beyond the rule of *res judicata* enunciated in the present section. They are dealt with in the Indian Evidence Act, Sec.41.

11. Judgment not inter partes or in rem.-

A judgment, which is not *inter parles* or *in rem,* does not make the question decided by it *res judicata* in a subsequent suit. But such judgment, or the whole record in the previous suit, is admissible, as evidence that a right had in the previous litigation been set up unsuccessfully by one of the parties to the subsequent suit. Hence a judgment in a suit by *A* against *B* a rival claimant for an office negativing *A*'s title as against *B* is no bar to a suit by *A* against a third party for the emoluments of the said office. It is only a piece of evidence on the question of title.

Section 40, Indian Evidence Act, provides : "The existence of any judgment, order 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." Section 41 of the Indian Evidence Act provides : that a final judgment, order or decree of a competent court in exercise of a probate, matrimonial, admirably or insolvency jurisdiction which confers upon or takes away from any person any

legal character, or which declares specific things, not as against any specified person but absolutely, is relevant when the existence of any legal character, or the title of any such person to any such thing is relevant. By Sec.4 of the Evidence cannot be allowed to disprove the facts established by such judgments.

The judgments referred to in Sec.40 of the Indian Evidence Act are judgments in personam which operate as res judicata. It applies to a case where the Court has jurisdiction to decide the matter and one party says that it should not do so because that matter has been decided before, and a court may be prevented from proceeding with trial of the suit, or the issue involving the same matter between the same parties which has been previously decided by an Indian or a foreign court. Thus a judgment in personam only binds the parties and not the strangers to the suit or proceeding.

The judgments in rem referred to in Sec.41 of the Evidence Act are conclusive not only between the parties to suit but are conclusive against the whole world, thus the

parties as well as the strangers are put in the same category. The legal character or status decided by the courts of insolvency, admiralty, etc. are judgments in rem and are conclusive wherever the status of the person so declared is involved against the whole world. In Radhakrishin V. Mst. Gangabai it was held that “an order adjusting a person as an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment in rem but the ground on which the order is based has no such effect. There is a broad distinction between the effect of a judgment in rem and a judgment in personam the point adjudicated upon in a judgmentin rem is always as to the status of the res and is conclusive against the world as to that status, whereas in a judgment in personam the point whatever it may be which is adjudicated upon (it being as to the status of the res) is conclusive only between the parties or privies.” Thus where the decision of the Rangoon High Court declaring Ebrahim an insolvent would operate as a judgment in rem under Sec.41 of the Indian Evidence Act but the decision that Ebrahim was a partner of the insolvent firm would not operate as a judgment

under Sec.41. A fortiori, the implied decision about the nature of the deed of dissolution could not be conclusive as a judgment in rem under Sec.41. Similarly a decision of a probate court in admitting the will to probate so long as the order remains in force is conclusive as to the due execution and validity of the will, and party to those proceeding cannot be permitted to contest the will unless the grant the grant of probate is revoked.

A judgment in personam which is not between the same parties or one of the parties is a stranger in the subsequent suit may not operate as res judicata but serves as a strong piece of evidence in support of the matter so decided.

A.I.R.1959 A.P. 280 (D.B.)

held that....

There is a distinction between a person’s right and status and it is only the decision about status that can operate as judgment in *rem*.

CHAPTER – 4

RES JUDICATA IN CIVIL CASES

S Y N O P S I S

1. General view of the Doctrine of res judicata.-

This is the legislative exposition of the common law maxim *nemo debet bis vexari pro una et eadem causa,* - The principle of which had long been recognized in India, even before the enactment of the Civil Procedure Code of 1859. The rule has been enunciated in England, as observed by their Lordships of the Privy Council, in the case of *Soorjomonee v. Suddanund,* in a series of cases with which the profession is familiar. It has probably never been better laid down than in *Gregory V. Molesworth,* in which Lord Hardwicke held, that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form, and that decision has been followed by a long course of decisions, the great part of which will be

found noticed in the veryable notes of Mr. Smith to the case of the *Duchess of Kingston.* The Principle underlying the rule of *res juidicata* has been thus explained by DeGrey, C.J., in the celebrated case of the *Duchess of Kingston.*

A.I.R. 1932 P.C.

Held that…

"From the variety of cases relating to judgment being given in evidence of 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 judgement of the 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; but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter

incidentally cognizable, nor of any matter to be inferred by argument from the judgment.” The substance of the rule as enunciated and recognized in England was, however, approved of and acted upon in numerous cases by the Judges, and imported almost *res integra,* in this country. The Code of Civil Procedure of 1859 tacitly recognized the rule in Sec. 2, which provided as follows:

The civil courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a couty of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim. “ The section was held, however, not to exclude the operation of the general law relating to *res judicata* as settled in England, and in accordance with which, “ where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves, in any other suit in any other form”.

The Present code has adopted the broader rule of bar by verdict, a decision of every issue in a suit being *res judicata* in every

subsequent suit. In introducing this clause, the Special Committee reported thus: “ It is not possible to make a complete exposition of a subject so complex as that of res judicata within the limits of a section of an Act, and the Committee think it better to re-enact Sec. 13 as it stands in the Code with such modifications only as experience has shown to be necessary. “ Report of the Select Committee. The doctrine of *res judicata* is not dependent on the limited provisions of Sec. 11 but is based on the general principles of law that multiplicity of suits should be avoided. As observed by Mr. Best: “ It would be productive of the greatest inconvenience and mischiefs, if, after the cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground either of alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflection will show that if some points were not established at which judicial proceedings must stop, no one

could ever feel secure in the enjoyment of his life, liberty of property: while, unjest, obstinate and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert into one vast scene of litigation, disturbance and ill-will." The principle of res judicata is one of convenience and rest and not one of absolute justice and it should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on question.

A.I.R. 1925 Oudh.

Held that…

The underlying general principle of the rule of res judicata is that the person should not be harassed by repeated litigation about the same subject matter.

2. Rule of res judicata apart from Sec. 11, C.P.C.-

When a question at issue between the parties to a suit is heard and finally decided

the judgment given on it is binding on the parties at all subsequent stages of the suit. Its binding force depends not upon the Code of Civil Procedure, Sec. 11, but upon general principles of law; if it were not binding, there would be no end to litigation. It has often been emphasized that the application of the doctrine of *res judicata* should be confined to the rule as enacted in the Civil Procedure Code. But the principle of finality of adjudication has an operation independent of the enactment in the Civil Procedure Code. The Application of the rule by the courts in India should, therefore, be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

The Principle of finality of adjudication has arisen chiefly in execution proceedings, in which it is now generally agreed upon that an order made at one stage of execution proceedings is binding on all the subsequent stages.

A.I.R. 1962 A.P. 129.

Held that…

It may be noticed here that although the rule of *res judicata* enunciated in Sec. 11 may be applicable in certain execution proceedings arising out of the same judgment, and may also possibly be applicable in certain cases where separate suits have been brought raising points which have already been decided in execution cases between the same parties still the special rules laid down in the explanation to sec. 11 which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally in execution cases. So it has been held that the principle of constructive *res judicata* should be very cautiously applied to execution proceedings. The authorities do not, however, all return the same answer to this question, for while in some cases it has been laid down that where the judgement-debtor does not object to the first application for execution of a decree on the ground of illegalities in relation to execution proceeding he cannot raise such objection, when a subsequent application for execution is made. There are other in which the contrary has been affirmed. As pointed out by the Judicial committee parties should not be allowed to

agitate the same question after it has been once decided, and the dictum of their Lordships has been extended to cases where the parties had an opportunity to object to the decision, but did not avail themselves of that opportunity.

One Principle seems to be clear and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such decision.

But when the court, after the service of notice of the judgment-debtor to show cause why the decree should not be executed, makes an order for execution (e.g. that attachment should issue), the Court thereby is deemed to have decided (whether rightly or wrongly) that the execution application was not then time-barred. On the same principle an order made in execution proceedings, whether right or wrong, is *res judicata* between the parties in subsequent execution application where the validity of that order comes in question

directly for the purpose of deciding whether the subsequent application is maintainable.

The rule has likewise been often applied for pronouncements made in the course of orders remanding a case to a subordinate court or calling for findings. It is not open to a court to take two different views of the law in different stages of the same case.
The same appellate Court cannot, therefore, pronounce (except where it is moved by an application for review) a different opinion on a relevant question of law from that which it held in a previous stage of the same case and on which earlier opinion, it based its decision remanding the suit to the lower Court.

The question has also been raised from time to time, whether when a point has once been decided between the parties in some proceeding other then a suit, such a decision is conclusive in a subsequent suit between them. There can of course be no such effect where the original proceeding is avowedly summary and decision is made subject to the result of a separate suit. But in the absence

of such a provision, the point is by no means beyond doubt. Emphasis has often been laid upon the fact that the provision in the Code is applicable only in respect of adjudications in former “suits” but, as observed by their Lordships of the Privy Council in the undermentioned case the application of the rule by the courts in India should be influence by no technical considerations of form but by matter of substance within the limits allowed by law. So a person, whose claim has been adjudicated upon in the manner, pointed out by the Land Acquisition Act is not at liberty to have it re-opened and again heard in another suit. But in a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine is whether the will is true or not, and it is not the province of the court to determine any question of title with reference to the property covered by the will. A proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the provisions of the Civil Procedure Code. That being so, the finding of a court on the construction of a

will being incidental and for the purpose of determining the question of the representative title of the applicants, cannot be regarded as concluding a party to an application for probate by res judicata from obtaining a construction of the will in a suit brought by him. On an application for probate of a will, the District Judge passed an order refusing probate on the ground that, in the course of certain prior proceedings, inter partes, under the Guardians and Wards Act, it had been decided that the will propounded was not a genuine will, and that by virtue of such decision the question as to genuineness of the will was res judicata, and could not be re-opened in the subsequent proceedings under probate. The order was reversed on the ground that the proceedings under the Guardians and Wards Act could not so operate as to make the question of the genuineness of the will res judicata so as to bar the subsequent application for probate. The prior decision under the Guardians and Wards Act was only a decision inter partes and could not affect the subsequent application for probate, the adjudication upon which will have the effect of

a judgment in rem, as provided in Sec. 41 of the Evidence Act, and will affect not only the parties to the previous proceedings, but the beneficiaries under the will and the world at large. But where under the Land Acquisition Act, Sec. 31, sub-section (2), a dispute as to title to receive the compensation has referred to the Court, a decree thereon not appealed from renders the questions of title res judicata in a suit between the parties to the dispute, or those claiming under them whether or not the decree is to be regarded as one “in a former suit” within the meaning of this section. The principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code of Civil Procedure. On a similar principle it has been held that where settlement courts have fully gone into rival claims and dealt with and decided all point raised, it is not open in subsequent proceedings to one party to deny the status of another party as found by such settlement courts, or to assert more than was awarded by such settlement courts that such judgments may be a piece of evidence and sometimes very

strong evidence on the question of title. The same opinion has been expressed in Peary Mohun v. Durlavi. Where, however, the contention is that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question must be determined with reference to the provisions of Sec. 11, and it is not open to either party to rely upon the principle of finality which forms the basis of the general law of res judicata apart from these provisions.

There is, however, no denying the fact that the rule of res judicata which is a principle of the conclusiveness of the judgment, is firmly embedded in the juridical systems of most countries and modern and as well as ancient. The basis of this doctrine is stated by Black in his well-known book on judgments, Vol. II, p. 599, para. 500 in the following words:

"That the solemn and deliberate sentence of the law, pronounced by its appointed organs upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated and

should for ever set the controversy at rest, is a rule to all civilised systems of jurisprudence."

A final decision inter partes is accepted as irrefragable truth even if the result may be that thereby an error is perpetuated. It is said that res judicata renders that which is straight crooked and makes white appear black. Facitex curvo rectum, ex albo nirgrum, but nevertheless, a matter which has been adjudicated is received as true.

According to the reasoning of the Roman Jurists the aim of the law in barring a subsequent suit which had been previously decided was to protect litigants from being harassed by successive suits, and to guard against the public evil which would arise in the shape of a general unsettlement and uncertainty of rights if judicial decisions were not conclusive. The rule that "one right of action should only be tried once is reasonable rule to prevent interminable litigation and the embarrassment of contrary decision."

It is a settled principle of law that a judgment shall not be contradicted by a judgment in a subsequent trial between the same

parties where the same right is in question (except, of course, by the judgment of a court of appeal).

In the words of Roman Jurist Julian which are equally true today, the plea of previous judgment is as a rule a bar whenever the same question of right is renewed between the same parties of whatever form of action. “Et generaliter, ut fulianus definit exceptio res judicita obstat quotients inter easdem personas eadem quaestio revocatur vel alio genere judicie”.

A.I.R. 1958 Punj. 83.

Held that…

The plea of res judicata was a recognized defence to a subsequent suit between the same parties relating to the same subject matter known as exceptio rei in judicium ded uctao or simply exceptio res judicata.

A.I.R. 1916 P.G.78.

Held that…

It is, however, true that although the rule of res judicata is a cardinal principle of the legal systems of most countries and many

eulogiums have been lavished upon this doctrine, said to be most salutary but the Judges have not failed to issue a note of caution whenever it has been considered necessary that the Court should be influenced by no technical consideration of form but by matters of substance within the limits allowed by law. It is worthwhile to reproduce what was said by Sir Lawrence Jenkins in delivering the judgement of the Board of the Privy Counci in Sheparasan Singh v. Ramnandan Pershad Narayan Singh.

"But in view of the arguments addressed to them their Lordships desire to emphasize 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 republican ut sit finis lituim, otherwise great oppression might be done under colour and pretence of law. 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 Nilkantha include the plea of a former judgment among those allowed

by law, each setting for this purpose the text of Katyayana, who describes the plea this: ”if a person though defeated at law sues again he should be answered ‘you were defeated formerly’. This is a called the plea of former judgment.

A.I.R. 1953 S.C.

A.I.R. 1958 Punj.

A.I.R. 1953 S.C.

Held that…

And so the application of the rule by the courts in India should be influenced by no technical consideration of form but by matter of substance within the limits allowed by law.”

The above passage was cited with approval by Mahajan, J., in Raj Lakshmi Dassi v. Benamali Sen cited in Umrao Singh v. Mst. Munni. His Lordship further observed that the condition regarding the competency of the former Court to try the subsequent suit is one of the limitation engrafted on the general rule of res judicata by Sec. 11, C.P.C. and has application to suits alone. When a plea of res judicata is founded on a general principle of law, all that is necessary to establish is that

the Court that heard and decided the former case was a court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of res judicata on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction, like revenue courts, land acquisition courts, administration courts, etc. It is obvious that these courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statue. The above dictum of the Supreme Court has been universally followed by all the courts in India. In another decision of the Supreme Court in MohanLal v. Benay Krishna it has been re-affirmed that the general principles of res judicata apply to execution proceedings. It was further held that the principle of constructive res judicata is applicable to execution proceedings is no longer open to doubt.

(2004) 1 SCC 497-E Dismissed of SLP of admission stage whether can constitution of India Art 136.

CHAPTER - 5

SUITS,PRIOR DECISIONS,APPEALS AND MISCELLANEOUS PROCEEDINGS

1.Suits, meaning of.-

The word “suit” has not been defined in the Code of Civil Procedure. Undoubtedly it is a term of wide significance. The only indication of what is meant by the term “suit” is what we get from Sec. 26 of the code of the Civil Procedure which runs thus :

“Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.”

It has been held in Venkata Chandrayya v. Venkatarama Reddi that a proceeding that does not commence with a plaint is not a suit.

Their Lordships of the Privy Council while interpreting Sec. 3 of the Indian Companies Act had held that the word “suit” ordinarily means and apart from some context must be taken to mean a civil proceeding instituted by the presentation of a plaint.

A.I.R. 1934 Mad.

Held that…

The term “suit” came up for consideration before their Lordships of the Madras High Court in a Full Bench decision in Rajgopala Chettiar v. Hindu Religious Endowment Board, Madras, wherein it was observed that the term “suit” in the civil Procedure Code can mean only a proceeding instituted by the presentation of a plaint.

Their Lordships while interpreting Sec. 84 (2) of the Hindu Religious Endowment Act held that it must follow therefore that an order passed by the District Judge on an application under that Act even if that order complies with all other requirements of the definition of a decree cannot be a decree under the Code inasmuch as the application cannot be the commencement of a suit and without a suit there cannot be a decree and hence an order on an application under that Act cannot be called a decree and is therefore not appealable to the High Court.

Another instance may be cited where an application for permission to sue in forma

pauperis is rejected, there is no adjudication in any stage of a suit. Such an application is neither a plaint nor a proceeding in a suit nor the order of rejection of the leave to sue in forma pauperis is a decree.

The Privy Council in the case of Mungal Pershad Dichit v. Girja Kant Lahiri has held-

“It appears to their Lordships that an application for the execution of a decree is an application in the suit in which the decree was obtained.”

This and similar other remarks elsewhere support the view that the proceedings in a suit do not terminate with a decree but the word “suit” may fairly be interpreted to include the proceedings taken to execute the decree.
(2004) 1 SCC 712-E

1995 (6) SCC 733. Applicability (Deva Ram V/s Iswarchand)

supreme court held that in that matter involved in the second suit must be directly & substantially in issue in previous suit to attract the principle of res judicata in second suit.

Even act the appellate stage who have not been heard in such cases supreme court decided in the case of 1995 Supp.(4)SCC 413 Joginersingh v/s Surinder singh.

In this case the decision in the high court in that appeal can not operate as res-judicata so far as other heirs are concerned who have later come to file another appeal. Supreme court held that res-judicata can not operate against those who have not been heard.

1993(2) UJ SCC 774 Sulochana Amma v/s Narayanan Nair. Even in the injunction case res-judicata is considered and supreme court held in this case that this doctrine is also applied to equitable of injunction.

The trial court should try the case by the same virtue either it may be issue of jurisdiction or any other. In such legal aspect so many different court are on the same decision even in the case of AIR 1996 SC 987 Church of south India Trust Association v/s Telugu Church council. In this case supreme court held that court deciding former such must have been competent to try the same by virtue

of its pecuniary jurisdiction to try the subsequent suit.

Even in the can in jurisdiction sometimes this doctrine can not operate. We can see in the case of 1996(8)SCC 324.Municiple committee Sishind v/s Parshottamdas In this case the view of supreme court is very clear that Finding even by court having no jurisdiction and it shall not operate as res judicata. Court finding U/s.30 of the Land Acquisition 1894 that land acquired belongs to claimant Khewantdas and not municipality without jurisdiction-same would no operate as res judicata for determining Khewantdas title to land.

-Ss. 11 & 100 and Or. 20R. 18-Res judicata –Applicability – Earlier suit was filed by predecessor of respondents for eviction of predecessor of appellants claiming exclusive tittle to the suit property- Suit was resisted by predecessor of appellants claiming adverse possession and alternatively as co-owner on the basis of a joint patta granted by Director of Settlement to predecessor of appellants with predecessor of respondents under S. 18(4) r/w

S. 5(2) of T.N. Estates (Abolition and Conversion into Ryotwari) Act, 1948 – Trial court dismissed the suit taking the view that predecessor of appellants had perfected their title by adverse possession while appellate court concluded that the parties were co-owners-Decision of appellate court became final in absence of further appeal-Subsequently suit for partition preferred by predecessor of appellants-Question of title to the suit property was directly and substantially involved in the earlier suit between the same parties and by operation of res judicata, in the subsequent suit for partition the defendants in that suit (respondents herein) estopped from questioning the claim of co-ownership-Principle of res judicata cannot be inapplicable merely because the previous suit was only in respect of a part of the property while in the subsequent suit the whole property was involved,(2003)10 SCC 578-A

2.Former suit, meaning of-Explanation I.-

There was at one time some controversy as to the meaning of the expression “or suit” the decision wherein may operate as res judicata in

a subsequent suit. In Gururajammah v. Venkata Krishama Chetti, the doubt has now been set at rest by the present Explanation I which provides “the expression ‘former suit’ denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto".

A.I.R. 1957 A.P.

Held that…

To put the matter tersely the expression “former suit” means a previously decided suit and the same rule applies to appeals. This was in fact the view adopted by Mahmood, J., in Balkishan v. Kishan Lal, and has been subsequently followed. As Herman puts it in his commentaries on the Law of Res Judicata it is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature. From this standpoint, Mahmood, J., in Balkishan v. Kishan Lal, and has been

subsequently followed. As Herman puts it in his commentaries on the Law of Res judicata it is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature. From this standpoint, Mahmood, J., held in Balkishan v. Kishan Lal, that the doctrine of res judicata so far as it relates to prohibiting the re-trial of an issue must refer, not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue; and the rule is not limited to the courts of first instance, it applies equally to the procedure of the first and second appellate courts and, indeed, even to miscellaneous proceedings.

Thus where the High Court decides the matter in issue between the parties in a suit subsequently instituted to the suit in question, (that is, the firstly instituted suit remaining pending, the subsequently instituted

suit was decided earlier and having gone through all the stages of the first and second appeal had become final), the decision on these issues is binding on them in this point.

A.I.R. 1936 Mad.

Held that…

That is, if during the pendency of an appeal or revision from the judgment of a lower court another judgment establishing title of the parties is given in another suit and is allowed to become final such judgments coming into existence during the pendency of proceedings by way of appeal or revision will operate as res judicata on the proceedings under appeal or revision although such judgments have themselves come into existence after the judgment under appeal or revision.

Principle of res judicata for its applicability under Sec. 11, C.P.C., contemplates of two suits, i.e. the former suit and the subsequent or later suit. Although final orders in different stages of the proceeding are binding between the same parties and their privies on the general principles of res judicata. Their Lordships of the Privy Council while considering whether an order made

by an execution Court in 1867 construing a decree to have included mesne profits, and no appeal having been preferred against the order of the execution Court, whether the matter of mesne profits could be re-agitated in a subsequent proceeding observed that the matter decided by the executing Court was not a decision in the former suit, but in a proceeding which was merely a continuation. It was binding between the parties and those claiming under them. The binding force of such judgment depends not upon Sec. 13, C.P.C., 1877 (now Sec. 11 of the code) but upon the general principles of law. It was further observed that the execution Court had jurisdiction to execute the decree and it was consequently within his jurisdiction and it was his duty to put a construction upon the decree who decided right or wrong and it was final as no appeal was preferred.

If one of the two cross suits between the same parties arising out of the same transaction is decided before the other and the issue for decision in both suits in the same the decision in the one suit operates as res judicata in the other.

A.I.R. 1937 All.

A.I.R. 1952 Nag. 271 (D.B.)

Held that…

1.Subsequent suit, meaning of.-

In order to invoke the bar of res judicata under Sec. 11, C.P.C., the Court which tried the former suit was competent to try the subsequent suit in its entirety, mere competency to try an issue in the subsequent suit is not enough.

A.I.R. 1954 All. 801 (D.B.).

A.I.R. 1962 S.C. 214.

Held that…

Subsequent suit means the whole of subsequent suit.

Now we have the authoritative pronouncement from the Supreme Court where the words “such subsequent suit” have been interpreted by the Supreme Court in a very recent decision in Mst. Gulab Bai v.C. Manphool Bai, wherein his Lordship Gajendragadkar, J., who delivered the judgment of the Court thus observed:

“The word ‘suit’ has not been defined in the Code, but there can be title doubt that in the context the plain and grammatical meaning

of the word ‘suit’ would include the whole of the suit and not a part of the suit, so that giving the word ‘suit’ its ordinary meaning it would be difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said word in the material clause. The argument that there should be finality of decisions and that a person should not be vexed twice over with the same cause can leave no material bearing on the construction of the word ‘suit’ Besides, if considerations of anomaly are relevant, it may be urged in support of the literal construction of the word ‘suit’ that the finding recorded on a material issue by the Court of the lowest jurisdiction is intended not to bar the trial of the same issue in a subsequent suit filed before the Court of unlimited jurisdiction. To hold otherwise would itself introduce another kind of anomaly. Therefore, it seems to us that as a matter of construction the suggestion that the word ‘suit’ should be liberally construed cannot be accepted……

“Having regard to this legislative background of Sec.11 we feel no hesitation in holding that the word ‘suit’ in the context

must be construed literally and it denotes the whole of the suit and not a part of it or a material issue arising in it."

The word "suit" as it appears in Sec. 13, C.P.C., 1867 (now Sec.11 of the present Code) must be understood to mean such a matter as might have formed the subject of separate suit independently of the special provisions of the Code which enable the plaintiff to write several causes of action in the same suit. Thus where too money bonds which were the subject of the former suit cannot be allowed to form the subject of litigation against and the circumstances that the plaintiff has joined them in the subsequent suit for four bonds will not enable him to obviate the plea of res judicata.

A.I.R. 1919 Nag.

A.I.R. 1954 All. 801 (D.B.)

Held that…

It is a settled law that if right to property cannot be established by reason of its having been adjudged against the plaintiff in a previously decided suit, the plaintiff cannot evade the provisions of Civil Procedure Code regarding res judicata by joining several

causes of action or by adding some more property to the property in dispute in the previous suit against the same defendants by swelling up the valuation of the subsequent suit and instituting it in a court of superior or higher pecuniary jurisdiction.

A party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit, and claim that the decision in the former suit does not operate as res judicata. But if it appears that his subsequent suit proceeded upon a cause of action which did not exist at the date of the previous suit or if that cause of action existed it was one which he could not have availed of at that time having regard to the nature of the suit as if there was the fact that he subsequently institutes a suit embracing the entire cause of action with the result that his suit being of higher value would justify him in claiming that the decision in the earlier suit was not operative as res judicata.

If it is possible to treat the entire cause of action founded as divisible and if in

the earlier suit one of the component parts of the cause of action was relied upon, then the previous suit will stand as a bar to the extent of the matter involved in the earlier suit.

A.I.R. 1923 All. 176 (D.B.)

Held that…

But it must be borne in mind that where the claim for the rest of the property (not forming subject of dispute in the previously decided suit) is based on different cause of action or cause of nature it cannot operate to deprive the plaintiff of his right to set up that title in regard to that property which was not then in dispute.

A.I.R. 1943 Oudh 338.

Held that…

However, in those cases where the cause of action recurring and the claim having been decided between the parties in respect of a certain period, e.g. claim for arrears of maintenance for a certain period a subsequent suit for arrears of another period, the issue involved in both the suits being whether the arrears claimed were in fact due, the former decision will operate as bar of res judicata.

The claim decided in a previous suit or litigation for a certain period whether operates, as res judicata between the same parties in a subsequent suit for a subsequent period is a question, which depends on the peculiar facts and circumstances of each case. In a question before their Lordships of the Privy Council in Broken Hill Proprietary Co. v. Broken Hill Municipal Council.

A.I.R. 1930 Mad.209.

A.I.R. 1937 Mad.254.(F.B.)

Held that…

Whether a valuation under the Local Government Act, 1919, New South Wales, in a previous year adjudicated by the Court would operate as res judicata as regards the valuation for subsequent years it was observed:

“The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply.”

If a question is decided by a œurt on a reference which depends upon consideration which may vary from year to year there can be no res judicata. By way of illustration, the

valuation of land for purposes of rating for each year is so peculiar to that year and has to be made on considerations that prevailed in prior years that no question should be considered as a general principle and what happened in one year-whether a matter of principle or a matter of detail-should not be used in another year and therefore the decision of one year is not res judicata in another year.

But it is clear that even an erroneous decision of law in one suit would operate as res judicata in the subsequent litigation, provided the question arose as between the parties and it was substantially in issue between them. That this principle would extend to cases where the latter suit covers the subsequent years or faslis or not if the earlier case decides a matter of general principle it would be res judicata in later years.

An extract from the judgment of the Privy Council in Hoystead v. Commissioner of Taxation, for the proposition that the decision in the prior litigation would be res judicata

in subsequent suit for subsequent years is pertinent in this context:

"…… It is settled, first that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact, secondly the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigation, because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, another is abundant authority reiterating the principle.

A.I.R.1957 A.P.

Held that…

On a consideration of the authorities on the subject the following broad proposition can

be laid down in this regard. That in judging whether the decision in a previous litigation operates as res judicata or not, the test is whether it decided a general principle that is applicable to the later years also or whether it was peculiar or special to that particular year; in other words, whether the considerations vary from year to year or such as would govern the subsequent years also. In the decision of that question, it is also irrelevant whether the previous judgment was erroneous either in law or on fact.

(2004) 1 SCC 551-A: Rules of Res judicata nature of and rational for method to be followed in deciding question of Res judicata. Dispute in earlier suit relating to only part of property in dispute in later suit. Held a decision as to a specified part of property could not have necessary constituted Res judicata for the entire property in dispute in the later suit.

2. False suits.-

If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements he

cannot afterwards gain any advantage for those omissions of lies. He must be considered to be as much bound by the decisions as he would have been found by the decision if he put forward a true case and called all his evidence that was available. There can be no escape from the operation of the rule of res judicata.

A.I.R. 1925 Lah. 160.

Held that…

3. Finding in unnecessary suits how far constitutes res judicata.-

There is no warrant in law for the proposition that a finding given in a suit which is perhaps an entirely useless suit and need not have been instituted at all does not operate as res judicata in a subsequent suit relating to the same matter if the other requirements of law as laid down in Sec. 11 have been fulfilled. The usefulness or otherwise of a suit in a question which is entirely besides the point and a finding given in a suit which the plaintiff need not have instituted is as much res judicata as one given in a suit which he was bound to institute.

A.I.R. 1963 All.

Held that…

Decision on two alternative findings whether each one of them operates as res judicata.-The law is that when a court decides a case on two alternative findings, each one of them operates as res judicata and is a binding authority and that a trial court should decide all issues even though the findings on some of them are sufficient to enable it to decide the case one way or the other. The law, therefore, is not that a finding unnecessarily given is no finding; it may bind not only other courts but also the parties. It may be that a court should not give a gratuitous finding or a direction to the prejudice of a total stranger.

4. Suits instituted without authority and suits irregularly constituted.-

Suits instituted without the authority of the party will not operate as res judicata in a subsequently instituted suit with proper authority. Thus where though the judgment obtained by the plaintiff in a prior suit between the same parties instituted by the defendant’s agent though without authority to

do so and the lower appellate Court had found that the party was not responsible for the fraudulent act of his agent, will not constitute res judicata by itself, yet it will constitute a strong case in favour of plaintiff’s title and possession and it lies heavily on the defendant to displace it.

A.I.R. 1942 Pat.

Held that…

And the decision in a suit irregularly constituted is still a decision of a court with jurisdiction and if the Court has pronounced its decision and passed a decree against the party in the suit he must have the decree set aside by regular proceeding by way of appeal or otherwise.

A.I.R. 1929 Mad. 687.

Held that…

Similarly when plaintiff filed a suit claiming the land in suit in the first instance as lies separate property but in the course of the trial, he, however, made a distinct admission that the land was trust property. The Court recording the admission came to the conclusion that it was trust property and that both the plaintiff and the defendant were

jointly entitled to its management. It was held that although in form this was a suit between two private persons, it was in effect and substance a right claimed by the plaintiff on behalf of the trust on the one hand and the defendant on the other and the defendant was bound by that decision.

A.I.R. 1964 All. 64.

Held that…

5.Suits dismissed as premature.-

A suit dismissed as premature suit will not ordinarily operate as res judicata in a subsequent suit between the same parties inasmuch as there could be no decision of the questions involved in the former suit and hence no decision on merits of the case. Thus where a former title suit was dismissed as premature because the terms of the kabuliyat had not expired when that suit had been brought subsequent title suit was not barred by res judicata.

A.I.R. 1935 Lah.

Held that…

In order to create an effective bar of res judicata, a suit must have been finally heard

and decided and it cannot be said that a suit which is rightly dismissed on the ground that it is premature is so heard and decided.

AIR 1996 SC 2367 State of Maharashtra & another v/s National constitutional Company Bombay.

In this case supreme court held that the suit should be dismissed on technical ground of non-joinder of party. Without adjudicating on merits not covered under expression heard and finally decided. Such decision of suit would not operate as res judicata.

6. Withdrawal of suits without permission to file fresh suit.-

The basic principle of res judicata is that there should have been a final adjudication on merits. The case of a withdrawal of a previous suit without the permission of the Court to bring a fresh suit is analogous to a dismissal for default and in the latter case also as there is no decision on merits consequently there is res judicata.

A.I.R. 1939 Lah.

Held that…

In other words, where the plaintiffs abandon their claim, there is no trial of the issues arising between the parties and consequently there is no decision which can operate as res judicata. To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law, however, prescribes that the plaintiff shall not sue again on the same cause of action unless the suit is withdrawn owing to some technical defect., etc. and the permission of the Court is obtained under O. XXIII, r. l, C.P.C.

A.I.R. 1937 Mad.

Held that…

The result of such a withdrawal, therefore, is not to bring in the operation of the rule of res judicata embodied in Sec. 11, C.P.C., but only to entail the statutory penalty enacted in O. XXIII, r. 1, C.P.C., itself, namely, that no fresh suit can be instituted against those defendants on the same cause of action. Nor Explanation V to Sec. 11, C.P.C., can be invoked because it can only be invoked in respect of any adjudication made by the Court. Thus where the plaintiff, who in the

first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them without the permission of the Court, the rule of res judicata will not apply as there is no decision on merits but no fresh suit can be brought against these defendants on the same cause of action because of the bar of O. XXIII, r. l, C.P.C.

A.I.R. 1940 Oudh.

Held that…

Similarly wherein a suit brought by the zamindars against five defendants as “riyas” for demolition of certain constructions in the sehandarwaza of the defendants. The name of one of the defendants was removed from the array of defendants without taking permission of the Court under O. XXIII, r. l, C.P.C., to bring fresh suit against him. Held that the suit was brought to an end against him, and his subsequent re-impleading means bringing a new suit against him and the suit cannot, therefore, be decreed against him as no permission of the Court was obtained under O. XXIII, r. 1(2), C.P.C.

A.I.R. 1960 Mys. 178.

Held that…

7. Withdrawal of suits with permission to file fresh suit.-

When plaintiff brings a fresh suit after withdrawal of the first suit with permission of the Court to file a fresh suit the defendant cannot plead res judicata in the subsequent suit. It has been laid down by their Lordships of the Privy Council that where though a claim was included in the prior suit, but there was no judicial decision upon it, the claim had never been judicially considered or adjudicated upon between the parties, and all that happened was that the plaintiff elected not to proceed with that action for the purpose but to seek a judicial decision in other proceedings, the claim is not barred by res judicata as the judgment shows on its face no decision as regards that particular issue. The same principle will apply where permission to withdraw the suit with liberty to bring fresh suit, is given by an appellate Court. Thus were the defendant filed an appeal which was heard and the plaintiff-respondent applied for

permission to withdraw the suit with a right to bring a fresh suit regarding the same cause of action and the appellate Court passed an order allowing the application and allowed the appeal also. Subsequently, the plaintiff filed a suit on the same ground as previously and the defendant raised the plea of res judicata. It was held that though the order of appellate Court regarding withdrawal was irregular, it was not without jurisdiction. Consequently res judicata could not be pleaded on the ground of the decision of the appeal. The proper procedure in such a case would be for the appellate Court to set aside the decree of the trial Court, and then grant the permission to withdraw. Similarly it has been held by Full Bench of Madras High Court that an order allowing the plaintiff to withdraw his suit with liberty to bring fresh suit, made under O. XXIII, r. l, C.P.C., but under circumstances not within the scope of the rule cannot be treated as an order made without jurisdiction, such order is consequently not null and void. A fresh suit instituted upon leave so granted is not incompetent. The Court trying the subsequent suit is not competent to enter into

the question whether the Court which granted the plaintiff permission to bring a fresh suit had properly made such order. A Full Bench of the Patna High Court also took the same view and further observed that the order granting permission right or wrong is binding upon the parties until it is set aside by some process known to law in Chorder (e.g. appeal, revision or review) but not in a collateral trial proceeding or in subsequent suit.

A.I.R. 1930 Lah.

Held that…

A Full Bench of the Madras High Court unanimously held that it is open to an appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. In such a case where the appellate Court allows the suit to be withdrawn with liberty to file fresh suit the lower Court’s decree is wiped out and the subsequent suit is not barred as res judicata.

Even in the case of decree the suit is clearly barred by this principle

AIR 1996 SC 2252 Nirmaljit singh & others v/s Harnamgingh. In this case These three sons of

Boor Singh were parties to the reference to arbitration and where also defendants to the suit. The decree which has been passed in the terms of the award is binding on them. So long as the decree stands and has not been set a side, the decree is binding to the parties to it and can not be ignored. The contention that no notice of the filling of the award was served on the parties was not raised either in the plaint of before the trial court or before the first appellate court. This contention was raised for the first time in second appeal before the high court. The view of the supreme the high court was not right in coming to the conclusion that in the absence of the notice of the filling of the award. The decree in the terms of the award can be considered as non set and can be ignored so that it would not operate as res judicata.

A.I.R. 1958 Punj.

Held that…

Where a suit was allowed by the Court to be withdrawn on payment of cost and a second suit was filed without complying with the condition and the second suit was consequently

dismissed. Thereafter a third suit was filed after complying with the condition and the dismissal of second suit was set up as a bar of res judicata to the maintainability of third suit, it has been held by the Punjab High Court that the basic object of the procedural law was to facilitate determination of dispute on merits. The provisions of Civil Procedure Code debar a fresh suit in four cases, viz. Under O.II, r. 2, C.P.C., omission to sue or relinquishment of a part of claim; under O. IX, r.9, C.P.C., in case of abatement and under O. XXIII, r.l, C.P.C., withdrawal or abandonment without permission of the court to file fresh suit. Thus there is no specific provision in the Civil Procedure Code debarring a third suit after the dismissal of second suit for non-compliance with the terms of the permission. The dismissal of the suit for non-compliance with the conditions stands on the same footing as dismissal for non-compliance of provisions of Sec.80, C.P.C. or Sec.69 of the Partnership Act which amount to what is known as “non-suit” and such dismissal will not bar the right of the plaintiff to litigate the matter in fresh suit after complying with the condition, and as

there was no final decision of the case the principles of res judicata will not apply.

A.I.R. 1935 All.

A.I.R. 1938 Pat.

Held that…

8. Prior decisions.-

Two conflicting decisions on same issues- It is the settled law that on the principles underlying the plea of res judicata which aims at avoiding multiplicity of litigation and at securing finality of two conflicting decrees have been obtained by parties from two different courts or even from the same court, then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of res judicata does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of res judicata is not one which affects the jurisdiction of a court. It is a plea in bar and such a plea can be waived. Similarly when there are two conflicting decisions on an issue it was remarked by Malik, J., as he then was,

in Haji Mohd. Ubed Ullah Khan v. Kunnar Mohd. Abdul Falil Khan.

A.I.R. 1921 Mad.

Held that…

That it is the later decision that operates as res judicata. If the prior decision inter partes is either not cited in a later case where the same point arises or, if cited, is disregarded by the court which has jurisdiction to decide that point, it must be deemed that the plea of res judicata was either waived or that it was held that the previous decision was not binding and it is, therefore, the later decision that would be binding between the parties. The Madras High Court has also expressed the same view somewhat more emphatically in Sheshayya v. Venkatadri Appa Row, wherein it was held that in cases of judgments inter partes, the later adjudication should be taken as superseding the earlier, whether or not the earlier adjudication was pleaded as a bar to the trial of the later suit. The plea of res judicata may be waived by accident, mistake or intentionally. The maxim of competing estoppels or “estoppel against estoppel sets the matter at large” is not

applicable to estoppel by record. The same rule applies to two conflicting orders and the later order must prevail over the earlier order. Thus where there was a compromise between the 4th defendant and some of the judgment-debtors by which they were set free. The transferee of the decree applied for execution against these judgment-debtors also. Their objection was allowed. In a second application for execution against them also, they objected but their objection was lost in default. In a third application against them it was held that the objection of the judgment-debtors was barred by res judicata as the later of the two inconsistent orders must prevail. Even an ex parte decision in a previous suit will operate as res judicata in a subsequent suit.

9. Erroneous decisions.-

Whether an erroneous prior decision in prior suit operates an res judicata in a subsequent suit between the parties has been a highly controversial matter amongst the various High Courts in India. But all the authorities of various High Courts have agreed on the point that a decision on an issue of fact, howsoever

erroneous, is binding on the parties in a subsequent suit when the same question is directly and substantially in issue. Similarly the authorities of the various High Courts seem to have agreed that a finding on a mixed question of law and fact stands on the same footing as a decision on a question of fact and even an erroneous decision on a mixed question of law and fact is res judicata like the decision on a question of fact. The reason being that jurisdiction of a court is that power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. Correctness or otherwise of judicial decision has no bearing upon the question whether it does or does not operate as res judicata. A party taking the plea of res judicata has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided.

Now the controversy that arises amongst the various High Courts of India is with regards to prior decisions on an issue of law. Some of the High Courts have adopted the view that an erroneous decision on a point of law

would constitute res judicata as much as a correct decision on a question either of law or fact, which meant that there could be res judicata not only on a question of fact, a mixed question of law and fact, but also on a pure question of law on which the parties might be at dispute regarding the matter which was directly and substantially in issue in the two litigations.

Some of the High Courts have adopted the view that a decision on a question of law may be res judicata but an erroneous decision on a question of law cannot be allowed to operate as res judicata especially when the law has been altered; in the meantime, the decision in the earlier suit on a particular question of law would not operate as res judicata with regard to the same question in a subsequent suit. The above view is not justified by the weight of authorities to the contrary and the decision of the Supreme Court. Hence the above view is no longer a good law.

Another series of authorities of the various High Courts have affirmed the view of the lines of English decisions to the effect that a decision on an issue of law operates as

res judicata of the cause of action (more accurately matter directly and substantially in issue) in the subsequent suit is the same as in the former suit.

His Lordship Bhagwati, J., who delivered the judgment of the Supreme Court in Sundar Bai v. Devaji, S.C. Appeal No. 128 of 1951 (S.C.) reported in A.I.R. 1954 S.C. 82: 1953 S.C.J. 693 observed:

“Where the rights claimed in both suits is the same the subsequent suit would be barred by res judicata, though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred by res judicata even though the property was identical.”

Therefore, it is only when we have eadem question or the same question that the principle of res judicata can apply. But when the questions are different the decision in law with regard to one matter cannot operate as res judicata with regard to a different matter.

10. Appeal, meaning of.-

The word appeal has not been defined in the Code of Civil Procedure. According to Webster's Dictionary the first meaning in law of the word "appeal" is the removal of a cause or a suit from an inferior to a superior Judge or Court for re-examination or review. The explanation of the terms in Wharton's Law Lexicon which is only different in words, "is the removal of a cause from an inferior to a superior court" for the purpose of testing the soundness of the decrees of the inferior court. And in consonance with the broad meaning of the words "appellate jurisdiction" means the power of superior court to review the decrees of an inferior court. Here the two things which are required to constitute appellate jurisdiction are the existence of the relationship of the inferior and superior court and the power on the part of the former to review the decrees of the latter. This has been well put by Story: "The essential criterion of appellate jurisdiction is that it revives and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction,

therefore, implies that the subject-matter had already been instituted and acted upon by some other court whose judgment or proceedings are to be revised" (Section 1761, commentaries on the Constitution of the United States.)

1995 Supp.(4)SJC 286

P.M.A. Metropolitan v/s Moran Mar Marthoma in this case supreme court held that the appellate decision and not the trial court decision operate as res judicata.

A.I.R. 1932 P.C.

A.I.R. 1954 S.C.

Held that…

The phrase "when there has been an appeal" was construed by their Lordships of the Privy Council to mean that any application by a party to the appellate Court to set aside or revise a decree or order of a court subordinate there to is an appeal, even though it is irregular or incompetent or the person affected by the application to execute were not parties or it did not imperil the whole decree or order. Their Lordships refused to read into the words

any qualification either as to the character of the appeal or as to the parties to it.

The Supreme Court in Raja Kulkarani v. State of Bombay, has held that the word “appeal” must be construed in its plain and natural sense without the insertion of any qualifying words, e.g. valid or competent appeal.

Whether the appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to determine and this determination is only possible after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g. when it held to be barred by limitation or that it does not lie before that court or is concluded by finding of fact under Sec.100, C.P.C. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever it does not follow that there is no appeal pending before the court.

A.I.R.1917 Mad.

Held that…

11.Finality of decisions which are appealable.-

There can be no doubt that an appeal is only a continuation of the original proceedings the decree passed by the appellate court being the decree in the suit.

A.I.R. 1954 Mad.

A.I.R. 1957 A.P.

Held that…

A decision liable to appeal may be final until the appeal is preferred. But once the appeal is filed the decision loses its character of finality and what was once res judicata again becomes res sub-judice, that is, the matter under judicial enquiry. The appeal destroys the finality of the decision and it becomes a pending matter. As pointed out by Sir Lawrence Jenkins in Kailash Chandra Bose v. Girja Sundari Devi that a decree on appeal supersedes the decree passed under appeal and the decree of the court of first instance could not in the circumstances be pleaded as res judicata. In the same way their Lordships of the Privy Council have held that if there had been no appeal in the first suit the decision

of the Subordinate Judge would no doubt have given rise to the plea or res judicata. But the appeal destroys the finality of the decision. The judgment of the lower court is superseded by the judgment of the court of appeal.

In another case before the Privy Council in S.P.A. Annamalay Chetty v. B.A. Thornhill, the the appellant maintained that under this provision (C.P.C. of 1889, Sec.207 “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”) 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 respondents contended that such a decree was final between the parties and formed res judicata until it has been set aside the in appeal. Their Lordships affirmed that in their 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 judicata as between the parties. Their Lordships further expressed 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 expenses. A contrary view was expressed by Mahmood, J., in a Full Bench decision of the Allahabad High Court in Bal Krishna v. Kishan Lal, after quoting Pothier"… That judgments still liable to appeal stand, for the purpose of res judicata, on the same footing as provisional judgment and that the effect of such judgments are only momentary and ceases as soon as the appeal is made…" his Lordship remarked that such judgments are only provisional and are not definite adjudications.

A.I.R. 1917 Mad.

A.I.R. 1926 Rang. 122.

Held that…

They are only provisional, and not being final cannot operate as res judicata. The above view was adopted in Chengalavala Gurraju v. Madapathy Venkateswara Row Pantulu Garu. It is submitted that the above view is not sound, because the mere contingency or possibility that an appeal may be filed from the decision and the appeal court may upset the decision

does not affect the finality of the decision and it is too remote and too hypothetical.

A.I.R. 1949 Oudh.

A.I.R. 1938 Lah.

Held that…

Thus where merely an application for leave to appeal to Privy Council was pending in the High Court against the decision of the High Court and no leave had yet been granted. It was held that a mere application for leave does not render the decision sub-judice and the judgment of the High Court, therefore, cannot be regarded as merely provisional. Therefore when the judgment of a court of first insance is appealed against such judgment ceased to be res judicata and becomes res sub-judice and after decision by the appellate court it is appellate court’s judgment which takes the place of and supersedes the decision of the trial court and for purposes of applying the bar of res judicata the decision of the appellate court should be looked into and not that of the court of first instance. Where a judgment operating as res judicata in a subsequent case is pending in appeal, the matter is not res judicata in

appeal and the case should be disposed of on the merits.

A.I.R. 1931 P.C.

A.I.R. 1936 Pat.

Held that…

It is true that a decree cannot operate as res judicata during the time an appeal is pending. However, when the appeal is dismissed, whatever the grounds, the decree appealed from becomes operative and would bind the parties.

A.I.R. 1960 M.P. 222(D.B.)

Held that…

-S. 11 and Or. 23 R. 1- Res judicata-Withdrawal of suit at appellate stage with liberty to file fresh suit on the same cause of action-Held, a judgment given in suit which has been permitted to be withdrawn with liberty to file a fresh suit on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to permission of the court, (2004) 1 SCC 471-A

Now the appellate judgment operates as res judicata as regards all findings of the lower

court, which though not referred to in it, are necessary to make the appellate decree possible on such findings.

A.I.R. 1932 All.

A.I.R. 1947 Oudh 74 (D.B.)

A.I.R. 1931 Sind 170 (D.B.)

Held that…

But where the appeal is not decided on merits but is dismissed on some technical grounds the result is the same as if no appeal had been filed at all and, therefore, no decision of the question by the appellate court and no modification of the decree of the first court which consequently became final as between the parties on each point actually decided by it. Thus where the appeal is not decided on merits, but abates or where the appeal has been held to be defective by reason of the absence of the necessary parties or where the appeal was withdrawn or where the appeal is dismissed for default due to non-appearance of appellant there is no decision on merits of the appeal. But to support the plea of res judicata, besides the parties and the matter in issue being the same, the matter in

issue must have been heard and finally decided. If there is an appeal it destroys the finality of the decision of the lower court and if the ultimate court of appeal dismisses the suit as badly framed the merits of the case are not res judicata.

A.I.R. 1925 Cal.

A.I.R. 1926 Cal.

A.I.R 1946 All.

A.I.R. 1934 Cal.

Held that…

The same rule would apply where the appellate court for any reason does not decide or declines to decide a point decided by the trial court and disposes of the appeal on some other grounds the matter or point so left undecided does not operate as res judicata. The appellate court whose decision is the test by which question of res judicata is to be determined has on the materials before it ample authority to dispose of the appeal on one of the grounds on which the decision of the trial court was founded and to leave open and undecided the other issue in the case, and in such circumstances as was observed by their

Lordships of the Privy Council in Parshotam Gir v. Narbada Gir it would be contradiction in terms to say that the appellate court had finally decided the issue though in fact the issue was left untouched and undecided.

A.I.R. 1925 All. 243.

A.I.R. 1921 Mad. 21 (F.B.)

Held that…

Thus where the decision of the previous suit proceeded in the first court both on the question of possession and title but the decision of the appellate court was confined to the question of possession and title but the decision of the appellate court was confined to the question of title alone, it was held that there was no res judicata regarding the question of possession. Before the Full Bench of the Madras High Court in Maruvada Venkataratnama v. Maruvada Krishnama where the suit was for declaration of a will to be a forgery the question of its operating as an authority to adopt was also raised and determined by the lower court but the High Court although both the questions were raised before it only decided on the genuineness of

the will. The Full Bench relying on two Privy Council decisions in Sheo Sagar Singh v. Sita Ram Singh, Abdulla Ashgar Ali Khan v. Ganesh Dass.

A.I.R. 1926 Cal. 163.

Held that…

Held that the question as to the will being operative, as an authority to adopt was not barred by res judicata in a subsequent suit. It was further held that as the matter was made the ground of attack in the trial court and was raised in the appellate court, there was no ground for the applicability of the doctrine of constructive res judicata enunciated in Explanation IV to Sec.11, C.P.C., that a mere ground of attack relating to the main relief should not be regarded as a separate relief, and the refusal to entertain a ground which related to the relief which was adjudicated upon by the judgment, cannot be regarded as a refusal of relief. Therefore the constructive res judicata referred to in Explanation IV to Sec. 11, C.P.C., has also no application in the present case. Similarly where in a previous suit for ejectment between the same parties the

Munsif who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground the of its being instituted before the expiry of the agriculture year in which the defendants predecessor died. On appeal that decree of dismissal was affirmed on the second ground, it was held that the decision of first court on the first issue would not operate as res judicata in a subsequent suit for ejectment.

A.I.R. 1930 Lah.

A.I.R. 1924 All.

Held that…

It is open to an appellate court in proper cases when reversing the decree of the lower court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. In such a case where the appellate court allows the suit to be withdrawn with liberty to file fresh suit, the lower court’s decree is wiped out and the subsequent suit is not barred as res judicata.

A.I.R. 1949 (P.C.) 239.

Held that…

12. Finality of appealable decision-No appeal preferred-Wrong decision by court-Revision lies.-

Once the plaintiff neglected to take remedy of appeal provided to him against the decision as to jurisdiction became res judicata and final just as much as any other unchallenged decision will become final.

In a subsequent suit on identical facts he court was bound to consider the plea of res judicata and if the court has refused to accept the plea of res judicata, the statutory prohibitions of Sec. 11, C.P.C., even if do not amount to deprivation of jurisdiction but are only prohibitions of Sec. 11 of the Code would amount to actions revisable by the High Court under Sec. 115 of the Code of Civil Procedure.

Their Lordships of the Privy Council have clearly laid down in Joy Chand Lal v. Kamalaksha, the correct principles for the exercise of revisional powers by the High Courts in India in the following words:

A.I.R. 1927 All. 358.

Held that…

"There have been a very large number of decisions of Indian High Courts on Sec. 115 (Civil Procedure Code) to many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court had acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-sections (a) and (b) and sub-section (c) can be ignored. The case of Babu Ram v. Munna Lal and Hari Bhikaji v. Naro Vishvanath may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous; that is, in the view of the High Court), in the one case of limitation and in the other on a question of res judicata, invested itself with jurisdiction which in law it did not posses and the High Court held, wrongly their Lordships think, that it had no

power to interfere in revision to prevent such a result.”

A.I.R. 1952 Punj.

Held that…

Discretion under Sec. 115, C.P.C., must be exercised by the High Court against a person who has neglected or refused to take his proper remedies. When he has allowed a decision to become final he cannot be heard to say that it should not be final. –S. 11 –Res judicata-Finality of last order-where appeal, revision and then writ petition of appellant challenging assessment order under Central Excise Act had been dismissed on ground of delay and appellant did not file SLP against dismissal of writ petition, held, assessment had.

A.I.R. 1922 P.C. 241.

Held that…

13. Adverse finding-Where no appeal possible whether res judicata.-

A party, for instance, an appellant having succeeded in appeal could not have preferred

any further appeal for challenging an adverse finding contained in the judgment. The adverse finding in such judgment cannot operate as res judicata in a subsequent suit or proceeding between the same parties. Their Lordships of the Privy Council in the well-known case in Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy, have observed at page 467:

A.I.R. 1944 Nag.
A.I.R. 1952 Nag.
A.I.R. 1954 J.& K.
A.I.R. 1938 Oudh.
A.I.R. 1949 Pat.
A.I.R. 1953 Mys.
A.I.R. 1955 A.P.
A.I.R. 1956 Nag.
A.I.R. 1960 A.P. 168.
Held that…

“Their Lordships do not consider that this will found an actual plea of res judicata for the defendants, having succeeded on other plea had no occasion to go further as to the finding against them.”

It has often been tried to establish that where a plaintiff’s suit is dismissed but

certain issues are decided adversely to the defendant and in view of the fact that on some points the court has decided against the defendant the decree was not in conformity with the judgment and this by itself gave the defendant a right of appeal from the decree. The matter came up before a Full Bench of five Judges of the Allahabad High Court and the majority view (Oilfield and Mahmood, JJ., dissenting) observed in following words:

"We find that the decree before us is, on the face of it entirely in favour of the defendants and the proper presumption is that it has been correctly prepared in advertence to the judgment. The mode in which this presumption would have been rebutted and the decree set right is provided in Sec. 206 of the Code (review of judgment) and we do not think that any other mode that directly created by statute for bringing the decree into conformity with the judgment exists, and that until it appears from the face of the decree that something has been decreed, adversely to the defendant, no right of appeal arises, because there is nothing in the decree itself for him to appeal against."

A.I.R. 1952 Pepsu 76 (D.B.)

Held that…

Thus it is clear that there is no right of appeal against the adverse finding contained in any judgment.

A contrary view, however, has been taken by the Pepsu High Court which has held that where there was no right of appeal against the adverse finding except on question of cost of the suit, and the decision of the appellate court on points which he could not properly decide would only amount to an irregularity. Conditions would have been quite different if no appeal lay to him at all because in that case the entire proceedings of the appeal before him would have been vitiated by total want of jurisdiction and the judgment would therefore be void. But where a court has jurisdiction to entertain an appeal and if he has committed any mistake or irregularity in deciding it that does not make his judgment void. The judgment of the trial court merges in that of the appellate court and the decision of the appellate court operates as res judicata.

The High Court, however, allowed the appeal on other ground also on the assumption

that even if there was no right of appeal that on appreciation of the evidence on record the finding of the lower appellate court could not be supported.

It is submitted that the principle of law enunciated above is not sound.

A.I.R. 1930 All.112.
Held that…

14. Order rejecting memo. Of appeal.-

Where a memorandum of appeal is presented in court by any unauthorized person, it is no appeal at all and the court may reject it for that obvious defect, but the court is not justified in treating it as an appeal in due form and rejecting the same as statute barred. Thus an order of rejection of a memorandum of appeal which had been presented by a Vakil not properly authorised according to law cannot operate as res judicata in a subsequent proceeding in which an appeal has been filed in proper form but beyond time. There was not and there could not be any question of res judicata before the court and the only question which

required consideration was whether prayer for extension of time was to be granted or refused.
A.I.R. 1952 Nag. 238(D.B.)
Held that…

15. Abatement of suit or appeal under O. XXII, rr. 3 to 4, C.P.C.-

The failure of the appellant in an appeal or plaintiff in a suit to bring on record the legal representatives of a deceased party results in abatement of the appeal or suit, as the case may be.

The provisions of abatement of suits under O.XXII, rr. 3 to 4 and 11, C.P.C., are as under:

“Order XXII, rule 3,C.P.C.-(1)Where one of two or more plaintiff dies and the right to sue does not survive to the surviving plaintiff or plaintiff alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representatives of the deceased-plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the

suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the cost which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

"Order XXII, rule 4,C.P.C.-(1)Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right to sue survives, the court on an application made in that behalf shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant."

"Order XXII, rule C.P.C.-In application of this order to appeals, so far as may be the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

Now the only question remains whether the abatement is of the whole appeal or suit or of a part of the appeal or suit, in so far as the interest of the deceased party (plaintiffs or defendants or appellants or respondents, as the case may be) are concerned. It is not possible to lay down any general rule which may be of universal application and each case must be decided on its own facts. The following underlying principles are, however, helpful in judging the above question:

(1) If a decree can be passed and given effect to in so far the rights of the parties actually before the court are concerned, without interfering with the interests of others, then the suit or appeal can continue, if not, it abates as a whole.

(2) The court must see that it does not pass a decree, which it may find itself incapable of executing owing to the circumstances that the lower court’s decree in favour of the deceased party has become final in consequence of the partial abatement of the appeal against him.

A.I.R. 1927 Lah.

Held that…

16. Two suits tried together on the same matter, appeal in one if barred if no appeal in the other.-

There is a conflict of decisions as to whether where the matter in issue in two suits was the same and the suits were tried together on the same evidence and disposed of by the same Judge, [and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is barred by res judicata by reasons of the fact that no appeal was filed against the other decree.] The leading Full Bench decision of the Lahore High Court in Mst. Lachhmi v. Mst. Bhulli, wherein it was suggested that if the appeal is allowed to proceed and is successful an anomalous and embarrassing situation of having two inconsistent decrees on the record of the Court might be created by reason of the other decree having become final as no appeal was filed against the other decree.

A.I.R. 1926 Mad.

A.I.R. 1943 Mad.

Held that…

It was held in the above decision that res judicata is either estoppel and verdict or estoppel by judgment (or record) and apart from this there is no estoppel by “decree”. The determining factor is not the decree but the decision of the matter in controversy. While recognising the weight and justice of the maxim that no one shall be vexed twice over the same matter. The condition precedent to the applicability of the rule is that a cause must have been at one time fairly and finally tried in a proceeding separate and district from the dispute in which the issue is raised again. Thus where two suits having a common issue, are by consent of the parties or by order of the court, tried together the evidence being written in one record and both suits disposed of by a single judgment, there being but one finding and one judgment, on what principle can the hearing of the appeal in which this finding and this judgment are under consideration be barred merely because no appeal has been filed

in the connected suit which was disposed of by that very judgment.

Their Lordships answered that there has been in substance as well as in form but one trial and one verdict and it will be a travesty of justice to stifle the hearing of the appeal against such a judgment on the ground that the findings contained in it operate as res judicata.

The party must have at least one fair trial of the issue resulting in a decision by the court of ultimate appeal as allowed by law for the time being in force. As such there can be no question of applicability of the principles of res judicata the two decrees in substance are one.

The contrary view in the judicial decision of certain High Courts is based on the reasoning that two or more decrees could not challenge by one appeal and the unappealed decree had become final and thus being prior in time operate as res judicata to the continuation of the decree appealed against, on the ground that if the appeal is allowed to proceed and is successful an anomolous and embarrassing situation of having two

inconsistent and contradictory decrees on the record of the court might be created. The Madras High Court is whole-heartedly in favour of the right to proceed. The Allahabad High Court has held different view at different times, but the tendency of the latest decisions is in favour of the right to proceed.

The Allahabad High Court has held different view at different times, but the tendency of the latest decisions is in favour of the right to proceed. In the Calcutta High Court the opinion of the majority in Mariam Nissa v. Joynab Bibi, is in favour of the right to proceed. Subsequent decision of the Division Benches have, however, taken the contrary view. The High Courts of Patna and Rangoon have followed the earlier decisions of the Allahabad High Court but these decisions are no longer considered to be authoritative in that Court itself. In the Punjab the rulings are not uniform, but the tendency of the latest decisions is in favour of the right to proceed. There is a conflict in the authorities of Oudh Court also, but in recent cases apparently the view taken in the five Judges decision of the Allahabad High Court in Ghansham Singh v. Bhola

Singh, was approved. The Nagpur High Court has taken the view in favour of right to proceed. Where two suits are tried together and appeals are preferred from both but one of the appeals abates, the decision in the case the appeal from which has abated does not operate as res judicata. The controversy has been set at rest by the Supreme Court in Shankar v. Narhari, their Lordships of the Supreme Court while approving the judgment in Mst. Lachhmi v. Mst. Bhulli, have held that the question of res judicata arises when there are two suits. Even when there are two suits a decision given simultaneously cannot be a decision in the former suit when there is only one suit, the question of res judicata does not arise at all and where the decrees are in the same case and based on the same judgment and the matter decided concern the entire suit, there is no question of the application of the principle of res judicata.

A.I.R. 1956 Orissa 68 (D.B.)

A.I.R. 1953 S.C.

A.I.R. 1953 S.C.

A.I.R. 1962 S.C.

A.I.R. 1953 S.C.

Held that…

The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one.

After the pronouncement of the above decision by the Supreme Court all the High Courts in India, except the Orissa High Court, have followed the rule of law laid down in Shankar v. Narhari referred to above.

The Orissa High Court in Suni Devi v. Pranakrishna, has observed in this regard in the following terms:

> "Had this decision been a decision of the Supreme Court of India the matter would have been taken as finally settled. But as is seen from the report, it is not a decision of the Supreme Court of India but a decision of the Supreme Court of Hyderabad which in consequence of the merger of Hyderabad and for the necessity for the disposal of the appeal pending in the Supreme Court of Hyderabad is a court consisting of two Judges of the Hyderabad

Supreme Court and one Judge of the Supreme Court of India, Mahajan,J.”

It is submitted that the view of the Orissa High Court that the decision in Shankar v. Narhari is the decision of the Supreme Court of Hyderabad and not a decision of the Supreme Court of India is misconceived. From a persual of the above judgment it is clear that the said judgment was pronounced in accordance with Art. 374(4) of the Constitution of India which provides as under:

“On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council is a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.”

The aforesaid decision was pronounced by the Supreme Court on 13th October,1950, after the commencement of the Constitution on 26th January,1950 and hence there can be no room for

doubt that the aforesaid decision is not the decision of the Supreme Court of India. It appears that this fact was not brought to the notice of the learned Judges of the Orissa High Court. Moreover, now there is no longer any room for doubt as in the latest decision of the Supreme Court in Badri Narayan v. Kamdev Prasad, his Lordship Raghubar Dayal, J., who delivered the judgment of the Court has affirmed in clear and unequivocal terms that the decision in Shankar v. Narhari is the decision of the Supreme Court of India.

17. Two appellate decrees in similar terms, appeal from one if barred if no appeal from the other.-

Similarly, there is a conflict of case-law on the point whether where there have been two decrees passed by the Lower Appellate Court, and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, and a second appeal is filed against one decree only, the decision, which has been allowed to become final, operates as

res judicata in respect of the second appeal or not.

A.I.R. 1956 Pat. 87.

Held that…

In some cases, it has been held to operate as res judicata, and in others not to so operate. But it has been held by a Full Bench of the Allahabad High Court that when it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant, in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred by the rule of res judicata, or at all, by reason of his failure to appeal from the decree which does not prejudice him.

A.I.R. 1928 All.

A.I.R. 1925 All.

A.I.R. 1927 All.

A.I.R. 1927 Oudh.

A.I.R. 1927 Lah.

A.I.R. 1953 S.C.

Held that…

The same view seems to have been consistently maintained in recent cases. Now the controversy has been set at rest by the decision of the Supreme Court in Shankar v. Narhari which is in favour of the right to proceed.

18. Finality of interlocutory order.-

The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

Does this, however, mean that because at an earlier stage of the litigation a court decided an interlocutory matter in one way and no appeal had been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter.

Dealing the question almost a century ago the Privy Council in Maharaja Moheshwar Singh v. Bengal Government, held that it is open to the appellate court which had not earlier considered the matter to investigate in an appeal from the final decision grievances of a party in respect of an interlocutory order. The following observations of their Lordships of the Privy Council may be quoted with advantage:

"We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suit or to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suit the necessity of so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other

inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought by appeal for adjudication."

The above view was re-affirmed by the Privy Council in Forbes v. Ameeroonissa Begum and Sheonath v. Ramnath.

A.I.R. 1960 S.C.941.

Held that…

There can be no doubt about the salutary effect of the rule laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a court has decided the matter it is final as regards that court. Should it always be regarded as final at later stages of the

proceeding in a higher court, which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred? The effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior court, will put on every litigant against whom an interlocutory order is decided the burden of running to higher courts for the redress of the grievances even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation the other party to the litigation would also generally suffer by such repeated recourse to higher courts in respect of every interlocutory order alleged to have been wrongly made. It is in the recognition of the importance of preventing this that the Legislature included a specific section in the Civil Procedure Code, viz. Sec. 105, C.P.C., which runs thus:

“(1) Save as otherwise expressly provided, no appeal shall lie from any order made by

court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1) where any party aggrieved by one order of remand made after commencement of the Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Therefore, the Legislature has clearly provided that in an appeal from a decree it will be open to a party to challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case. The only exception is provided by sub-section (2) of the above section which precludes any party from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand wherever such appeal from an order of remand is provided under the law.

Das Gupta, J., who delivered the judgment of the Supreme Court in Satya Dhan v. Deorajin Debi, approving the above Privy Council decisions has laid down in nut-shell the following principles for the applicability of the doctrine of res judicata in respect of interlocutory orders:

"It is clear, therefore, that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision, if however, an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second sub-section of Sec. 105, C.P.C., did not apply to the Privy Council and can have no application to appeal to the Supreme Court one reason being that no appeal lay to the Privy

Council or lies to the Supreme Court against an order of remand.”

A.I.R. 1921 P.C. 11.

A.I.R. 1960 Pat. 418.

Held that…

But the interlocutory orders which have the force of a decree must be distinguished from other interlocutory orders which are a step towards the decision of the dispute between the parties by way of a decree or a final order. Therefore, the case of execution of decree stands on a different footing. The decision of a dispute as regards execution it is hardly necessary to mention is a decree under the Civil Procedure Code and a decision in execution proceeding being a decree really terminates the previous proceedings. The execution proceeding though in form is a continuation of the previous proceeding, it is in substance an independent subsequent proceeding. Therefore, the test applied in these cases of interlocutory judgment is whether the judgment terminates the proceeding leading up to a decree or final order such judgment if not appealed against operate as a

bar of res judicata. And if the interlocutory judgment which does not terminate the proceeding leading a decree or final order no bar of res judicata can be attracted. Thus the leading case of the Privy Council on the point where their Lordships of the Privy Council in Ram Kripal Shukul v. Rup Kuari, disagreeing with the Full Bench of the High Court held that the principle of res judicata applied to execution proceedings and the order of Mr.Probyn, the District Judge who had earlier decided in execution of decree that the decree did award mesne profits had never been reversed or set aside and it was immaterial that no second appeal lie to High Court for if no second appeal did lie the judgment was final and if an appeal did lie and none was preferred the judgment was equally binding upon the parties and the High Court as well as the Privy Council were bound to uphold the order of Mr. Probyn. The above case of Ram Kripal was followed by the Privy Council in Bani Ram v. Nanhu Mal, which also related to an order made in execution proceedings. It was again followed by the Privy Council in Hook v. Administrator General of Bengal. But where the High Court has

remanded a case to the lower court under its inherent powers the matter finally disposed of by the order of remand cannot be re-opened when the case comes back to the lower court.

A.I.R. 1953 S.C.
A.I.R. 1922 P.C. 253.
Held that…

19. Miscellaneous proceedings-Decision in a proceeding for letters of administration or administrative suit and succession certificate proceedings.-

Their Lordships of the Supreme Court in Smt. Raj Laxmi Dasi v. Banamali Sen, have held that a plea of res judicata on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction like revenue courts, land acquisition courts, administration courts, etc. It is obvious that these courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statue. Where the will of a Hindu testatrix addressed to her grandson directed

that out of the income of specific property, he should perform the worship of the family idols but there was no provision for the worship of the idols after the death of the grandson and the balance of the income was to be divided between the representatives of the three branches of her own family. Administration proceedings were taken on the death of the grandson and it was decided that out of the produce of the house belonging to the estate of the testatrix the worship of the idols be performed and that the surplus be paid equally to the three branches of the family and a decree was adopted accordingly. It was held by the Privy Council that the order in the administration suit was binding on all the parties and operated as res judicata.

A.I.R. 1932 Cal.

A.I.R. 1921 L.B.22.

Held that…

Similarly where a decision made in a proceeding for Letters of Administration, which was contested in its progress, stated that a person was a particular relation of the deceased and as such was the nearest heir, it was held that

the decision would be binding upon those claiming through the party who contested the relationship in the administration case. In an administration suit between the parties if it is found that plaintiffs claim against the administrator for a share in the estate is barred by limitation the determination of that issue is res judicata; as regards an application by the same plaintiff for a revocation of the grant of Letters of Administration a decree obtained and executed against the former administrator, in whom the aggregate of rights and obligations of the deceased were vested as legal representatives of the estate, is binding upon his successor so long as the decree and the sale consequent upon it were not the result of fraud or collusin. But where an administration suit a decree declaring the shares of the heirs to the estate, the amount of the funeral expenses and the costs to be paid was passed and it being a declaratory decree only was not capable of execution and another suit praying that the shares declared by the previous decree be distributed is not barred by res judicata.

There has been a controversy whether the probate proceedings are in the form of suit and Sec. 11, C.P.C., is applicable for the purposes of res judicata or the doctrine of res judicata is applicable on the general principles of res judicata apart from the limited provisions of the Code.

The Bombay High Court took the view that contentious probate proceedings being required to be in the form of a suit under Sec. 83 of Probate and Administration Act they constitute a suit under Sec. 11,C.P.C. and a finding by a probate court in such proceedings though not a judgment operates as res judicata between the parties thereto.

A.I.R. 1924 Mad.
A.I.R. 1930 Oudh 29.
A.I.R. 1930 P.C.
A.I.R. 1953 S.C.
Held that…

While other High Courts took a contrary view and held that probate proceedings were not in the form of suit but the doctrine of res judicata applied to such proceedings on the general provisions apart from the limited

provisions of the Code. However, the privy Council settled the controversy in Kalipada Dev. Dwijapada Das, by laying down that the terms of Sec. 11, C.P.C., are not to be regarded exhaustive. The binding force of a judgment in probate proceedings depends not upon Sec. 11, C.P.C., but upon the general principles of law. The rule of res judicata may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as is expounded by the learned Hindu commentators. The application of the rule of res judicata, therefore, by the courts in India should be influened by no technical considerations of form but by matter of substance within the limits allowed by law. The decision of the Supreme Court in Smt. Raj Laxmi Dasi v. Banamali Sen has reaffirmed the above view of the Privy Council.

A.I.R. 1930 P.C.

A.I.R. 1927 Cal.

A.I.R. 1936 Rang.

Held that…

Thus where a question of relationship of parties had been decided in a previous probate

proceeding, a subsequent suit between the same parties involving the same question is barred by res judicata.

A.I.R. 1924 Mad.

A.I.R. 1932 Cal.

Held that…

Any decision after contest in a probate proceeding is res judicata in any subsequent proceeding of any sort against the caveators who contested it. On general principles of the Probate and Administration Act grant of probate by a competent court is binding on all the contesting parties unless good cause under Sec. 50 of the said Act is made out to revoke or annul the grant of probate of Letters of Administration.

A.I.R. 1925 Mad.861.

A.I.R. 1938 Rang.

Held that…

But where an application for probate by a legatee has been dismissed for default, the legatee heirs can nevertheless plead the existence of the will as a defence to a suit

for the property which they claim as belonging to them under the will. Similarly the grant of Probate after caveat by the heirs will not be res judicata in a subsequent suit by the heirs of a Mohammedan testatrix, claiming adversely to the will, against the beneficiary of the will where the issue to be tried in the suit is not only the testamentary capacity of the testator, but also whether she was aware of the invalidity of a release which the meant to confirm by means of the will. In the same way an incidental or unnecessary finding will not operate as res judicata in a subsequent suit. Thus where in a suit for Letters of Administration, an order while affirming the claimant A's status as the legal son of the deceased which was in dispute, also incidentally contained a finding that the rival claimant M was a legal wife and heir of the deceased. The finding went on the principle that the claimant A was entitled to fourteen annas share in the property, whereas the rival claimant M was only entitled to a two annas share and, therefore, the former had better claim to letters of administration. It was held that the finding as to the rival claimant's

status was unnecessary, it could not be said to have been heard and finally decided or be res judicata in a subsequent suit for a share of inheritance by the rival claimant M against A.

A.I.R. 1955 Bom.

Held that…

A decision as to the proof the will given by any civil court cannot operate as res judicata in probate proceedings taken out in the Probate Court. The Civil Court is concerned with deciding the rights between the parties. A Probate Court is a court of conscience and it has to deliver a judgment which would become a judgment in rem and will bind not only the parties before it but the whole world. Therefore, a probate court is a court of exclusive jurisdiction on probate matters. The Civil Court dealing with the same question deciding the same issue cannot pass a judgment which would bind the world and would constitute a judgment in rem. The decision of civil court cannot bind the probate court. The probate court must apply its own mind and must satisfy its own conscience as to the execution of the document and as to the testamentary capacity of

the deceased and the satisfaction cannot be influenced or effected by any civil court.

A.I.R. 1923 Rang.

Held that…

In proceedings for letters of administration where findings are recorded after taking evidence at length like a regular suit and it is found that the rival claimant was not the legitimate daughter of the deceased. The findings in such proceedings will bar a subsequent suit for declaration claiming as an heir of the deceased.

A.I.R. 1929 Oudh 29.

Held that…

Similarly where a legatee under a will who applies for grant of letters of administration and is opposed by a party as an heir of the deceased on the ground that the will was a forgery and the court decides after contest in favour of the will being genuine and grants the letter of administration it is not open to question the genuineness of the will in a subsequent litigation between the legatee and the heir. But in an application for Letter sof Administration where a person has been declared

as a fit person for the grant of Letters of Administration such a decision will not operate as res judicata in a subsequent suit for possession of the property as an heir by the defeated applicant.

A.I.R. 1924 Lah.

A.I.R. 1925 Mad.

A.I.R. 1936 Pesh.

Held that…

Decisions under the Succession Certificate Act, Sec. 25, upon any question of right between the parties are not res judicata. Thus where in a previous case, an application by an adopted son for succession certificate was dismissed by the lower court on the ground that there was no valid authority to adopt and no valid taking in adoption. The decision was confirmed by the High Court on the ground that no inquiry need be held in miscellaneous petitions into intricate questions of law and fact. It was held that there was no final adjudication on the validity of adoption and the question was not res judiata. But the finding of a court under the Succession Act with regard to the genuineness or otherwise of

a will was held to be conclusive to attract the bar of res judicata against the parties affected therein.

A.I.R. 1960 Cal. 146 (D.B.)
Held that…

20. Arbitration proceedings.-

Where the question whether contracts Nos. 938 and 947 had any arbitration clause or not was put in issue before the Master of Roll in the Court of London and he was apparently satisfied that all the contracts did contain the arbitration clause and on that basis he proceeded to appoint the Umpire. The parties having agitated that question in a previous proceeding and the issue having been decided, whether rightly or wrongly by the foreign court, the appellant was held to be precluded from reagitating the issue before Indian Court on principles of res judicata. No appeal having been preferred from the decision of Master in Court although an appeal lay to the Divisional Court.

The rule is now well settled that the arbitrators must observe the first principles

of the justice, be the arbitration commercial or of any other kind. Though in tending no injustice they must observe fundamental rules which govern judicial proceedings. In the following cases it has been held that the procedure followed by the arbitrators was deemed to be an illegality.

A.I.R. 1953 S.C. 21.

Held that…

In Harvey v. Shelton, it was remarked: “It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge which means are not known to and capable of being that and resisted by the other party. It is contrary to every principle to allow such a thing and I wholly deny the difference between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard and each in presence of the other. In every case in which matters are litigated you must attend to the

representations made on both sides, and you must not in the administration of justice in whatever form, whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side. In this case interviews between the arbitrator and one party rendered the award invalid.” The above passage was approved by the Supreme Court in the case of P. Vengamma v. P. Kesanna. In re Gregson and Armstrong, where after the close of evidence the arbitrator held a meeting and received some information in the absence of one of the parties, the award was set aside. In Ramsden & Co., Ltd. v. Jacobs, Bray, J., held that whatever might be the practice, the procedure of hearing evidence of one party in the absence of the other was absolutely wrong and the award was set aside.

A.I.R. 1953 S.C. 21.

Held that…

In Fuerst Bros. & Co. v. Stephenson, the Umpire in a commercial arbitration, after he had

finished hearing the arbitrators approached one of them and asked him for further information, which was given it being left to that arbitrator to tell the others what was going on. The Court set aside the award holding that the alleged practice would not justify what was done. It is immaterial if the arbitrator or Umpire swears an affidavit that information obtained by him ex parte has not influenced his mind one way or the other or has not resulted in any prejudice.

A.I.R. 1958 Pat.

A.I.R. 1964 Cal.

Held that…

Where the partition suit was decided upon an award given by the arbitrators and a decree was granted in pursuance of the award. Held that it is well established that a decree passed on an award is also conclusive as res judicata between the parties.

A.I.R. 1961 Assam 148 (D.B.)

Held that…

But a court, before which an application under Sec.14 of Indian Arbitration Act is filed

for making the award a rule of the court and pass a decree on the basis of the award, holds that it was no jurisdiction to entertain the application for filing the award, it is not necessary for the Court to give decision on other issues. Any decision by the Court on the other issues cannot be binding on any proper court which may entitled to entertain the application.

21. Decisions under the Land Acquisition Act whether operate as res judicata.-

A decision in a proceeding under the Land Acquisition Act cannot be treated as a decision in a former suit so as to operate as res judicata with reference to the property other than that to which the enquiry under that Act related. On a similar principle a decision by a Judge under the Land Acquisition Act on a question of title does not operate as res judicata in a subsequent suit between the parties. But where a patnidar though a party to a reference omits to make a claim at the time of the apportionment of the compensation a subsequent suit to recover portion of the compensation in a Civil Court is barred.

A.I.R. 1922 P.C. 80.

Held that…

So also where in certain land acquisition proceeding a dispute arose as to the apportionment of compensation between two rival claimants and the dispute is decided by the Court on the construction of the term of a gift deed in which the land acquired was included, that decision operates as res judicata as between those parties or their representatives not only with reference to the extent of the money but with reference to other property convered under such title in a subsequent suit between the parties though not by reason of this section but by reason of general principles of res judicata.

A.I.R. 1961 Ker.

Held that…

The land acquisition proceedings recognizing the defendant’s position as a tenant in respect of the 33 cents and 33 cents alone which was the subject-matter of the land acquisition proceedings, will certainly be binding on parties. But such a decision will

not operate as res judicata in respect of other properties, which were not the subject matter of land acquisition proceedings.

A.I.R. 1936 Pesh.

Held that…

Persons who have not come before the Collector or the Acquisition Judge are at liberty to controvent the award of the Collector in a suit and to prove that they were the lawful owners of the property, and therefore, there were the persons who were entitled to recover the amount of compensation awarded for it.

A.I.R. 1953 S.C.

Held that…

It has been held by the Supreme Court in Raj Lakshmi Dasi v. Banamali Sen, that the Land Acquisition Court had jurisdiction to decide the question of title of the parties in the property acquired and that title could be decided by deciding the controversy between the parties about the ownership of the four-anna share claimed by S and R. The question of title to the four-anna share was necessary and substantially involved in the land acquisition

proceedings and was finally decided by a Court having jurisdiction to try it and that decision thus operated as res judicata and estopped S and the mortgagees from reagitating that matter in the subsequent suit.

22. Insolvency proceedings.-

A decision on merits in an insolvency matter operates as res judicata between the parties. Thus where a stranger to the bankruptcy whose property is wrongfully seized by the receiver applies under Sec.22 of the Insolvency Act and his application is dismissed on mertis he cannot begin again and raise the same issue in a civil court.

A.I.R. 1921 Mad.

A.I.R. 1963 Orissa.

Held that…

Similarly it has been held that decision under Sec.7 of the Presidency Towns Insolvency Act is res judicata.

A.I.R. 1933 Mad.

Held that…

In insolvency proceedings the Official Receiver represents the general body of creditors. Where the Official Receiver applied to set aside a sale by the insolvent as a fraudulent preference and it was held that there was no fraudulent preference and the High Court held on second appeal that the order was not one made under Sec.4 of the Provincial Insolvency Act. Subsequently a creditor applied under Sec.4 of the Act to have the sale set aside as fraudulent. Held that the decision of the High Court that the first order was not one under Sec.4 of the Act bound the petitioner and the doctrine of res judicata was applicable and therefore the subsequent petition was not sustainable.

A.I.R. 1937 Lah.

Held that…

Similarly where the decision of the former suit was passed by the Subordinate Judge who was competent to try the question of title as between parties and after adjudication of one of them as insolvent, the Official Receiver had been impleaded with the permission of the Court, it is not open to who was one of the

parties in the previous suit to raise the same matter again in an application under Sec.4 of the Provincial Insolvency Act before the Insolvency Court, which has concurrent jurisdiction with ordinary Civil Courts to try questions of title relating to property alleged to belong to the insolvent on the general principles of res judicata.

A.I.R. 1932 All.

Held that…

But a judgment between the creditors and the insolvent by the insolvency courts holding that the debt of the creditor was not time-barred would not operate as res judicata between debtor and his surety who was not a party to the proceedings.

A.I.R. 1927 P.C. 108.

Held that…

Similarly where a mortgagor dies and his property devolves upon an insolvent over whose estate a receiver has been appointed, a decree for foreclosure in favour of the mortgagee in a suit to which the Receiver has not been made a party is not res judicata against him even

though he had been heard on petitions and objections against the decree.

A.I.R. 1924 Mad.

Held that…

Nor decisions against insolvent after insolvency precludes pleas in bar as against official assignee who is not made a party.

A.I.R. 1958 S.C.

Held that…

In a case before the Supreme Court a person A had executed a usufructuary mortgage of his properties in favour of M and a subsequent hypothecation bond in favour of K. Several other creditors made application for adjudging A as insolvent on ground that A had committed acts of insolvency by executing usufructuary mortgage and hypothecation bonds to defeat the interest of the creditors. After contest A was adjudged insolvent and an Official Receiver was appointed in respect of the properties of the insolvent. Subsequently a suit for recovery of arrears of rent and also the possession of the mortgaged properties was filed by M impleading the mortgagors and the Official Receiver as parties and was decreed in

favour of the mortgagee plaintiff and since then he entered into direct possession of the properties. Thereafter the Official Receiver moved an application under Sec.35 of the Travancore Insolvency Regulation for declaring the transfer in favour of mortgagee M. A preliminary objection was raised by the Receiver that the order of adjudication not having been appealed had become final and operated as res judicata. Their Lordships have held that there was no finding that transferee M was privy to the acts of insolvency and it was not necessary to find at that stage and it has not in terms been found that the transaction impugned in later case was not bona fide so far as the transferee is concerned or without consideration matters which directly arise in the annulment proceedings. Hence the order of adjudication did not bar the later controversy and the matter was still open under Sec.35 of the said Act.

A.I.R. 1956 T.C.

Held that…

A Full Bench of the Travancore-Cochin High Court in Muhammad Pillai v. Pariyathu Pillai, while considering the question whether a withdrawal of the insolvency petition with the leave of the Court would constitute res judicata has remarked that Sec.4 of the Provincial Insolvency Act applies only to decisions of questions arising in cases of insolvency and that no case of insolvency can be said to arise when the fact of insolvency and the right to maintain the insolvency petition is disputed and no order of adjudication has been passed. After the order of adjudication an insolvency petition cannot be withdrawn even with leave of the Court, for the debtor has become insolvent by the order of adjudication. Therefore it is only an annulment of the order of adjudication and not a withdrawal of the insolvency petition that can be made after the order of adjudication. Section 14 of the Act only applies to withdrawal before adjudication and the effect of such withdrawals before adjudication would be to relegate the parties to status quo ante, that is, the position of the parties would be as if no insolvency petition has been filed and

the creditors would be free to enforce their claim against the debtor. Thus a compromise before the order o adjudication in pursuance of which the leave to withdraw insolvency petition is applied for and granted by the Court is merely a contract or agreement by the parties and so when such agreement is sought to be enforced or pleaded as a bar of res judicata to the claim of the creditors the Court is free to consider its validity and binding nature.

A.I.R. 1961 S.C.

Held that…

23. Income-tax proceedings.-

Their Lordships of the Supreme Court have held that there is no such thing as res judicata in income-tax matters.

A.I.R. 1957 Nag.

Held that…

Each year is a separate unit that falls for scrutiny. The finding that the debt in question did not become a bad debt relates to the accounting period under consideration only.

A.I.R. 1960 Assam.

Held that…

24. Rent and revenue proceedings.-

Where a plaintiff sued the defendant for his ejectment that the latter was adhiar and being a defaulter in rent was liable to ejectment under the Assam Adhiar Protection and Regulation Act, 1948 and the defence was that he was not an adhiar and was not liable to be disturbed by any order of Revenue Officer passed under the Adhiar Act. The suit for ejectment was decreed. Subsequently the defendant filed a suit in the civil court for declaration of title that he was not an adhiar but a non-occupancy tenant and for recovery of possession. It was held that the Adhiar Protection Act intended to apply to a case where the person concerned was admittedly an adhiar; but in case of any dispute even if the Revenue Court purported to act on the assumption that he was an adhiar, and indeed in purporting to act under the law, the Revenue Officer may have to form his own conclusions as to whether any perron is or is not an adhiar but in case of any dispute between the parties,

any action taken by the Revenue Officer under the Act would not confer jurisdiction on him which he did not validly possess. Hence the order of the Revenue Officer was without jurisdiction and did not operate as res judicata in the subsequent suit in the Civil Court.

A.I.R. 1960 Cal.

Held that…

The pre-emption proceeding under Sec.26-F, Bengal Tenancy Act, is not a summary proceeding in the sense in which the term is usually understood and there is nothing in this particular statute to compel the Court to confine itself only to prima facie findings on the questions of title. The decision on a question of title is final and operates as res judicata between the parties.

A.I.R. 1960 Pat.

A.I.R. 1918 Pat.

Held that…

A decree for rent does not ordinarily operate as res judicata to the rate of rent payable for the period subsequent to the period

covered by the decree. In that view the judgment and decree of the Small Cause Court for arrears of rent will not bar by res judicata a bare declaration suit as to rate of rent.

A.I.R. 1954 Pat.

Held that…

Question of title gone into in a rent suit may operate as res judicata in a subsequent suit based on the same title.

A.I.R. 1962 S.C. 287.

Held that…

But where question of title was decided by Revenue Court by referring an issue to the Civil Court under Sec.271 of the Agra Tenancy Act, 1926 and a subsequent suit was filed for declaration of title and injunction restraining the execution of the decree obtained from Revenue Court. It was held beld by the Supreme Court that the Revenue Court had no exclusive jurisdiction to try the suit of the nature of the subsequent suit under Sec.230 of the said Act, consequently under the terms of Sec.11, C.P.C., the decision of the said issue by the

Revenue Court does not operate as res judicata for the necessary condition of the competency of that court to try the subsequent suit was lacking.

2004(1) GLH 487: -Md. Mohammed Ali (Dead) By Lrs. V/S Sri Jagadish Kalita and others.
Res Judicata- Earlier in money suit, plaintiff failed to prove his claim for arrears of rent court did not decide question of title acquired by adverse possession was not barred by res judicata.

A.I.R. 1938 Lah.
Held that…

25. Summary proceedings and executive orders.-

Decisions which are contemplated to operate as res judicata under Sec.11, C.P.C., are those which are given after a complete observance of the procedure laid down by law and not those which are more or less orders passed in an executive capacity.

A.I.R. 1962 All.

Held that…

It has been held that the Government has the power to change its mind even in the same case. One can visualize a situation where Government first decides not to refer a dispute for adjudication by the Industrial Tribunal but subsequently on receiving more reliable reports on the gravity of the situation in the locality, it decides to make a reference. The executive must have the power in the public interest to review its decision in such situations and Sec.21 of the U.P. General Clauses Act enables any authority to amend, vary, or rescind its previous orders. The analogy of the principles of res judicata does not apply in these matters. The Government can always review its previous decision and make a reference, provided it acts bona fide and within a reasonable time and there is no statutory bar against such review.

A.I.R. 1940 P.C.

A.I.R. 1958 Raj.

Held that…

The Privy Council in Bhagwan Din v. Gir Har Saroop laid down the following three principles on which decisions in cases to which Sec.11, C.P.C., did not apply in terms would be res judicata:

(1) where the decision was in a summary proceeding which was not a suit nor of the same character as a suit ;
(2) where there was no appeal from the decision, and
(3) Where the decision had not been made final by any provision in the Act.

If any of the above conditions are present, the order in the previous proceedings might be res judicata on the general principles, but if none of these conditions are present, the order in the previous proceedings cannot be res judicata even on general principles. Thus on the above principles any decision in proceedings under the Rajasthan Protection of Tenants Ordinance, 1949, would not have the effect of res judicata in a subsequent suit.

A.I.R. 1958 Raj.

Held that…

Proceedings for issue of patta under the Marwar Patta Act, 1921, are not res judicata and it is always open to the parties to apply again and if the circumstances have changed the authorities concerned can change their mind.

A.I.R. 1961 S.C.
Held that…

26. Order passed under O.XXII, r. 5, C.P.C.-

The order passed under O.XXII, r. 5, C.P.C., involves a summary enquiry as to who should be substituted in place of the deceased during the pendency of a suit or appeal same question can be reagitated in a separate suit and is not barred by the rule of res judicata.

A.I.R. 1926 All.439.
A.I.R. 1958 All.573.
Held that…
A contrary view has been expressed in an Allahabad case in Raj Bahadur v. Narain Prasad but this view has not been followed in other decisions of the same High Court.

A.I.R. 1960 Punj.

Held that…

27.Evacuee property proceedings.-

Administration of Evacuee Property Act takes preference whenever it comes in conflict with other laws because of the provisions of Sec.4 of the said Act and the Ordinance which runs in the following terms:

“The provisions of this Ordinance and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.”

The point which has frequently occurred relates to the interpretation of Sec.17 of the said Act whether a sale of an evacuee property in the execution of any decree which has been confirmed after the 14th of August, 1947, can be questioned and set aside in view of the provisions of Sec.17 of the said Act? Thus where a suit for recovery of money was decreed on 21st April, 1948 and shortly after wards the house of the evacuee-judgment-debtor was put to auction sale and the Custodian who represented

the` evacuee-judgment-debtor filed objection under O.XXI, r. 58, C.P.C., and also under the evacuee law claiming that the sale was void and liable to be set aside. These objections were dismissed and the sale was confirmed. An appeal to the District Judge and a second appeal to the High Court were also dismissed. A subsequent objection claiming benefit of Sec.17 of the said Act was filed for setting aside the auction sale and it has been held that Sec.4 has not been intended by the Legislature to give a right time Custodian to reagitate the matter over and over again after it has been decided against him. The principle of res judicata is a rule of justice and applies to execution proceedings. The provisions of Sec.4 do not come into play and Sec.17 cannot abrogate the law of limitation in execution proceedings or that it abrogates the principles of res judicata. The subsequent objections were held to be barred both on grounds of limitation and res judicata.

A.I.R. 1956 S.C.

Held that…

The Supreme Court has explained that in view of the policy underlying the intention of Sec.17 of the said Act and the mandatory nature of the prohibition contained in Sec.17 of the Act the sale of evacuee property in execution of decree in contravention of Sec.17 was wholly null and void.

Even in the case of execution proceedings this principle will not operate as the res judicata SCC is clear in the case of 1994(1) UJ (SC)468.

A.I.R. 1952 Punj.

Held that…

Similar view was expressed by Punjab High Court that the purpose of the Act is to keep the evacuee property intact and safe from any orders of a Court or other authority and Sec.17 prohibits all kinds of sale of evacuee property whether they are ordered for the first time in execution proceeding or take place in pursuance of a direction contained in the decree itself.

A.I.R. 1956 S.C.

A.I.R. 1938 Cal.

Held that…

An application for getting the sale of evacuee property held in contravention of Sec.17 would lie under Sec.47, C.P.C., because the Custodian is a representative of the judgment-debtor, such an application for the purposes of limitation would be governed by Art.137 of the Limitation Act and not Art.127 of the Limitation Act.

A.I.R. 1960 Punj.

Held that…

A Full Bench of the Punjab High Court has held that it is true that if there is a change of law, the rule of res judicata cannot apply and as there has been no change of law and the amendment in Sec.17 was merely declaratory of the law as it always had been the applicability of the principle of constructive res judicata to an objection in execution proceeding that the property was evacuee property and could not be sold, will not be excluded for that reason. Thus where no appeal after amendment of Sec.17 was filed against the order dismissing the objection of the custodian under Sec.17 to the sale of the property in execution which objection was filed prior to amendment and the order becomes final, it is not open to the

custodian to raise the same objection later on after the confirmation of the execution sale, owing to the bar created by the rule of constructive res judicata; where the question of notice had already been decided by rejection of the previous petition the same question could not be re-agitated again.

A.I.R. 1962 Oudh.

Held that…

28. Proceedings under Industrial disputes.-

A finding given by the Industrial Tribunal on the question as to whether certain workers are workmen for the purpose of the Industrial Disputes Act would not constitute res judicata in proceedings arising subsequently under the Payment of Wages Act. The object of the Industrial Disputes Act and those of the Payment of Wages Act as also the functions to be discharged by the Tribunals under the two Acts are different. The definitions of workmen under both the Acts are also not identical.

A.I.R. 1964 S.C.

Held that…

Where in a case before their Lordships of the Supreme Court a question arose that the existing working hours having been found reasonable by the Industrial Tribunal in 1950 there was no sufficient justification for changing them in another reference. It was pointed out by the Supreme Court: “It is true that too frequent alterations have been generally deprecated by this Court for the reason that it is likely to disturb industrial peace and equilibrium. At the same time the Court has more than once pointed out the importance of remembering the dynamic nature of industrial relations. That is why the Court has, specially in the more recent decisions, refused to apply to industrial adjudications principles of res judicata that are meant suited for ordinary civil litigation. Even where conditions of service have been changed only a few years before industrial adjudication has allowed fresh changes if convinced of the necessity and justification of these by the existing necessity and justification by the existing conditions and circumstances: During

these years, considerable changes have taken place in the country’s economic position and expectations. With the growing realization of need for better distribution of national wealth has also come an understanding of the need for increase in production as an essential pre-requisite of which greater efforts on the part of the labor force are necessary. That itself is sufficient reason against accepting the argument against any change in working hours if found justified on relevant considerations that have been indicated above. We are satisfied that in arriving at the figure of 36 working hours in a week the Tribunal has given proper weight to all relevant considerations.

A.I.R. 1957 S.C.

A.I.R. 1958 Cal.456.

Held that…

Section 11, C.P.C., will not be directly applicable to industrial disputes but the general principles of res judicata are applicable to the decision of industrial disputes also.

A.I.R. 1958 Cal.

Held that…

The award of the Industrial Tribunal under Sec.19 of the Industrial Disputes Act is not perpetual or conclusive like the civil court decree or order. The award is not final for all times but operative only for the time specified in and not beyond that time.

-S. 11- Res judicata- Industrial disputes – Applicability of doctrine of res judicata to – Held, applicable provided the court trying the subsequent provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the proceedings and the matter had been heard and finally decided – On facts, since the High Court was competent to adjudicate upon the dispute and had done so by a reasoned order on merits and correctness whereof had not been challenged, held, the Labour Court was incompetent to entertain the dispute – High Court also erred in upholding the award of the Labour Court – However, appellant prohibited from recovering any amount paid to the respondent under S.17-B of Industrial Disputes Act, 1947, (2004)1 SCC 68

A.I.R. 1963 Assam.

Held that…

Though Sec.11 of the Civil Procedure Code in terms is not attracted to industrial disputes, still, if once a matter had been decided by a competent Tribunal, it will not be in the interest of the industry to re-open the dispute. It can be said under these circumstances, that if the same point is re-agitated again, there is no bona fide dispute. But all these observations are based on the assumption that the Tribunal at an earlier stage was competent and had in fact given an award adjudicating on the controversy between the parties.

A.I.R. 1920 Cal.

A.I.R. 1924 All.

A.I.R. 1962 Raj.

A.I.R. 1955 Andh.

Held that…

29. Partition suits.-

Broadly speaking where an earlier suit for partition has ended in a decree but for some reason or another there has been no partition

by metes and bounds and it is not possible to give effect to that decree and the parties continue in joint possession even thereafter, a second suit for partition does lie. The principle is that so long as a property is jointly held until that time a right to partition continues intact, or, in other words, a right to partition is a continuous and a recurring right and cannot be lost by mere non-exercise of it. Thus partition suits stand on a footing of their own. But this principle must be read subject to an important qualification and that is that any questions of right or title which might have been finally decided in the earlier suit cannot be allowed to be reopened in the second suit except perhaps where a case fraud or the like may be alleged and proved. The decree in the earlier partition suit would operate as res judicata only to the extent pointed out above and where the earlier decree is not enforcible, a second suit for possession by partition will be perfectly maintainable so long as the parties joint interest continues.

A.I.R. 1957 Andh.

Held that…

It cannot be doubted that when a preliminary decree declaring a right to partition or the shares of the parties has not been given effect to by the parties proceeding to partition in accordance with it and the properties continue to be jointly held by the co-shares their right to partition continues so long as they continue to be interested in the joint properties as co-shares. It is competent for them to bring a suit for declaration of their right and for partition in case their right to partition is denied or challenged.

It might be that a defendant in a partition suit has the liberty given to him to seek a partition and separate allotment of his share but the law does not oblige him to do so. If there had been a final decree in the prior partition suit allotting certain property for the share of the plaintiff or their vendor and directing them to be put in possession of the property so allotted, then Sec.47, C.P.C. might bar a separate suit and the remedy of the plaintiff would be to execute the decree for partition.

A.I.R. 1955 Pepus.

Held that…

Dismissal of a partition suit under Order XXII, rule 9, C.P.C., is not a decision on merits, hence a subsequent suit for same property by same parties is not barred.

A.I.R. 1928 Lah.

Held that…

30. Applications for Amendment of decree.-

A court is competent to entertain successive applications for amendment of clerical or arithmetical mistake in a decree, or of error arising therein from any accidental slip or omission. Such applications for amendment of a decree are not barred by the rule of res judicata. But if an application for amendment has been heard and disposed of on the merits, a subsequent application or a subsequent suit may not be maintained in the same matter, and it may be barred upon general principles of law.

A.I.R. 1927 Rang.

Held that…

For an accidental omission in a decree an appeal is not necessary nor an omission to appeal bars an application for amendment. Moreover Sec.152, C.P.C., allows such an amendment at any time. Thus where the High Court erroneously referred the petitioner to the District Court for amendment of decree and the District Court granted the amendment and on revision the High Court set aside the order of the District Court granting the amendment on the ground that the decree of the District Court had no jurisdiction to allow the amendment. On a second application for amendment of decree it was held that the second application was maintainable.

A.I.R. 1933 Pat.

Held that…

Where an application for amendment of a decree was dismissed for default on account of the applicant’s failure to file the process forms and application for review of that order also having been dismissed he applied a second time for amendment of the decree. It was held that

the previous application for amendment was not heard and decided on the merits, the rejection of that application did not operate as a bar to the entertaining of the second application and that the principle of res judicata did not apply.

A.I.R. 1937 Oudh.

Held that…

Similarly where the trial court decided the matter between the judgment-debtor and decree-holder in an application for amendment of decree with regard to future interest but the court of second appeal disposed of the judgment-debtor’s appeal not on the merits but on the ground that the court was concerned with the execution of the decree, meaning thereby that the execution court could not go behind the decree and had no power to alter its terms, it cannot be said that the court of second appeal heard and finally decided the judgment-debtor’s application for amendment of the decree. Such decision does not operate as bar by res judicata on the question of the

amendment of the decree with regard to future interest.

2004(1) GLH 554:-

Yusufkhan Mehmoodkhan Pathan & Ors. V/S rears of Hazi Mohamadbhai Hazi Dudhwala & Ors. S-11 C.P.C. and Art 136 of Limitation Act.

Res judicata- Earlier execution petition disposed of for want of prosecution Held the second execution petition not barred by principle of Res Judicata and the same is also not barred by period of limitation as the same execution petition.

Even in the case of seniority section 11 is clear that the case once decided would operate at res judicata.

A.I.R 1991 SC 1134-Nityanand Kar & Anr.v/s.State of Orissa and others.

In this case Supreme court held that matter of seniority once decided would operate res judicata not only against employees party to the proceedings but against the whole class or category to which they belong.

A.I.R. 1930 Oudh.

Held that…

31. Application for review.-

An application for review is not a suit within the meaning of this section and a decision of a question arising in an application for review cannot operate as constructive res judicata. But a party whose application for review of a compromise decree on the ground of non-consent or that the lawyer had no authority to compromise has been dismissed, cannot afterwards sue to set aside the decree on the same ground.

32. "Res judicata" with reference to orders in claim proceedings.-

A decision between the decree-holder and the intervenor does not bind the judgment-debtor, though there is authority to the contrary also.

A.I.R. 1955 All.

A.I.R. 1942 Mad.

A.I.R. 1945 Mad.

A.I.R. 1961 Mad.

Held that…

A claim petition filed under Order XXI, rule 58, C.P.C., having been dismissed and no suit having been filed under Order XXI, rule 63, C.P.C., within one year, as provided for by the procedural law, from the date of rejection of the claim petition, a subsequent suit is barred by res judicata.

33. Decisions under the Indian Companies Act whether operate as res judicata.-

As a rule, a question once settled by a Liquidating Court cannot be re-opened by a regular suit. Even an order settling the list of contributories unappealed, becomes final and res judicata and the question of liability of such person under the list cannot be re-opened. Conversely, on dismissal of a suit by the voluntary liquidator against a person for the recovery of a certain sum due by him to the Company, by reason of his begin a shareholder, an application by an official liquidator to place defendant on the list of contributories of the Company is barred. So also where a suit

by the liquidator of a company on a promissory note executed by a person for money due on shares is dismissed on the merits, the same matter cannot be re-agitated in the Liquidation Court, as the acceptance of the pronote in lieu of the shares amounted to a novation of the contract to pay the premium and thus the suit on the pronote was dismissed on the merits by a competent Court.

A.I.R. 1952 Punj.

A.I.R. 1921 P.C.

A.I.R. 1922 (P.C.) 80.

Held that…

The principles of res judicata applies to proceedings under the Indian Companies Act outside Sec.11, C.P.C., on the general principles of res judicata. Thus where an application under Sec.162 of the Indian Companies Act for winding up of the company was moved by a creditor and the company or its directors did not raise objection that the creditor had no right to bring the petition as nothing was due to him and the winding up having been ordered on such petition it amounted to a constructive decision of the

question of his being a creditor and of the sum claimed by him and it was not open to the company or its directors to object at the later stage of the proceeding that no sum of money was due to the creditor concerned.

A.I.R. 1960 S.C. 1186.
Held that…

34. Writ petitions to Res Judicata.-

Their Lordships of the Supreme Court have expressly held in M.S.M. Sharma v. Dr. Shree Krishna Sinha on a question having been raised before them whether a subsequent writ petition under Art.32 of the Constitution which raised almost the same controversy which has already been decided by the Supreme Court in an earlier writ petition under Art.32 of the Constitution. Their Lordships thus observed:

“In a writ petition under Art.32 of Constitution of India the petitioners raised almost the same controversy against the Chairman and the Committee of Privileges, Bihar Legislative Assembly, regarding the validity of prohibition for publication of an account of certain debate of the Assembly which question

had already been decided in the earlier writ petition (No.122 of 1958 reported in A.I.R. 1959 S.C. 395), cannot be re-opened in the subsequent writ petition and must govern rights and objections of parties which are substantially the same and is, therefore, barred by res judicata even though the personnel of the Committee of Privileges were not the same as at the earlier occasion. The Committee of Privileges was the same Committee so long as it was a committee constituted by the same Legislative Assembly…… The fact that there was difference of opinion amongst judges constituting the Court only shows that there was room for difference of opinion but it was a judgment of this Court which binds both the parties. For application of the general principle of res judicata it is not necessary to go into the question whether the previous decision was right or wrong."

A.I.R. 1961 S.C.

Held that…

Now the next question to consider is whether it makes any difference to the application of the rule of res judicata that

the earlier decision on which the plea of res judicata is raised is a decision not of the Supreme Court but of a High Court exercising its writ jurisdiction under Art.226 of the Constitution of India. An argument was raised before the Supreme Court, in the case of Daryao v. State of U.P., that one of the essential requirements of Sec.21, C.P.C., 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 Art.32 of the Constitution its decision cannot be treated as res judicata for the purpose of such a petition.

A.I.R. 1951 S.C. 217 at p.226.
A.I.R. 1953 S.C. 156.
A.I.R. 1956 S.C. 585.
Held that…

The present problem was posed before the Supreme Court at several occasions but not finally or definitely answered. In Janardan Reddy v. State of Hyderabad, and again in Qasim Razvi v. State of Hyderabad,it was remarked that their Lordships do not consider it

necessary to decide whether an application under Art.32 of the Constitution was maintainable after a similar application under Art.226 id dismissed by the High Court. Then in another case before the Supreme Court in Bhagubhai Dullabhai v. District Magistrate, Thana, the majority view of the Supreme Court expressed 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 Art.32 of the Constitution when it appeared that Supreme Court had refused special leave to appeal to the convicted person against the order of conviction passed by the High Court.

A.I.R. 1961 S.C.

A.I.R. 1962 Punj.

A.I.R. 1964 Raj.

Held that…

Ultimately the matter directly cropped up for consideration before the Supreme Court in Daryao v. State of U.P., when His Lordship Gajendragadkar, J., who delivered the judgment of the Court, after elaborate discussion of the

above question enunciated the following legal principles to be applied as a test for the applicability of the doctrine of res judicata in writ matters:

"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 Art.226 (of the Constitution) is considered on merits as 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 proceeding permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art.32 by an original petition made (to the Supreme Court) on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art.226 is dismissed not on merits but because of the latches 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

Art.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 merits it would be a bar, if the order shows that the dismissal was for the reason that the petitioner was guilty of latches or that he had an alternative remedy it would not be a bar except in cases which we have already indicated (above). 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 Art.32. If the petition is dismissed as withdrawn it cannot be a bar to a

subsequent petition under Art.32, because in such a case there has been no decision on the merits by the Court.”

A.I.R. 1955 S.C. 223.

Held that…

The scope of the jurisdiction of the High Court under Art.226 of the Constitution for the issue of a writ of certiorari was explained by the Supreme Court in Hari Vishun Kamath v. Ahmad Ishaque.

A.I.R. 1954 S.C. 440.

Held that…

The learned Judge observed:

“According to the common Law of England, certiorari is a high prerogative writ issued by the court of the King’s Bench or Chancery to inferior courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior court to be dealt with there, and if the order was found to be without jurisdiction it was quashed. The

Court issuing certiorari to quash however, could not substitute its own decision on the merits or give directions to be complied with by the Court or Tribunal. Its work was destructive, it simply wiped out the order passed without jurisdiction and left the matter, there."

In T.C. Basappa v. T. Nagappa, Mukherjee, J., dealing with this question observed:

"In granting a writ of certiorari the superior Court does not exercise the power of an appellate Tribunal. It does not review or re-weigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes an order, which it considers to be without jurisdiction, or palpably erroneous but does not substitute its own view for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person. Vide Lord Cairns in Walsall's Quersees v. N.W. Rly. Co.

A.I.R. 1957 Mad.

Held that…

It was held in Burmah-Shell Co.v. Labour Appellate Tribunal that though the High Court held in the writ petition that the decision of Appellate Tribunal in the appeal preferred to it against the award was correct, that did not result in the substitution of the finding of the High Court for that of the Appellate Tribunal. Nor did the order of the Appellate Tribunal with its finding merge in the order of the High Court in the writ petition. It was not the High Court that was the court of competent jurisdiction to decide an issue in an industrial dispute. That jurisdiction was vested only in the statutory Tribunals.

The proceedings in the High Court under Art.226 of the Constitution were not proceedings for the adjudication of an industrial dispute. The plea of res judicata under such a case, therefore, must be rested only on the decision of the Appellate Tribunal in appeal against the award.

A.I.R. 1956 Pat.

Held that…

On the same facts no person can be twice harassed. So far as successive proceedings

under Art.226 of the Constitution on the same facts and same cause of action are concerned, the bar of res judicata will apply to successive writs under Art.226 of the Constitution.

A.I.R. 1958 M.P.

A.I.R. 1964 Pat. 174.

Held that…

Similarly it has been held that where an earlier writ was precisely alleged on the same facts as the subsequent writ petition except that the vires of the ordinance was challenged as an additional ground in the subsequent writ petition, on the principles of Explanation IV to Sec.11, C.P.C., the petitioner ought to have challenged the vires of the ordinance in the former writ petition although Sec.11, C.P.C., does not apply in terms to cases of writ but the principles contained in it should be applied consequently, the subsequent writ was held to be barred by res judicata.

The following passage from Halsbury’s Laws of England, Vol.9, p.786 with regard to successive application for issue of writs is noteworthy:

"When an application for prerogative writ has been made, argued and refused on the grounds of defects in the case, it is not competent for the applicant to make a second application for the same writ on amended affidavits containing fresh materials."

A.I.R. 1961 Manipur 1.

Held that…

Now in the matter of a writ application before a High Court under Art.226 of the Constitution the decision proceeds on certain admitted facts the question in such an application is whether the High Court in the exercise of its extraordinary jurisdiction will issue a direction to a subordinate authority and if the High Court refused to exercise its discretion to issue such a direction, the dismissal of the application will not amount to a decree in a suit within the meaning of Sec.11, C.P.C., and such a decision cannot be said to have the effect of res judicata in a subsequent suit between the parties.

A.I.R. 1963 Cal.

A.I.R. 1960 Bom. 196.

A.I.R. 1951 Bom.25

Held that…

Prima facie, the decision of one High Court in a proceeding under Art.226 of the Constitution in some other High Court. But where the parties are not same in both High Courts, the rule of res judicata does not apply. Whether in the event of the High Court having decided on merits the contentions raised in a writ petition under Art.226 of the Constitution, would allow the same contentions to be re-agitated in a subsequent suit, it was held in Manahem v. Union of India, that against an impugned order in a petition under Art.226 of the Constitution the only remedy of the aggrieved party was by way of an appeal to the Supreme Court and the following passage of the Full Bench In re Prahalad Krishna Kurne, was affirmed:

A.I.R. 1961 S.C.

Held that…

"Although the decision of the High Court refusing a writ or an order under Art.226 may become final qua the High Court, it is not as if the Constitution does not provide other remedies to the citizen. He has a right, an

independent right, to approach the Supreme Court under Art.32. Apart from that there is a right of appeal given to the citizen from an order of refusal of the High Court to enforce his fundamental rights. He has the right to ask the Supreme Court to grant him special Leave to Appeal under Art.136. Therefore,it is not as if the citizen is without a remedy in the event of the High Court refusing to review its own judgment, however, erroneous the judgment may be."

His Lordship held that the same principles ought to be held to be applicable as contained in Sec.11, C.P.C., in all such matters. Therefore the suit was held to be barred by rules of res judicata.

A.I.R. 1954 Hyd.

Held that…

It is submitted that the Bombay view is not sound in view of the decision of the Supreme Court in Daryao v. State of U.P., to the effect that if a writ petition under Art.226 of Constitution is decided on merits it will bar a subsequent writ under Art.32 of the Constitution before the Supreme Court on the general principles of res judicata. And further

the granting of special leave to appeal to Supreme Court is not an effective remedy apart from the fact that it is discretionary. But a previous order of the High Court under Art.226 of the Constitution quashing the order declaring a person as evacuee cannot debar the custodian from issuing notice to show cause why the property be not deemed to be evacuee property to the same person on the basis of a new title.

A.I.R. 1962 S.C. 1963 at p. 1566.

Held that…

After the Allahabad High Court dismissed the petitioner's writ petitions he applied for and obtained a certificate from the said High Court to appeal to the Supreme Court but he failed to deposit the necessary security for printing charges as required by the rules of the Allahabad High Court, and in consequence, on the 9th August, 1960, the certificate granted to him was cancelled. That is now the two writ petitions which purported to challenge the validity of the notices served on the petitioner for the two years 1365 and 1366 fasli were held to be barred by res judicata.

A.I.R. 1963 S.C. 1128 at p. 1134.

Held that…

It is well settled that in order to decide whether a decision in an earlier litigation, operates as res judicata, the Court must look at the nature of the litigation what were the issues raised therein and what was actually decided in it.

A.I.R. 1965 Punj. 507.

Held that…

Where a writ was refused for want of evidence such order-refusing writ cannot bar a subsequent regular suit on the same facts.

A.I.R. 1958 Cal.

Held that…

35. Other miscellaneous proceedings.-

The dismissal of an earlier application for the declaration under the Guardians and Wards Act that the petitioner was the guardian of the minor will not bar a subsequent application for appointment of guardian of the minor on the principles of constructive res judicata because while applying for being declared a guardian the petitioner could not

have made an alternative case that the petitioner should be appointed guardian contrary to the case that the petitioner was already the guardian.

A.I.R. 1958 Andh.

Held that…

Where on an application of the mortgagor his debts were ordered to be scaled down under Sec.9-A of the Madras Agriculturists Relief Act on the basis that the document executed by him was a mortgage and the mortgage was a party to the proceeding under that Act, and subsequently the mortgagor brought a suit for redemption of the mortgage, it was held that the order scaling down the debt being between the same parties it operated as res judicata on the question of the nature of the document.

A.I.R. 1961 Cal.

Held that…

A second application for fixation of standard rent in respect of residential premises under the West Bengal Premises Rent Control Act, 1950 may of course be barred by res judicata or principles analogous thereto, but, for that, the material circumstances must

remain the same. That bar would not apply in altered or changed circumstances and, therefore, when the situation has materially changed by the expiry of the relevant three years to entitle the landlord to increase standard rent in the new situation a secondary application for standardisation of rent would well be maintainable and would not be barred on principle also.

A.I.R. 1958 Mys.113.

Held that…

Section 11 of the Mysore House Rent and Accommodation Control Act as well as the rule of construction of res judicata prohibit the re-investigation of the same point or points of dispute. The principle behind the said rule is that a question finally decided should not be reopened. Section 11 of the said Act lays down that the Court shall summarily reject any application under Sec.8, sub-section (2) or (3) which raises between the same parties or between parties under whom they or any of them claim, substantially the same issue as have been finally decided in a former proceeding under that Act. The word “issue” is used in the

same sense as is used in Sec.11,C.P.C. It refers to the subject matter in dispute. But a dispute which arises subsequent to the earlier decision cannot be barred by res judicata by reason of the earlier decision. Thus where the matter in issue in the previous case was as to whether the landlord bona fide required the house for the use of his brother and mother at the time of that application whereas in the subsequent case the question for consideration is as to whether he bona fide requires it now for his own use. The two issues are not identical. Held the subsequent application was neither barred by the principles of constructive res judicata nor under Sec.11, C.P.C.

A.I.R. 1965 Assam 18.

Held that…

An application for ejectment of adhiars, who were found to be in possession of land in excess of 10 acres was rejected by Conciliation Board. Subsequent second application on the same facts for ejectment will not be barred by principle of res judicata.

A.I.R. 1962 S.C. 338 at pp. 341-42.

Held that…

36. Scope and applicability of principles of res judicata to election proceedings.-

Both the appeals Nos. 7 and 8 before the High Court arose out of one proceeding before the Election Tribunal. The subject matter of each appeal was, however, different. The subject matter of appeal No.7 filed by the appellant related to the question of his election being bad or good, in view of the pleadings raised before the Election Tribunal. It had nothing to do with the question of right of respondent No.1 to be declared as duly elected candidate. The claim on such a right was to follow the decision of the question in appeal No.7 in case the appeal was dismissed. If appeal No.7 was allowed, the question in appeal No.8 would not arise for consideration. The subject-matter of appeal No.8 simply did not relate to the validity or otherwise of the election of the appellant. It related to the further action to be taken in case the election of the appellant was bad, on the ground that a ghatwal holds an office of profit. The decision

of the High Court in the two appeals, though stated in one judgment, really amounted to two decisions and not to one decision common to both the appeals. That in his appeal No.8, the respondent No.1 had referred to the rejection of his contention by the Election Tribunal about the appellant and respondent No.2 being holders of an office of profit. He had to challenge the finding on this point because if he did not succeed on it, he could not have got a declaration in his favour when respondent No.2 was also in the field and had secured a larger number of votes. He could, however, rely on the same contention in supporting the order of the Election Tribunal setting aside the election of the appellant and which was the subject-matter of appeal No.7. This contention was considered by the High Court in appeal No.7 in that context and it was, therefore, that even though the High Court did not agree with the Election Tribunal about the appellant's committing a corrupt practice, it confirmed the setting aside of his holding an office or profit served the purpose of both the appeals, but merely because of this the decision of the High Court in each appeal could not be said to

be one decision. The High Court came to two decisions. It came to one decision in respect of the invalidity of the appellant’s election in appeal No.7. It came to another decision in appeal No.8 with respect to the justification of the claim of respondent No.1 to be declared as a duly elected candidate, a decision which had to follow the decision that the election of the appellant was invalid and also the finding that respondent No.2 as ghatwal, was not a properly nominated candidate. The Supreme Court was therefore of opinion that so long as the order in the appellant’s appeal No.7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he could not question the finding about his holding an office of profit, in the Supreme Court appeal, which was founded on the contention that finding is incor-rect.

CHAPTER - 6

Issues

SYNOPSIS

1. Issue.-

The term “issue” means a point in debate or controversy on which the parties take affirmative and negative positions. It must be taken to indicate the sense that in pleading, a single material point of law of fact depending on the suit, which, being affirmed on the one side and denied on the other, is presented for determination. In Wharton’s Law Ltxicon the term is thus defined “The point in question, at the conclusion of the pleading between contending parties in an action, when one side affirms and the other side denies.

2. When issues arise.-

Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

3. Material proposition.-

Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

4. Kinds of issues. –

Issues are of two kinds: (a) issues of fact and (b) issues of law.

5. Framing of issues.-

At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

6. When Court not required to frame issues.-

Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

7. Matter directly and substantially in issue-Scope and meaning of.-

In order that a suit may be barred by previous decision by operation of the doctrine of res judicata, the first requisite condition is that the matters directly and substantially in issue in both the suits should be the same.

Section 2 of the old Code of Civil Procedure of 1859 (corresponding to Sec.11 of the present Code) was in the following words: “The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.”

The Judicial Committee of the Privy Council in a series of decisions while

interpreting the words cause of action in Sec.2 (corresponding to Sec.13 of the Code of Civil Procedure, 1877 and Sec.11 of the present Code) of the Code of Civil Procedure has laid down the law that the cause of action is to be construed with reference to the substance and not merely to form.

The expression cause of action cannot be taken in its literal and most restricted sense. But however, that may be by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent court as to the status of one of them in relation to the other, it cannot, in the opinion of their Lordships, be again tried in another suit between them."

In another case it was held by their Lordships of the Privy Council:

"If both parties invoke the opinion of the Court upon a question, if it is raised by the pleadings and argued, their Lordships are unable to come to the conclusion that merely because an issue was not framed which, strictly construed embraced the whole of it, therefore, the judgment upon it was ultra vires. To so hold would appear scarcely consistent with the

case of Mst. Mitha v. Syed Fuzl Rub, wherein it was held that in a case where there had been no issue at all, but where, nevertheless, it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the court the judgment upon it was valid.

"The term 'cause of action' is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion, that this clause in the Code of Civil Procedure would by no means prevent the operation of the general law relating to res judicata founded on the principle nemo debet bis vexari pro eddem causa. This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in Gregory v. Molesworth, in which Lord Hardwicke held that when a question was necessarily decided in effect, though not in express terms between the parties to the suit, they could not raise the same question as between themselves in any other suit in any

other form, and that decision has been followed by a long series of decisions, the greater part of which will be found noticed in the very able notes of Mr.Smith to the case of the Duchess of Kingston.”

After the above decisions the Legislature introduced the words matter directly and substantially in issue in the Code of Civil Procedure, 1877 by deleting the words cause of action from the old Code. It is therefore, abundantly clear that it is not necessary that the cause of action in the former suit and the subsequent suit should be identical, but the matter directly and substantially in issue in both the suits should be same or identical in order to attract the applicability of the principle of res judicata in the subsequent suit.

The rule of English law that where the allegation on the record is uncertain there is no res judicata is also the rule embodied in Sec.13 of the Code of Civil Procedure, 1882. “If a thing be not directly and precisely alleged, it shall be no estoppel.” That rule

was reproduced in Explanation I of the Sec.13 of Civil Procedure Code, 1882.

A.I.R. 1959 Bom.

A.I.R. 1962 Andh Pra. 160.

Held that…

Therefore what Sec.11 C.P.C., requires is not that the cause of action in the two suits must be identical but that the matter directly and substantially in issue in the subsequent suit should also be directly and substantially in issue in the former suit. It will be noticed that under Sec.11, C.P.C., not only the suit itself may be barred but also an issue.

A.I.R. 1935 Oudh.

Held that…

For the meaning of the phrase matter directly and substantially in issue one may look into Explanation III appended to Sec.11, C.P.C., 1908 which runs thus:

"The matter above referred to must in the former suit have been alleged by one party

and either denied or admitted expressly or impliedly by the other."

Thus the phrase matter directly and substantially in issue which occurs in Sec.11, C.P.C., must mean, according to Explanation III of the said section, that the matter above referred to, must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other.

A.I.R. 1936 Bom.

Held that…

In order to test whether a matter is or is not directly and substantially in issue between the parties it has to be viewed from the three aspects: (a) The matter must consist of proposition of fact or directly and substantially alleged by one party and denied or admitted expressly or impliedly by the other. (b) Such a proposition has been or might and ought to have been, directly and substantially the ground of defence or attack, in the sense that the plaintiff directly and substantially did allege or might and ought to have directly and substantially alleged the

proposition to show a right to sue, or the defendant alleged it or might and ought to have alleged it to constitute his defence. (c) The matter so determined to be directly and substantially in issue must have been heard and finally decided.

A.I.R. 1941 Cal.

Held that…

A bare assertion in a plaint is not a claim. An assertion becomes a claim when the plaintiff prays expressly or impliedly for the court’s decision upon it. Again an assertion may become a claim if the defendant treats it as such by denying it and inviting the court’s decision thereon.

A.I.R. 1926 Cal.

A.I.R. 1956 Pat.

A.I.R. 1952 Cal.

Held that…

Even if a particular matter be not included in the formal issues, if it is

directly and substantially in issue between the parties and if there be a decision thereon, it will operate as res judicata.

A.I.R. 1932 P.C.

A.I.R. 1952 T.C.

A.I.R. 1957 T.C.

Held that…

Similarly, it is now well settled that where a point is not properly raised by the plaint, but both parties have without protest chosen to join issues upon that point, the decision on that point would operate as res judicata between the parties.

A.I.R. 1924 P.C.

A.I.R. 1943 All.

A.I.R. 1927 Oudh.

Held that…

Thus an issue raised by parties even improperly and decided is res judicata.

A.I.R. (1936) Nag.

A.I.R. 1954 Mad.

Held that…

Where the party himself has invited a decision and on the decision being adverse to him cannot turn round and impeach it on the ground that it was premature and should have been decided after the preliminary decree had been passed.

A.I.R. 1949 Nag.

A.I.R. 1961 Cal.422.

Held that…

In another decision of the Nagpur High Court it was observed that where a point is raised in the pleadings and the parties have without protest joined issues thereon a decision on it operates as res judicata between the parties even though the point was not properly raised and the finding on the point was not necessary and the previous suit could have been decided independently of the decision upon that issue.

A.I.R. 1938 Bom.

A.I.R. 1954 Orissa.

A.I.R. 1964 Manipur 2.

Held that…

No hard and fast rule as to what matters or issues are directly and substantially in issue can be laid down. But in order to determine whether a particular issue or matter is res judicata, the court can only look at the pleadings, the judgment and the decree. It is of course not necessary that before a matter can be said to be res judicata it should form the subject matter of a definite issue. If the court can gather from the materials before it, viz. The pleadings, the judgment and the decree that matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit either expressly or by necessary implication then the principle of res judicata would apply. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves having regard to the course of the litigation and the conduct of the parties and the manner in which the Court has itself dealt with it.

A.I.R. 1958 Andh Pra. 5.

Held that…

Where a plaintiff had previously filed a suit for ejectment on the ground that he needed the premises for his own use and in that suit the trial court found the genuine necessity of the plaintiff established, but the plaintiff's claim for ejectment was rejected on other grounds. Relying on the finding of genuine necessity in the earlier suit a subsequent suit was filed it was held, that the finding in the previous suit on the question of the plaintiff's genuine necessity for the house existed at the time of the institution of that suit could not by any reasoning operate as res judicata in the subsequent case when the basis is the plaintiff's genuine necessity as existing on the date of the subsequent suit.

A.I.R. 1930 Cal.

A.I.R. 1946 Lah.

A.I.R. 1933 Cal.

A.I.R. 1927 Mad.

Held that…

"Matter in issue" in Sec.11, C.P.C., is distinct from the subject matter and the object of the suit as well as from the relief that may be asked for it and the cause of action on which it is based, and the rule of res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. It is the matter in issue and not the subject matter of the suit that forms the essential test of res judicata.

A.I.R. 1925 Oudh.

Held that…

Similarly for the application of the principle of res judicata it is not necessary that the subject matter in the sense of the property involved in the two suits should be the same.

A.I.R. 1953 S.C.

A.I.R. 1963 Pat.

Held that…

The Supreme Court has also laid down very clearly that the test of res judicata is the

identity of title in the two litigation and not the identity of actual property involved in the two cases.

A.I.R. 1922 P.C.

A.I.R. 1960 Cal.

Held that…

Where the current controversy was directly and substantially in issue in the former suit Sec. 40 of the Indian Evidence Act clearly provides that a previous judgment or order of decree is relevant when it is tendered in evidence in support of a plea of res judicata in civil cases or of autrefois acquit or autrefois convict in criminal cases. Although a finding in a previous suit inter partes does not operate as res judicata it is the paramount duty of the party against whom it is given to displace that finding.

8. Connected issues.-

As regards questions involved in the suit are tried and decided in favour of a defendant however, numerous they might be, the estoppel

of judgment will apply to each point so decided as if it were the sole issue in the case.

A.I.R. 1931 Lab.

Held that…

Thus if there are two issues which had been determined in a suit and the decision of either of these issues was potent enough to defeat the plaintiff’s whole suit, then it is open to the defendant in subsequent suit to rely upon the previous decision on the one or the other of the issues and to ask the court to throw the then plaintiff’s case as barred by res judicata.

A.I.R. 1935 Mad.

Held that…

Where findings on two issues tend to the same result and the former decision proceeds on both the grounds each finding may operate as res judicata but before a matter can be held to be res judicata the finding in the previous litigation, should be certain and it must be

clear that the decree in the previous suit was intended to be based on that finding.

A.I.R. 1922 (P.C.)

A.I.R. 1942 Cal.

Held that…

Thus broadly stated when issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as res judicata between the parties to the suit. But if a decision on an issue does not support the ultimate decree such decision cannot operate as res judicata between the parties to the suit.

A.I.R. 1930 Cal.

Held that…

The same principle will apply where a finding upon an issue which is immaterial and unnecessary for the determination of the case may not have the force of res judicata, yet where the parties go to trial, evidence is given and the Court at their invitation decides the points raised, a finding on one of the

issue is conclusive between the parties in spite of the fact that it is only one of the several grounds on which the judgment was based and even if that issue had been decided the other way the decree would have been the same.

A.I.R. 1944 Oudh.

A.I.R. 1915 Mad.

A.I.R. 1930 Lah.

Held that…

Where the suit is based on decision of two or more issues and each of the findings constitutes an additional and supplemental ground for the disposal of the suit, each must therefore give rise to the bar of res judicata. Their Lordships of the Allahabad High Court in Shiv Charan Lal v. Raghunath, have held that if there were two findings of fact either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making

of the decree which was made is the finding which can operate as res judicata.

A.I.R. 1925 Oudh.386.

Held that…

The above rule of logical priority of necessary issues was no doubt followed by Oudh Chief Court in Ram Bali v. Ram Asre, where in an earlier suit for possession on the ground that the plaintiff and O were members of joint Hindu family. The Court decided two points: (1) that the pedigree was not proved and (2) that plaintiff and O were not joint. Held, when two such findings were recorded and when either of them would be sufficient to dispose of the suit it cannot be said that the finding as to pedigree was such as to bind the plaintiff. The main question there was one of jointness and it was not necessary for that court to enquire whether the exact relationship was proved or not, therefore decision of that issue was held not to be barred by res judicata. But this rule of logical priority of necessary issues although not specifically overruled is no longer a sound law.

A.I.R. 1932 (P.C.)

A.I.R. 1955 All.

A.I.R. 1951 All.

Held that…

If an issue though not directly arising out of the pleadings is framed and a decision is actually given the decision will operate as res judicata when the same issue arises in a subsequent suit on the principle that a party having invited the Court, or allowed it without protest to decide it is estopped after the decision on it has gone against him.

A.I.R. 1939 (P.C.)

A.I.R. 1954 Pat.

A.I.R. 1930 Pat.

Held that…

In order successfully to establish a place of res judicata or estoppel by record it is necessary to show that in a previous case a court having jurisdiction to try the question came to a decision necessarily and

substantially in volving the determination of the matter in issue in the latter case.

A.I.R. 1954 Pat.

A.I.R. 1936 Pat.

Held that…

Thus the relationship of landlord and tenant is the very foundation of a decree in a rent suit and as such is a matter necessary to be determined. When a suit for rent is filed unless the defendant admits the Court must determine the question as to whether the relationship of landlord and tenant has been established between the parties before a decree can be passed. Where the matter is pointedly raised in a suit as to whether the plaintiff is landlord and is entitled to a decree as against the defendant the matter is directly put in issue and is actually decided and therefore it cannot be held that it is only an incidental question.

A.I.R. 1942 Oudh.

A.I.R. 1956 All.

A.I.R. 1927 Oudh 625.

Held that…

When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be reopened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue.

The question whether or not the decision in a suit for rent operates as res judicata upon the question of the amount of rent annually payable is dependent upon the scope of the issues raised and decided. If the question raised and decided relates to the amount recoverable for the particular years in dispute the decision has not the effect of res judicata. On the other hand if the question raised is as to the amount of rent annually payable, the decision clearly constitutes res judicata. The tests are whether the party two seeks to reopen the matter in controversy could with reasonable diligence have raised the

matter, whether he had a fair opportunity to obtain an adjudication upon the matter, and whether the question formed the proper subject of litigation in the previous suit.

-Art.136-Res judicata-Appeal disposed of with matter being remanded to High Court for decision on all issues other than the one decided by High Court with no view however, being expressed on the one issue decided by it-Effect-Held, issue stood concluded as far as High Court was concerned, but open to be agitated in future proceedings once High Court had rendered decision on the other issues.

A.I.R. 1921 Cal.

A.I.R. 1924 P.C. 144.

Held that…

Where a Court having the question before its mind decided that the issue did arise, that decision would be as much res judicata as the final determination of the issue on merits.

A.I.R. 1957 Orissa.

Held that…

Where the plaintiffs as well as the defendants had proceeded upon certain admitted facts and certified copies of judgment and decree in the previous suit and straightaway proceeded to argue the question whether the suit was barred by the principles of res judicata. It was held that the plaintiffs not having raised the slightest objection it was too late to contend that the suit should go back to the trial judge for a further finding after recording evidence.

A.I.R. 1926 Oudh.

A.I.R. 1954 Mys.

A.I.R. 1962 Andh.Pra.160.

Held that…

9. Matter must be directly and substantially in issue in the former suit.-

It is a general rule, that to give a decision on a matter in issue in a former suit, the effect of res judicata, that matter must have been directly and substantially in issue

in that suit. A matter cannot be said to be directly and substantially in issue unless and until it is or becomes material, for the decision of the suit, to find as to it.

A.I.R. 1925 Oudh 290.

A.I.R. 1928 A.

A.I.R. 1925 Cal.

A.I.R. 1926 Cal.

A.I.R. 1925 All.

A.I.R. 1926 All.

A.I.R. 1927 Mad.

A.I.R. 1927 All.

Held that…

In other words, the decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue; but, where the decision on a question was essential to the relief granted or the decree passed, or where it formed the ground work of the decision, then the matter must be

deemed to have been directly and substantially in issue in the suit. The principle of res judicata has no application, where the matter in suit has not been directly and substantially but only incidentally or collaterally in issue. Another phase of the same question is, whether the question, decided in the previous suit, was in substance a part of the cause of action or whether it was only ancillary to the main cause.

A.I.R. 1932 Mad.

Held that…

Indeed, the true test is whether the matter has been directly and substantially in issue, in the former case, and has been heard and finally decided…… Other matter may have been directly though not substantially but rather incidentally in issue and may have been heard without being finally decided and the decision on these matters does not constitute res judicata. The question what was “the matter directly and substantially in issue” in the previous suit depends on whether the parties in the suit and the Court have dealt with the

matter as if there was a relief claimed in respect of which relief was claimed it was dealt with and decided as if it formed a direct and principal issue in the suit. It seems sufficiently clear that the Courts are precluded by this section from trying not only any suit but any issue, in which the matter to be determined has been directly and substantially in issue in another suit between the same parties and which has been heard and finally decided by a competent Court. It consequently follows that a finding of fact on a matter not covered by the prayers in the plaint may be pleaded as res judicata, in a future suit if the question involved in it is directly and substantially, in issue between the parties and is treated as a relevant fact by them and by the Court. So where a claim to a certain property was based entirely on a sale-deed and the question of the validity of the sale-deed had arisen directly in a previous suit between the same parties, relating to another property also included in the deed, which could not be determined without a decision as to the validity of the sale-deed, it was held that the decision in the previous

suit must be held to be binding as between the parties. But where a plaintiff sued for a half share of certain groves by partition, and it appeared that there had been a previous litigation of the same nature between the parties but it related to another grove, it was held that as the groves now in suit were different from the grove which formed the subject-matter of the previous litigation, it could not be said that the matter now in issue between the parties was directly and substantially in issue between them in the former litigation and the matter was not res judicata.

A.I.R. 1928 Nag.169.

Held that…

So where a plaintiff sued for ejectment and it appeared that he had previously brought a suit for ejectment; and for recovery of rent but on defendant’s setting up permanent tenancy had abandoned the prayer for ejectment and a decree was passed dismissing the claim for possession and decreeing rent, it was held that the matter was not res judicata as the question of the

status of tenant was not directly and substantially in issue.

A.I.R. 1928 All.62.

Held that…

But where the issue whether A was the nearest heir was directly and substantially in issue in the former suit and it was heard and decided by the appellate Court, the Allahabad High Court, held that the subsequent suit involving the same question was barred.

A.I.R. 1926 Oudh.

Held that…

But a finding in a previous suit on the right to mortgage does not operate as res judicata in a subsequent suit where the question in issue is the right to sell rights in a grove. Where the contention is that an issue should not be retried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question must be determined with reference to the provisions of this section.

A.I.R. 1926 Pat.

Held that…

It is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be res judicata which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous.

A.I.R. 1927 Oudh.

Held that…

When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue.

A.I.R. 1933 Cal.

A.I.R. 1931 Lah.

A.I.R. 1932 Nag.

Held that…

The rule of res judicata does not depend upon the identity of the subject matter, but it depends on the identity of the issues. 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.

10. When a matter is substantially in issue.-

"Substantially" evidently, signifies what was indicated by the phrase, "in effect though not in express terms", in Lord Hardwicks statement of the doctrine of res judicata in the case of Gregory v. Molesworth, which is cited with approbation by their Lordships of the Privy Council in the case of Soorjomonee v. Saddanand. In Krishna Behari v. Bunwari Lal,

their Lordships of the Privy Council said: By the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court as to status of one of them in relation to the other, it cannot be again tried in

another suit between them," and approved a dictum in Soorjomonee v. Saddanand, That the general law relating to res judicata, founded on the principle nemo debet bis vexari pro eadem causa, defined by Lord Hardwicks, in Gregory v. Moles-worth.

A.I.R. 1926 Mad.234.

Held that…

As preventing a question, which had necessarily been decided, in effect though not in express terms, between parties to a suit, from being raised as between them in any other suit in any other form, must be applied in interpreting the provisions of the Code of Civil Procedure. It is thus clear that the word "substantially" avoids the supposition "that a plaintiff may evade the application of the rule, merely by varying his form of pleading, or by describing the subject-matter of his suit, or expressing his rights in different language."As to what is a substantial question and what is not a substantial question no invariable rule can be laid down except that if the parties by their conduct of the litigation clearly treated it as

a substantial question and the Court also further treated it as a substantial question, it would be almost conclusive to show that question was one substantially in issue. But it appears to be generally settled that for a matter being in issue it is not necessary that it should have been distinctly and specifically put in issue by the pleading. The word “substantial has not such a stringent signification as the word “essential” or the word “necessary”. A decision may, therefore, operate as res judicata although no issue has been expressly raised. The test to be applied is whether it plainly appears that the question so raised by the parties in their pleading was actually submitted by them to the Court and judgment given on it. Some cases even go so far as to hold, that for the identity of the matter in issue, it is not necessary that an issue should have been taken in the former suit, it appears to be considered sufficient that the point was essential to the former judgment; and every matter which has been in issue even necessary implication, and which must necessarily have been decided in order to support the judgment, is held concluded. This

appears to be the principle underlying the decision of the Calcutta High Court in Bhowabul v. Rajendro, in which it was held that “a decree is, as between the parties to it, conclusive both as to the rights of these parties and the characters in which they sue," and that the defendant could not show that he was really the plaintiff in the suit. The expression “substantially in issue” means of real competence or value; it does not mean necessary. Therefore, if an issue is a suit had been directly raised and decided, and is not manifestly incidental or irrelevant, the Court which is considering whether that decision amounts to res judicata should not import nice questions as to whether the issue had been absolutely necessary to the determination of the suit, it is sufficient to find that the court and the parties thought so, and proceeded on that assumption. Their Lordships of the Privy Council in Midnapore Zamindari Co., Ltd. v. Naresh Narayan have held that an issue is res judicata where the judgment of an appellate court shows that the issue was treated as material and was decided, although the decree made merely affirms the decree of the lower

court which did not deal with the issue if the Court having the question before its mind decided that the issue did arise that decision would be much res judicata as the final determination on merits. If the Court did so decide it is immaterial whether it did so rightly or not. The question whether an issue was substantially raised and decided is a matter of fact to be decided upon the circumstances of each particular case and although no rule of general application can be laid down this proposition is well established that when a decree of the Court is not based upon a finding but was made in spite of it that finding cannot be res judicata.

A.I.R. 1927 Mad.

A.I.R. 1947 Bom.

Held that…

For the application of the principles of res judicata, it is necessary that the matter must have been substantially in issue. A matter will be substantially in issue if it is of importance and value for the decision of the case.

A.I.R. 1957 Hyd. 23 (D.B.)

Held that…

Evidently an unnecessary issue the decision of which either may will not affect the decision of the suit cannot be said to be substantial for the case.

11.When a matter is directly in issue.-

The word "directly seems to have been used in contradistinction to the words “incidentally” and “collaterally” made use of in the statement of the opinion of the Judges in the Duchess of Kingston’s case. It was broadly laid down in that case that “neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable.” As to when an issue should be considered to have been directly raised, and when incidentally or collaterally, no hard and fast rule can be laid down, except that a fact cannot be in issue directly when the judgment can be correct,

whether that fact exists or not. Thus where in a suit for rent fixed by a lease, the defendant pleads for its abatement, on the ground that the land is actually less than that entered in the lease (the terms of the lease admitting of abatement or enhancement with reference to the actual area), and it is found that the land is really more than that entered in the lease, and a decree is given for the claim, the amount fixed by the lease; the decision as to the excess cannot constitute res judicata because the only issue between the parties in the former suit was whether the land demised was or was not less than or equal to the estimated quantity. On the same principle, if a suit is brought to procure the entry of satisfaction of a mortgage and the judgment is that the mortgage is not satisfied because a specified amount remains unpaid, this judgment is, in subsequent controversies between the parties conclusive that the mortgage was not paid, but the amount due would be still unsettled because it was not in issue in the former suit between the parties; the Court observing in the case cited, that “It was probably necessary to take and state an account between them, which would

show how much was due upon the mortgage in order to determine whether anything was due; but the evidence and inquiry as to the amount due was merely incidental or collateral to the direct issue, whether anything was due." In India, also, the dismissal of a suit for the redemption of a usufructuary or a simple mortgage on the ground of the non-payment of the mortgage amount, and even a decree given on it conditionally on the payment of the amount found due and payable in respect of the mortgage, does not necessarily bar a subsequent suit for redemption; though if that amount was a point in issue in the former suit, the Court would be barred in the subsequent suit from inquiring into the correctness of that finding, and the only point which the Court would be able to try in the subsequent suit as to repayment would be that of the amount repaid after the date up to which the amount repaid was the point in issue in the former suit. Similarly a finding in a suit by certain partners as to the amount due to all the partners severally on a statement of the accounts of a dissolved partnership, was held not be res judicata as to the amount due to a

partner who in a subsequent suit claimed the amount found due to him from the rest of the partners who were his co-defendants in the former suit, even though the plaintiffs in the former suit were also made pro forma defendants in the subsequent suit. But a different view has been taken in an Allahabad case. The Calcutta High Court in Mohima Chandra v. Raj Kumar, even held that in a suit for damages for the taking away of fruit, the title to the land from which they were taken would be in issue only collaterally and a finding therein as to the said land being the joint property of the parties would not bar a suit by one of them to have a summary thakbast award in regard to that land set aside as wrong. The same view was taken also in another case, though the decision in it was rested on the ground that the second suit was brought for the express purpose of determining the plaintiff’s title, and was on an entirely different cause of action. This view however, has not been accepted in Madras where it has been laid down that in if a suit for damages for wrongful cutting and carrying bamboos from certain land, the question of title to that land should be raised, it would

be directly and substantially in issue, if the question was one which it was material to the plaintiff or defendant to raise; and the title to the land that was the foundation of the title to the trees. The question of a matter being in issue directly has arisen chiefly in suits for rent or damages. There is a conflict of opinion as to whether the decision in a former rent suit operates as res judicata in a subsequent title suit. In the cases cited below, it has been held that the title to the property, for or in respect of which, the rent or damages are claimed as directly in issue and consequently the decision in a former rent suit is res judicata in a subsequent title suit; while the contrary view has been taken in the undernoted cases. In the former class of cases it has somewhat similarly been held that the rule applies even when the question of title is raised not by the original defendant, but by some other person intervening to claim the title, or impleaded on the ground of his ascertaining such claim. In the latter class of cases the contrary was held in some early cases chiefly on the ground of the apprehension, that the question of title may be raised in a suit

of small value in a Court of the lowest jurisdiction, and thus become binding in regard to very considerable property outside its jurisdiction.

A.I.R. 1954 Pat.

Held that…

Such an argument has, however, no application now, as to constitute a decision res judicata, it has been made expressly necessary that the Court passing it should have had jurisdiction over the subsequent suit also. A judgment is conclusive only in respect of matters, which are directly in issue and not those which are brought incidentally during the trial. A fact cannot be in issue directly when the judgment can be correct whether the fact exists or not.

A.I.R. 1952 Mad.

Held that…

But where question in the previous suit for declaration was whether the plaintiff was the then presumptive reversioner and the question in the subsequent suit whether the plaintiff is

now the next heir of the last male owner. A decision in the former cannot conclude the latter. The cause of action for the subsequent suit arose only when the succession opened by the death of the limited owner several years after the decree in the previous suit. The prior decision cannot be relied on the question of the plaintiff’s title to attract the bar of res judicata.

12. Matter directly and substantially in issue constructively.-

The Privy Council in Doorya Prasad Singh v. Doorga Kunwari, Sir B. Peacock observed thus:

“…… Nemo debet bis vexari pro eadem causa.-This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down then in the case, which was referred to in Gregory v. Molesworth in which Lord Hardwicks held that when a question was decided in effect though not in express terms between parties to the suit, they could not raise the same question as between

themselves in any other form, and that decision has been followed by a long course of decisions…" In another decision the Privy Council has laid down the proposition of law that where a plaintiff claims an estate and the defendant being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then to bring forward.

A.I.R. 1942 Oudh.

Held that…

The principle of res judicata were not dependent on convenience of parties about taking certain pleas, the Court has to see whether a certain plea, if taken would have defeated the suit as brought and if it is found by the Court that there was any such plea which plea ought to have been taken then it could not be taken in a subsequent suit.

A.I.R. 1947 Bom.

A.I.R. 1931 Cal.

A.I.R. 1962 Andh.

A.I.R. 1956 Mad.

A.I.R. 1957 Mad.

A.I.R. 1951 Pat.

Held that…

13. When a matter is collaterally and incidentally in issue.-

A matter can never be said to be directly and substantially in issue which calls for a decision only collaterally or incidentally and it cannot be said to be heard and finally decided if the finding on any particular issue is not necessary for the decision of the suit. The question whether an issue was substantially raised and decided depends upon the circumstances of each particular case. And although no hard and fast rule can be laid down, this proposition is well established that when a decree of the Court is not based upon a finding but was made in spite of it that finding cannot be res judicata and further it could not said to be finally decided if it were not necessary to decide the issue for the

purpose of deciding the case, there can be no res judicata.

A.I.R. 1946 Pat.

Held that…

Similarly a question which is foreign to the suit and unnecessary for decision cannot be held to be matter directly and substantially in issue so as to operate as res judicata in a latter suit. A question which is relevant to the issue in a suit will not necessarily be a matter directly and substantially in issue and a finding on that question will not be res judicata unless it is so connected with the question in issue that the decision upon one must necessarily determine the decision upon the other.

A.I.R. 1930 Oudh.

A.I.R. 1954 Pat.

Held that…

In other words a decision on an issue, which is not necessary for the determination of

the real question in dispute between the parties does not operate as res judicata.

A.I.R. 1931 Cal.

Held that…

The above rule that a judgment or decree is not conclusive of anything not required to support it, is not a mere rule of construction but an unyielding restriction of the powers of the parties and of the Court.

In the undermentioned cases it has been held that a finding in a former suit not material or necessary for the disposal of the suit or adjudication of the claim for giving relief to the plaintiff is an unnecessary finding not being a decision on a matter directly and substantially in issue and as such will not operate as res judicata.

A.I.R. 1957 Cal.128 (D.B.)

Held that…

Similarly where the Court expressly stated that the decision of the issue is unnecessary and the party who pleads (or against whom it is

pleaded) res judicata was not a consenting party to the raising or decision of that particular issue in the earlier suit, the plea of res judicata would not be supportable.

A.I.R. 1921 Mad.

Held that…

In order that an incidental finding in one proceeding shall be res judicata in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first.

A.I.R. 1923 Lah.

Held that…

Similarly it has been held that a finding not necessary to the determination of the suit and is not one against which a party could have appealed. It is not a matter directly and substantially in issue which was heard and decided and is not res judicata in subsequent suit.

A.I.R. 1925 Oudh.

Held that…

It is equally true for a finding by an Appellate Court on a point not necessary for the decision of the suit and on which no issue was raised in the primary court and no ground taking in memo of appeal cannot operate as res judicata in a subsequent suit between the parties. Again, where the main question in the previous suit was whether this plaintiff was a coparcener with a certain person the Court decided two points (1) that the pedigree set up by the plaintiff was not proved and (2) that the plaintiff was not a coparcener with the person in question, it was held that as the question as to the exact relationship of the plaintiff with the person in question was not essential to the decision of the previous suit on that question.

A.I.R. 1929 Bom.32.

Held that…

In an ejectment suit, where court passes a decree for rent only, the finding as to title

need not be incorporated in the decree. The question of title gone through incidentally in a rent suit does not operate as res judicata.

A.I.R. 1925 All.

A.I.R. 1923 Cal.

Held that…

Similarly a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in Civil Court. Similarly that very finding which is necessary and sufficient for the disposal of the case, can operate as res judicata and in this connection it is the judgment of the lower Appellate Court and not that of the trial court which must be looked into.

A.I.R. 1926 All.

Held that…

The above rule may be illustrated wherein the previous suit before the Revenue Court the plaintiff sued for determination of the amount of rent to be paid by third parties on the allegation that these third parties were his ex-proprietary tenants, and they replied that they did not base their tenancy upon an agreement with the plaintiff, but they were holding from S who was a tenant of the plaintiff and S intervened and took the same position it was held that it was not necessary for the purposes of the decision of that suit to determine whether the lease was a benami transaction, S was a benamidar of the plaintiff and therefore that finding to that effect was not res judicata in a subsequent suit by the plaintiff against S for possession.

A.I.R. 1923 Lah.523.

Held that…

Where the real point in issue in a previous suit was whether the mortgage was for necessity

or not and it was found as a fact that the mortgage was for necessity and therefore there was no necessity to arrive at any decision upon the question whether M was lawfully adopted son of A, it was held that it was doubtful whether the finding on the question of adoption was not directly and substantially in issue.

A.I.R. 1935 Pat.

Held that…

As already pointed out that the decision of an issue is res judicata only when the issue arose directly and not incidentally having regard to the subject-matter of the particular suit or proceeding. Where, therefore, the Collector had given his decision in the course of a prior proceeding on an incidental issue also, but such issue arises in a subsequent suit, his decision cannot make it res judicata in the subsequent suit. But that decision is a piece of evidence under Sec.13, Evidence Act, to which some weight must be given in the determination of the status of the two estates in relation to each other. Nor a matter which is res judicata can be agitated afresh merely

by reason of a suggestion made in a judgment which was unnecessary to the decision of the case that the party may bring another suit.

A.I.R. 1957 Mad.

Held that…

Thus under industrial disputes although statutory finality is accorded to the award of Industrial Tribunal as modified by Appellate Tribunal but the statutory finality is not enough to sustain the claim that a decision on every one of the collateral issues decided in an industrial dispute or an appeal therefrom will operate as res judicata when the same question arises again as a collateral issue in subsequent proceedings even in subsequent industrial dispute. The prior decision is relevant in the subsequent proceedings but it is not conclusive.

A.I.R. 1952 All.

Held that…

14. Disposal of the case on preliminary issue.-

Whether res judicata.-When a case is not decided on merits at all but is disposed of on preliminary grounds only there can be no question of res judicata in a subsequent suit between the parties regarding matters or issues raised but not decided in the earlier litigation.

A.I.R. 1950 P.C. 80.

Held that…

Thus when a suit was rejected under O. VII r.11, C.P.C., as non-maintainable on the preliminary ground that a valid notice under Sec.80,C.P.C., had not been issued any observation which the Court might have made regarding the merits of the suit were of an incidental nature and cannot be treated as final decision and would not operate as res judicata in any subsequent suit between the parties. Unless the decision of the preliminary issue involves the decision of other issues as well.

A.I.R. 1922 P.C.

Held that…

In an another case Midnapur Zamindari Co., Ltd. v. Naresh Narain.

A.I.R. 1924 Mad.

Held that…

Before the Privy Council where the previous suit for eviction was contested on two grounds: (1) the defendants had occupancy rights and (2) the suit was premature. The trial court held that the suit was premature but that the defendants had not the occupancy rights. The plaintiff took up the matter to the High Court and the defendants also filed a cross-appeal against the finding of the lower court to the effect that they did not have a right of occupancy in the land. Both the appeal and the cross-appeal were dismissed. But notwithstanding the fact that the defendants filed a cross-appeal, their Lordships of the Privy Council held that the finding of the trial court as regards the absence of an occupancy right of the defendants would not

operate as res judicata inasmuch as once they succeeded on the plea that the suit was premature there was no occasion to go further as to the finding against them. In a Madras case where a suit for eviction was contested by a defendant on two grounds.

A.I.R. 1938 Oudh.

Held that…

Firstly that he had a permanent occupancy right in the land and secondly, that there was no valid notice to quit. The trial Court held that the defendant has failed to establish his right of permanent occupancy but that the plaintiff's suit would in any case fail because no notice to quit was given. But as the plaintiff filed an appeal which was dismissed by the District Judge on the ground that no notice to quit was given. The District Judge did not decide the question as to whether the defendant established his claim to right of permanent occupancy. Thus it was clear that the question as to whether the defendant had a permanent right of occupancy though decided by the Munsif was practically left open by the District Judge

and also by the High Court in the Second appeal and the litigation was disposed of on the ground of failure to give proper notice to quit. The question was clearly left open by the Superior courts and was not finally decided so as to operate as res judicata. To apply Sec.11, C.P.C., it is necessary to see what is the matter directly and substantially in issue in the present suit. In judging whether or not a previous decision is a bar to a subsequent one, the Court must look to the matter directly and substantially in issue in both the suits and that it was heard and finally decided in the previous suit. Even if the matter which is not in dispute had been in the previous suit, the decision of that suit cannot operate as res judicata in the subsequent suit if the previous suit is disposed of on a preliminary point. Similarly where a suit is dismissed as time-barred the dismissal does not operate as res judicata on the merits.

A.I.R. 1924 All.

Held that…

15. Obiter dictum-Whether res judicata.-

Observation or mere expression of opinion or a chance or casual remark by the Court in the previous judgment not arising out of the issues which were before the Court for decision; (nor a finding on such question is deemed to be necessary for the decision of the case) is called an obiter dicta. To constitute res judicata the matter must be directly and substantially in issue in the former suit. Obiter dicta will not constitute the matter res judicata in subsequent suit.

A.I.R. 1936 Nag.

Held that…

Similarly a mere suggestion by the Court in a judgment passed on a point not in controversy and in respect of which no issue has been framed has no binding effect and does not constitute res judicata.

A.I.R. 1953 All.

Held that…

But even an obiter dicta of Supreme Court is binding on all the Courts in India.

It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court they may not be considered to be binding, and in such cases the binding nature of the observations of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of Counsels when a point is not argued, are not binding.

A.I.R. 1940 All.

A.I.R. 1950 Pat.

A.I.R. 1953 All.

Held that…

But otherwise even what is generally called an obiter dictum, provided it is upon a point raised and argued is binding upon the courts in India.

A.I.R. 1940 Lah.

A.I.R. 1933 All.

A.I.R. 1935 Lah.

Held that…

16. Matter not decided expressly or impliedly-whether res judicata.-

The above heading may be conveniently sub-divided into two sub-headings, viz., (a) matter not raised and not decided, (b) matter raised but not decided. A question which has never been raised by the parties and never decided by the Court in the previous litigation cannot operate as res judicata. A finding by way of obiter dicta or casual or chance remark would be included in this category and cannot operate as res judicata as it cannot be taken to be such a decision as would bind in a subsequent suit.

A.I.R. 1937 Lah.

Held that…

17. Issue raised but not decided-No res judicata.-

As regards matter raised but not decided the rule of res judicata does not come into operation unless the matter which is subsequently decided by the Court is expressly or impliedly decided on the merits in the previous proceedings.

A.I.R. 1934 Oudh.

Held that…

Thus where the first suit did not give any definite finding on the question of title and the judgment was very vague and it was not proved that the plaintiffs were parties to the suit it was held that the second suit where a question of title was at issue, was not barred by res judicata.

A.I.R. 1931 All.

Held that…

Similarly it has been held that the rule of res judicata can be applied to the subsequent

proceedings only when the point raised in the subsequent proceedings were raised in the earlier proceedings and were specially decided. The question of the determination of the defendant’s tenancy which was neither decided nor was it necessary to be decided in a previous suit would not operate as res judicata in a subsequent suit between the parties.

A.I.R. 1928 Oudh.344.

Held that…

In a suit for resumption of a Muafi holding subsequent to its transfer the revenue courts held that the holding was liable to resumption. They decided, however, that as the holding had been held for a long time and by two successors to the original grantor, the holding should be deemed to be a holding in a proprietary right under Sec.107, Oudh Rent Act. The transferees brought a suit for a declaration that they had obtained the title of the transferor as under proprietor. It was held that the suit was not barred by the rule of res judicata owing to the decision of the Revenue Court as the matter in Civil Suit was the relief by way of declaration

of rights which had arisen in favour of the plaintiff by the effect of the rule of equity embodied in Sec.43, Transfer of Property Act and arising out of the declaration granted by the Court of Revenue. The matter surely was not only not within the exclusive jurisdiction of the Court of Revenue but was not at all within its jurisdiction and did not arise for determination in those proceedings. Where a particular issue does not arise on the pleadings nor is clear from the judgment nor it is indicated that the parties knew that they had to adduce evidence on it, any finding on such issue does not operate as res judicata.

It is quite true that a decision would operate as res judicata even if it is not specific and express, provided it is necessarily implied in the decree. For instance, a decree which necessarily involves a finding on an issue in the affirmative or the negative, even though no specific finding was recorded on it, would be res judicata in a subsequent suit. This rule, however, can have no application where the Court has expressly left undecided the issue that arose for decision in the later suit. In the words of the

judicial Committee of the Privy Council in Parsotam Gir v. Narbada Gir.

A.I.R. 1951 Mad.

Held that…

“It would be a contradiction terms to say that the Court had finally decided matters which it expressly left untouched and undecided.” Thus where the Collector dismissed the previous suits for rent in limine on the sole ground that the land-holder not having complied with the statutory requirements entitling him to an enhancement of rent, could not sue for water rate which he had not hitherto collected. He declined to go into the question whether the tenant would be liable for the water rate as “rent”. Consequently the decision of the Collector in the previous suit does not operate as res judicata.

A.I.R. 1958 Orissa

A.I.R. 1955 Ajmer 12.

Held that…

Where in an earlier suit the Munsif and did not decide the question of title and the Civil Judge in appeal had no occasion to decide and in fact did not go into the question of title. The question of title can be reagitated in a subsequent suit between the parties and cannot operate as res judicata.

A.I.R. 1954 All.

A.I.R. 1952 Cal.

A.I.R. 1953 Pat.

A.I.R. 1958 Orissa.

A.I.R. 1955 Mad.

A.I.R. 1960 M.P.

A.I.R. 1951 H.P.32.

A.I.R. 1951 H.P.54.

A.I.R. 1953 Cal.669.

Held that…

When matter not in issue at all-Whether res judicata.-When a particular question was not in issue at all in the previous suit such decision is not res judicata on that question.

A.I.R. 1953 S.C. 153.

Held that…

Thus where there was no issue regarding the character of tenancy, namely whether it was permanent and heritable or otherwise, such question of permanency of tenancy was not, therefore, directly and substantially in issue it was held by their Lordships of the Supreme Court that the plea of res judicata cannot be sustained.

A.I.R. 1957 Cal.

Held that…

It is undoubtedly true that if the parties and the Court have dealt with a particular issue as a direct and necessary issue, the decision would be res judicata and would bind the parties even if the issue on a proper examination be found to have been unnecessary and for incidental and the position would be the same if, an issue of this character, the parties invite and take a decision from the Court. But where the Court expressly stated that the decision of the issue is unnecessary and the party who pleads (or against whom it is pleaded) res judicata in the subsequent suit

was not a consenting party to the raising or the decision of the particular issue in the earlier suit, the plea of res judicata would not be supportable.

A.I.R. 1941 Cal.

Held that…

Where a point decided in the previous suit is not in issue in the subsequent suit but is only material to weaken the case of the plaintiff, the subsequent suit is not barred by res judicata. A judgment can operate as res judicata only in so far as it finally determines a controversy which is directly and substantially in issue in the case. Where the question raised in the subsequent suit was altogether beyond the scope of the previous suit and the issue in the form in which it was raised in the subsequent suit did not directly arise in the previous suit, the previous suit does not operate by way of bar by res judicata as there was no dispute as to his being an adopted son, the only dispute being whether he was then entitled to demand partition.

A.I.R. 1931 Cal.

Held that…

In the same way a judgment is conclusive on the matters which are directly in issue and not those which are brought incidentally into a controversy during the trial and a fact cannot be in issue directly when the judgment can be correct whether the fact exists or not. The rule that a judgment or decree is not conclusive of anything not require to support it, is not a mere rule of construction, but an unyielding restriction of the powers of the parties and of the Court.

A.I.R. 1929 All.

A.I.R. 1934 Cal.

Held that…

Where the plaint does not disclose a cause of action the plaint has to be rejected under O. VII, r.11, C.P.C., before proceeding with the trial of the suit and it may therefore, be said that where there is no cause of action, the Court has no jurisdiction to try a case and is not competent to decide other issues. Under

Sec.11, C.P.C., the bar arises only where the issue has been directly and substantially raised in a former suit. Where there was no cause of action, no matter in the plaint can be directly and substantially in issue on the former suit. Therefore a suit dismissed on the ground that there is no cause of action is not a bar under the principles of res judicata.

A.I.R. 1941 Cal.

Held that…

In a partition suit by a co-sharer the defendant co-sharer alleged that he had a right of way and right of passing damage over the land in suit and prayed that these facts might be taken into consideration when the allotments were made. There was no issue as to the existence of this right of way. The right of way was not challenged and indeed it seemed from a passage in the trial court’s judgment that this right of way was admitted in the partition suit, it was held that decision in the partition suit could not operate as res judicata on the question as to the existence of the right of way in favour of the defendant.

A.I.R. 1934 P.C.

Held that…

Illustrations

(1) In the year 1892 the mortgagor instituted a redemption suit alleging that nothing was due under the securities, and claiming to be put into possession or, if the Court should find that any sum was due, that it might order redemption subject to the payment of such sum. Decree was passed that the mortgagor should pay a certain amount by a certain date and in case of default the suit should stand dismissed. The default was made but the plaintiffs who were the representatives and heirs of the original mortgagor brought another suit for redemption of the same properties. In their plaint, the plaintiff's alleged that the whole of the sum has been satisfied out of the increased profits of the mortgaged properties, and claimed, (a) possession of the shares of the properties by redemption on the footing that the mortgage money had been satisfied, or (b) if any amount of the mortgage money be proved due, a decree for redemption in condition of payment of that

amount be passed. It was held by their Lordships of the Privy Council that the question was not res judicata the issues decided in the former suit being (1) whether the mortgagors were then entitled to redeem, and (2) the amount then to be paid if redemption then took place. And the issues in second suit being (1) Whether the right to redeem now exists (2) the amount now to be paid if redemption now takes place consequently it was held by the Privy Council that the right of redemption was not extinguished and another suit was maintainable.

A.I.R. 1929 Lah.

Held that…

(2) Where a suit brought for recovery of possession of the property on the ground that the plaintiff was the proprietor was dismissed and another suit was brought by the plaintiff as a mortgagor for redemption of the said property, it was held that in the earlier suit he was not bound to put forward his claim as mortgagor and seek redemption on payment of mortgage money, that the decision in the prior

suit cannot operate as res judicata because the matter involved in the two suits is essentially different. Where a person sues to eject an alleged trespasser he sues as the owner of the property, but where he sues to redeem he sues as the owner of an interest in it, namely, the equity of redemption and the defendant as the mortgagee is sued as holding the property as security for the debt.

A.I.R. 1925 P.C.

Held that…

(3) Where a prior suit for share of profits was decreed and no question of right to partition was raised or decided it was held by the Privy Council that in a subsequent suit the question of partition was not res judicata, but the Court added a declaration to the decree that by virtue of the decree in the previous suit the decree-holder could execute the decree without resorting to a suit for share of yearly profits to spare the parties unnecessary expense.

A.I.R. 1924 Cal.460.

Held that…

(4) Plaintiff sued the defendants, for arrears of rent in 1915 on the allegation that they held the disputed land under him as his tenants the defendants pleaded that they were not tenants under the plaintiffs and set up a title in themselves. The trial court came to the conclusion that the plaintiff had failed to prove the relationship of landlord and tenants between the parties and in this view dismissed the suit for rent. The plaintiff then instituted another suit to eject the defendants on the allegation that they were trespassers, it was held that the previous suit does not operate as res judicata. The decision is conclusive upon one point and one point alone, viz. That the defendants were not tenants of the plaintiff during the years for which rent was then claimed. No other questions were essentially in dispute at that stage and they cannot rightly be regarded as matters directly and substantially in issue in the suit and finally decided therein.

A.I.R. 1924 Oudh 129.

Held that…

(5) Failure of the reversioners in earlier suit for cancellation of deed of gift by window is not bar to claim as reversioners after her death. The validity of the deed of gift and its effect are distinct matters.

A.I.R. 1922 P.C. 241.

Held that…

An adverse finding against a successful party-Whether res judicata.-The leading authority on this point is the decision of the Privy Council in the case of Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy.

A.I.R. 1960 Cal.440.

A.I.R. 1960 Raj.304.

A.I.R. 1957 Cal. 128.

Held that…

Where a Zamindar filed a suit against his tenant claiming possession of certain Chur lands. The suit ended in a compromise and a

fresh “patta” and “Kabuliyat” fixing an yearly rent for eight years were executed. One of the terms of the compromise was that after the expiry of the period of eight years, a fresh “patta” and “kabuliyat” were to be given at a fair rate to be settled then. It was also agreed that after the settlement of the fair rent if the tenant refused to pay the rent, the Zamindar could evict him and obtain “khas” possession. To that suit the tenant raised two defences (1) that he had “Jotedari” or occupancy right and (2) that the suit was premature. The trial court negatived the tenant’s case as to his occupancy rights, but held that the suit was premature. The High Court agreed with the decision. The Zamindar brought a subsequent suit for “khas” possession of the land after giving notice to terminate the tenancy. The tenant again pleaded occupancy rights. The question that had to be considered was whether the finding in the prior litigation that the tenant had no occupancy rights was res judicata. Lord Dunedin observed as follows:

“Their Lordships do not consider that this will be found an actual plea of res judicata for the defendant having succeeded on the other

plea, had no occasion to go further as to the finding against them…”

A.I.R. 1937 Mad.114.

Held that…

Though a finding on an issue may not be necessary for the disposal of the suit, yet if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives a finding thereon the decision on that issue will constitute res judicata in a subsequent suit, provided that the party against whom there was finding on that issue, would be in a position to carry the matter in appeal.

A.I.R. 1955 Andh. Pra. 282.

Held that…

But it has also been held in some cases that though a suit is dismissed the adverse finding against the defendant would be res judicata in a subsequent suit between the same parties, if on the basis of that finding, costs in whole or in part were disallowed to the plaintiff or

awarded to the defendant, for in such a case there is a decree against the defendant and it becomes final unless he prefers an appeal against the same.

A.I.R. 1937 Mad. 114.

Held that…

Similarly wherein an earlier suit for recovery of possession by the landlord the tenants denied the lease and title of landlord and claimed adverse possession and the court found in favour of landlord as regards lease and adverse possession but dismissed the suit and appeal therefrom on the ground that landlord failed to serve a notice on the tenant to quit and disallowed costs of the defendant. It was held that the tenant could have appealed against the order relating to œosts and since he did not do so the matter became res judicata.

A.I.R. 1915 P.C. 116.

Held that…

This decision emphasizes the rule that there must be something in the decree that entitles a party to file an appeal.

The Privy Council held that in cases where the preliminary decree in a partnership action contains certain declarations of rights adverse to a party or directions not sustainable in law, then it is the plain duty of that party to file an appeal and if he does not so, he cannot agitate the matter in an appeal against the final decree.

A.I.R. 1960 A.P.168.

Held that…

And where there was nothing in the preliminary decree to which the plaintiff could have taken exception and make the foundation of an appeal then in an appeal against the final decree the matter which is the subject of adverse finding in the suit can be reagitated.

A.I.R. 1959 All.530.

Held that…

Where the creditor's suit against the sons is dismissed after adjudication on merits, the principles of Sec.11, C.P.C., would apply and execution of the decree against them for attachment and sale of their shares in the joint family property in order to satisfy the decree against their father would not be maintainable, but where no such adjudication has been made and the claim is dismissed against the sons merely on the ground that the plaintiff does not wish to proceed against them, no such consequence would follow and it would be open to the plaintiff decree-holder to proceed in execution against them on the ground of their pious obligation, and it would then be open to the sons to show that their share in the joint family property would not be liable because the debt was tainted with immorality or illegality. So far as O. XXIII, r. 1, C.P.C., is concerned it only prevents the plaintiff from filing suit in respect of the same cause of action which had been withdrawn by him at an earlier stage. It does not debar the plaintiff from putting his decree into execution against the sons if he is entitled to do so under some other provision of law. According to Hindu law

the sons will be bound for the payment of the debt of their father if the debt was not tainted with immorality and illegality, irrespective of the fact whether the father is dead or alive.

A.I.R. 1930 Cal.47.

A.I.R. 1946 Lah.387.

A.I.R. 1933 Cal. 222.

A.I.R. 1927 Mad.273.

Held that…

18. Subject-matter need not be identical in both suits.-

The decision of a matter which is directly and substantially in issue between the parties to a suit operates as res judicata between the same parties or their representatives in interest in a subsequent suit irrespective of the fact whether the subject-matter of the two suits is identical or is different.

A.I.R. 1925 Oudh 390.

A.I.R. 1925 Oudh 118.

Held that…

For the application of the principle of res judicata it is not necessary that the subject matter, in the sense of the property, involved in the two suits should be the same.

A.I.R. 1929 Oudh 172.

A.I.R. 1925 Mad.1172.

A.I.R. 1928 Nag. 112.

Held that…

Nor does not the test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter lie in the fact as to whether the two causes of action are different or the same.

A.I.R. 1927 Mad. 213.

Held that…

The cause of action in a partition suit of joint family property must be regarded as exhaustive of the whole property available for

division so far as its existence is known at the date of the plaint.

A.I.R. 1927 Nag.322.

Held that…

There is, however, nothing in law which compels a person to sue on an alternative cause of action and failure to do so in a former suit does not bar a subsequent suit, either under Order II, rule 2 or under Sec.11, Explanation IV. But it is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be res judicata which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous.

19. Matter in issue must in the former suit have been alleged by one party and either denied or admitted by the other: Explanation III.-

It appears to be generally agreed upon that to assert the plea of res judicata successfully, a defendant must show not only

that the matter in issue has been in issue in a former suit between the same parties, in a competent Court, but also that the matter so in issue was heard and finally decided by the Court. A right or title to be barred by such a plea must, moreover, have been alleged and denied. Explanation III has extended the signification of the expression matter in issue, and under it a matter alleged by one party may be in issue even if admitted by the other party. It is the matter in issue that forms the essential test of res judicata. Hence it is not enough that the matter was alleged by one party. It must appear that the matter referred to was alleged by one party and either denied or admitted expressly or impliedly by the other. The rule of res judicata does not apply where the right on which the second suit is based is not the same as that asserted in the first suit.

A.I.R. 1932 Bom.

A.I.R. 1933 S.

Held that…

The meaning of the rule is not that a decree will bar a man as to matters never raised if they are matters relating to the external object of the litigation but as to all matters which were relevant and examinable upon the question of right at issue between the parties. It has even been held that when a Court of competent jurisdiction, in deciding upon a particular subject-matter thinks it necessary to go into collateral facts for the purposes of its decision, its opinion on those facts is not conclusively binding in a subsequent suit which relates to a different subject-matter.

A.I.R. 1932 P.C. 50.

Held that…

Where a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as res judicata between the parties.

20. Decision on a question of fact.-

A decision on a question of fact is evidently res judicata, within the terms of the section. Even a wrong decision in a previous suit bars a subsequent suit. It has thus been held that an erroneous decree establishing rights is as much res judicata between the parties as a just decree. The existence of a custom is a question of fact and an erroneous decision on that point between the same parties operates as res judicata even though the subsequent suit relates to properties other than those involved in the prior suit. Where a question is finally decided between the parties, the fact that the grounds given for decision are erroneous do not prevent the matter from being res judicata.

A.I.R. 1929 Mad. 404.

A.I.R. 1921 P.C. 23.

Held that…

When a Court of law has in any proceeding before it, decided upon evidence or in the absence of evidence a question of fact, it is

not competent to it to allow that question to be again re-opened except in the very restricted terms laid down by the provisions for review of judgment.

A.I.R. 1929 Mad. 404.

Held that…

Thus where on a previous petition being dismissed, the petitioner files another petition praying for an apparently different relief, but the relief is such as rests only on the same question of fact as in previous petition, that petition cannot be entertained.

A.I.R. 1928 Cal. 717.

Held that…

It is now a settled law that a decision on a question of fact, howsoever erroneous it may be, constitutes res judicata between parties to the suit.

A.I.R. 1935 Pat.526.

A.I.R. 1938 Nag.195.

Held that…

The reason being that jurisdiction of a Court is the power to hear and decide and the power to decide erroneously as well as correctly. Correctness or otherwise of judical decision has no bearing upon the question whether it does or does not operate as res judicata. A party taking the plea of res judicata has to show that the matter directly and substantially in issue has also been directly and substantially in issue in previous suit and has been heard and decided.

An erroneous decree establishing rights is as much res judicata between the parties as a just decree and evidence offered to prove that the former decision is erroneous is irrelevant. A party’s ignorance of a ground of plea during the former litigation does not make the former decision any the less binding.

A.I.R. 1923 Mad. 545.

Held that…

Thus where an earlier decision was wrongly held to be res judicata though the parties in the

subsequent suit were not the same as in the prior suit. The same question came up for decision in a third suit. The parties to the second and the third suit were the same. It was held, that though there is a mistake of fact as regards the parties, yet the Judges who decided the second suit decided that the matter was res judicata between the parties and therefore their decision was final and their Lordships were not competent to go behind the earlier decision. Such questions whether a kabuliyat is binding on a party to a suit is a question of fact for the purposes of res judicata and cannot be re-opened or the existence of a custom is a question of fact and an erroneous decision on that point between the same parties operates as res judicata even though the subsequent suit relates to properties other than those involved in the prior suit.

21. Decision on mixed question of law and fact.-

The same rule applies to a case where the prior decision was as to a mixed question of law and fact. In other words, an issue of mixed

question of law and fact stands on the same footing as an issue of fact, and evidently a decision come to on a mixed question of law and fact may operate as res judicata. The question whether by custom the right to receive the offerings at a shrine is alienable or not is a mixed question of law and fact.

A.I.R. 922 Lah.329.

Held that…

When the existence of certain facts and the legal effect of such acts are both to be found before a question is answered, it is a mixed question of law and fact. Thus whether a tenancy is a permanent one or not is a mixed question of law and fact.

A.I.R. 1924 Cal.600.

A.I.R. 1926 Cal.80

Held that…

A finding on a mixed question of law and fact stands on the same footing as a decision on a question of fact and operates as res judicata. A judgment operates as res judicata with regard

to all the findings that are necessary and essential to the judgment. Even an erroneous decision on a mixed question of law and fact is res judicata like the decision on a question of fact.

A.I.R. 1938 Bom.

A.I.R. 1930 Pat.

A.I.R. 1933 Lah.

A.I.R. 1931 Bom.

A.I.R. 1926 Nag.

A.I.R. 1928 Cal. 777(F.B.)

Held that…

Decision on such questions as to whether an issue is barred by res judicata or not or the decision on the lord or the construction or interpretation of terms of a will in a certain manner or the question whether a document was an award or a partition deed or interpretation of other documents, are all mixed questions of law and fact and would attract the principles of res judicata in a subsequent suit between the parties.

22. Decision on a question of law.-

Under the Code of 1882 there was a conflict of opinion as to whether a question of law operated as res judicata in respect of another subject-matter in a subsequent suit it being held by the High Courts of Bombay and Madras that it did not and by the High Courts of Calcutta and Allahabad that it did.

A.I.R. 1926 Bom.

A.I.R. 1965 Raj.42.

Held that…

In order to settle this controversy and to give effect to the decisions of the Calcutta and Allahabad High Courts, C1. (a) of para. 1 of the section originally proposed was framed by inserting the words “by a finding of fact or of law or of both”. The Statement of Objects and Reasons as to which proceeded thus: “It is proposed to affirm the view entertained both at Allahabad and in Culcatta that a pure finding of law may operate as res judicata. This coincides with the English practice of holding

parties to be stopped by a former judgment, however erroneous, if it stands unreversed by a competent Court, though it is open to them to contend that the judgment does not accurately represent the findings. On the other hand, it is desirable to limit the operation of the principle to adjudication on merits, with a view to excluding, for instance, dismissals on a preliminary question of jurisdiction." But the subject was found to be unsuitable to the scheme of skeleton Act, and was consequently struck out. Nevertheless the same view has been reiterated both by the Bombay and Madras High Courts in more recent decisions and it has by them been held that where there has been a decision on an abstract question of law, e.g. the construction to be placed on a section in an enactment, and not a concrete question, such as the construction of a document entered into between the parties to a suit, it is no longer of a question of res judicata, as a Court can form its own opinion as to what the law is.

A.I.R. 1928 Cal.

A.I.R. 1925 All.

A.I.R. 1927 All.

A.I.R. 1926 Pat.

A.I.R. 1933 Mad.

A.I.R. 1932 Pat.337.

Held that…

The Calcutta High Court has in several cases maintained that an erroneous decision on a pure question of law in a suit does not operate as res judicata, in a subsequent suit between the same parties where the cause of action in the subsequent suit is not identical with the cause of action in the previous suit and the same view has been propounded by the other High Courts.

A.I.R. 1928 Cal.

A.I.R. 1931 Bom.

A.I.R. 1930 Bom.

A.I.R. 1930 Rang.

Held that…

It is otherwise, however, where the cause of action in the subsequent suit is the same as that in the former suit. So it has been held

that a previous decision on a question of law which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them is as binding upon them as a previous decision on a question of fact.

A.I.R. 1932 Bom.

Held that…

It has even been held that an erroneous decision on the question of the construction of a document operates as res judicata. But a case must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit, and if the law has been altered in the meantime and the effect of this law has been differently interpreted by judicial decision or altered by statute, a decision on a point of law in an earlier suit will not operate as res judicata with regard to the same question in a subsequent suit. For instance, where a stipulation as to the payment of interest contained in a kabuliyat is held to be penal and, therefore, unenforceable, and the law is

subsequently altered by judicial pronouncements, the decision as to penal nature of the stipulation will not operate as res judicata in a subsequent suit to recover rent on the basis of same kabuliyat. But it does not matter whether the decision previously given was, according to a later decision in another suit, erroneous as a proposition of law.

A.I.R. 1931 All.635.

Held that…

A statutory right conferred by a new Act may even be made a foundation of defence to the plea of res judicata.

A.I.R. 1928 Cal.777.

Held that…

The question as to whether an issue of law is res judicata inter partes, and if so, in what circumstances, has been the subject-matter of decisions of the various High Courts in England and India. The High Courts in England had no difficulty in holding that there was a bar when the cause of action was not the same

and what was decided in the former case was only a point of law, though in England the term res judicata is confined to the cases where the res, i.e. the cause of action is the same and in other cases the bar is called the bar of estoppel by record. The principle that there can be the bar of res judicata even where what was decided in the former suit was a pure issue of law will be found stated in Halsbury's Laws of England, Vol. XIII, Art. 464 (p.410):

"…… And this principle applies whether the point involved in the earlier decision and as to which of the parties are estopped, is one of fact, or one of law, or one of mixed law and fact."

In support of this case Halsbury refers to two below mentioned cases. At page 344 it is quoted in Halsbury "…… No question of fact which was directly in issue between the parties to the action before Bray, J. and which was decided by him, could be further litigated by either party and the same would apply to the exact point decided by Bray, J., whether it were a point of law or of mixed law and fact."

The expression “cause of action” as used in Sec.2 of Civil Procedure Code of 1859 ran as follows:

“The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a court of competent jurisdiction in a former suit between the parties under whom they claim.”

Their Lordships of the Privy Council in Krishna Behari v. Brojeshwari, while interpreting the expression “cause of action” used in the above section remarked:

“The expression cause of action cannot be taken in its literal and most restricted sense. But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent court, as to the status of one of them in relation to the other, it cannot…… be again tried in another suit between them.”

After the above decision by the Privy Council the Legislature introduced the words “matter directly and substantially in issue” in the

Civil Procedure Code of 1877 and thereafter in subsequent amendments. In England there cannot be a bar of res judicata unless the same cause of action is put in issue in the second suit as was put in issue in the first. What the English jurists therefore call the bar of res judicata is the bar created by the use of the word “suit” in Sec.11, C.P.C. Even in England there can be a bar on analogous principles even though the cause of action is not the same, viz. The bar of “estoppel”.

A.I.R. 1942 Bom.257.

A.I.R. 1949 Cal. 430

Held that…

Regarding the bar of “estoppel” Halsbury in Vol. XIII, Art.469, at page 409 mentions:

“But provided a matter in issue is determined with certainty by judgment an estoppel may arise where a plea of res judicata could never be established, as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point, which having been once

distinctly put in issue, has been solemnly found against him.

“Though the objects of first and second actions are different, the finding on a matter, which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties and their privies. And this principle applies, whether the point involved in the earlier decision, and as to which of the parties are estopped, is one of fact or one of law or one of mixed law and fact.”

Another authority from England in (1926) A.C. 94:(1926)95 L.U.P.C. 33 which has been followed by Madras High Court in Mahadavappa Sommappa v. Dharmappa Sanna and also by Calcutta High Court in Santosh Kumar v. Nirpendra Kumar, Lord Carson who delivered the judgment of the Board of observed:

“It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The

decision of the High Court related to a valuation and liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, namely the valuation for a different year and the liability for that year. It is not eadem questio and, therefore, the principle of res judicata cannot apply."

The above case is a clear authority for the proposition that in England a point of law cannot possibly conclude the parties by the principle of res judicata in a subsequent litigation not based upon the same cause of action when the facts to which the law is to be applied are different.

We come across another authority of English law in fones v. Lewis wherein Bankes, L.J., at page 344 remarked:

"…… It has been argued that this decision operates as an estoppel between the overseers of the parish for the time being and the respondent and it is impossible for the latter in any subsequent dispute with the former to say anything contrary to that

decision. I do not take this view. There is no real dispute as to the law of estoppel between the parties or privies.

"No question of fact which was directly in issue between the parties to the action before Bray, J. and which was decided by him could be further litigated by either party, and the same would apply to the exact point decided by Bray, J., whether it were a point of law or of mixed law and fact. But the reasons which led the learned Judge to his decision upon the precise point do not bind the parties in a subsequent litigation."

Therefore, so far as the English law is concerned, there is no doubt whatsoever, that a point of law cannot be taken to be res judicata between the parties between any future litigations from them facts in relation to which it was decided.

A.I.R. 1930 Pat.

A.I.R. 1955 A.P.

Held that…

Now coming to the authorities of the Indian High Courts we find that some High Courts have adopted the view that an erroneous decision on a point of law would constitute res judicata as much as a correct decision on question either of law of fact, which meant that there could be res judicata not only on a question of fact, a mixed question of law and fact, but also on a pure question of law on which the parties might be at dispute regarding the matter which was directly and substantially in issue in the two litigations.

A.I.R. 1928 Cal.777.

Held that…

Rankin, C.J., delivering the judgment of the Full Bench in Tarini Charan v. Kedar Nath.

A.I.R. 1927 All.

A.I.R. 1921 Bom.87.

A.I.R. 1953 Bom.

Held that…

Gave the reasons for the above view that whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. For this purpose it is not true that a point of law is always open to a party. Section 11, C.P.C., 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. Questions of law are of all kinds and cannot be dealt with as though they were the same. Questions of procedure, questions affecting jurisdiction, questions of limitation may all be questions of law. In any case in which it is found that the matter directly and substantially in issue in the former suit and has been heard and finally decided by such court, the 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 attached on a particular point, what is made conclusive between the parties is the decision of the Court and 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 re-opening or re-contesting that which has been finally decided. Thus the above view hereinafter called I view upholds that an erroneous decision on a point of law will constitute res judicata as much as a correct decision on a question either of law or of fact; on a mixed question of law and fact some of the High Courts have adopted the view that a previous decision on a question of law was res judicata in a subsequent suit. In Chhaganlal v. Bai Harkha, it was held that a plea of estoppel by res judicata could prevail even where the result of giving effect to it would be to sanction what was illegal in the sense of being prohibited by statute.

A.I.R. 1922 Lah.329.

A.I.R. 1937 Mad.

A.I.R. 1930 Lah.

A.I.R. 1930 Rang.

Held that…

Some of the High Courts have adopted the view hereinafter called the II view that a decision on a question of law may be res judicata but an erroneous decision on a question of law cannot be allowed to operate as res judicata so as to prevent a court from deciding the same question on its arising between the same parties in a subsequent suit.

A.I.R. 1953 T.C. 193.

A.I.R. 1925 Cal.1193.

Held that…

On a pure question of law like limitation, the decisions in prior suits will not operate as res judicata especially when the law has been altered in the meantime, the decision in the earlier suit on a particular question of law would not operate as res judicata with regard to the same question in a subsequent suit.

A.I.R. 1953 S.C.65.

Held that…

The above view that an erroneous decision on a question of law would not operate as res judicata in a subsequent suit between the same parties is not justified by the weight of authorities to the contrary and by the decision of Supreme Court in Mohanlal v. Benoy Krishna.

A.I.R. 1931 Bom.

A.I.R. 1932 Bom.

A.I.R. 1942 Bom.

A.I.R. 1949 Cal.

Held that…

Hence it is submitted that the above view of the High Courts has been shaken by the Supreme Court decision and is no longer a good law.

Another series of authorities of various High Courts have affirmed the view hereinafter called the III view on the lines of English decisions to the effect that a decision on an issue of law operates as res judicata if the

cause of action in the subsequent suit is the same as in the former suit.

A.I.R. 1949 Cal.

Held that…

But as far as the present Sec.11, C.P.C., is concerned what one has got to bear in mind is not the cause of action in the two suits but the matter directly and substantially in issue in the two suits. Hence even any erroneous decision on a question of law which has been directly and substantially in issue in the former suit and has been heard and finally decided will operate as res judicata between the parties in a subsequent suit when the same question of law is again directly and substantially in issue in a subsequent suit.

Now to sum up the whole thing and to bring about a possible reconciliation between the apparently divergent views, viz. The first view where it has been held that even an erroneous decision on the issue of law operates as res judicata and the third view that a decision on an issue of law operates as res judicata if the

causes of action (or to put it more accurately where matter directly and substantially in issue) in the two suits are the same.

It would be convenient to refer to certain observations from the Full Bench decision of the Calcutta High Court in Santosh Kumar v. Nripendra Kumar:

"An abstract question of law dissociated from and unconnected with the rights claimed or denied as between the parties to the litigation is of no importance or value to them or to the decision of the case itself and cannot be said to be substantially in issue and is not eadem question and the principles of res judicata cannot apply.

A.I.R. 1944 Lah.282.

A.I.R. 1954 S.C. 82.

Held that…

It is not every decision of a question of law between the parties which is binding but only that decision on such a question which affects the subject-matter or creates a legal relation

between the parties or defines the status of either of them, which is binding."

Therefore whenever a question of law rises as to whether a question of law operates as res judicata the question that the court must address itself is:

"Is it the question of law which is dissociated from and unconnected with rights claimed or denied as between the parties to the litigation? If it is dissociated or unconnected. (i.e. an abstract question of law has been decided) then the question of law does not constitute res judicata. If on the other hand the question of law is directly connected or associated with the rights claimed or denied and constitutes the very decision of the court, then the question of law would operate as res judicata."

Relying on a judgment of the Full Bench of the Lahore High Court in Mst. Sardaran v. Shiv Lal, his Lordship Bhagwati, J., who delivered the judgment of the Supreme Court in Sunderbai v. Devaji, observed:

A.I.R. 1954 Bom.

Held that…

"Where the right claimed in both suits is the same the subsequent suit would be barred by res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those case where the rights claimed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical."

Therefore, it is only when we have eadem question or the same question that the principle of res judicata can apply. But when the questions are different the decision in law with regard to one matter cannot operate as res judicata with regard to a different matter.

Now coming back to the first and the third view adopted by the various High Courts referred to above, can be reconciled in this manner. What becomes res judicata is the matter which is decided and not the reason which leads the Court to decide the matter. But neither the reasoning nor the mental process which the

Judge undergoes in order to come to the decision can operate as res judicata. It is never safe to lay down extreme general propositions of law that in no case a question of law can operate as res judicata. If the law is interpreted as a mere reasoning which leads up ultimately to the final decision, then that decision of law does not become res judicata in subsequent suits when the facts which have got to be determined are entirely different. The distinction between res judicata and judicial precedent established by court must always be borne in mind. When a court interprets the law, when it construes as a statute or determines what the position in law is with regard to a particular matter, that constitutes a judicial precedent set up by that court and that court may well follow the precedent when similar cases come before it where the same law has to be considered and interpreted. But if certain facts had to be determined on an application of the law to those facts or an interpretation of law with regard to those facts when the law applied to or interpreted with regard to those particular facts would constitute res judicata, and it would not be open to a party to say that

the law was different either in its applicability or in its interpretation with regard to those facts from what had been decided in the earlier suit.

A decision given by a court on question of law does not bind the same parties when those parties are litigating with regard to an entirely different right. The decision of law would only be binding between the same parties as res judicata if the right that a party claimed was the same in the former suit and in the later suit. If the certain facts were determined on an interpretation of law and it was held that a party had a certain right or that he was not entitled to a particular right then it would not be open to that party, in a subsequent suit to challenge the interpretation of the law and ask the court to decide that he had the right or to the other party to allege that he did not have the right.

Therefore, the first and the primary consideration in applying Sec.11,C.P.C., is to decide what is the res which has been determined. It is only the res which is determined which could become res judicata. But

if the res is the finding of certain facts then what becomes res judicata is only those facts and not the interpretation of the law which led the Court to find those facts.

A.I.R. 1957 A.P.

Held that…

Even an erroneous decision of law in one suit would operate as res judicata in the subsequent litigation, provided the question arose as between the parties and it was substantially in issue between them. In judging whether the decision in a previous litigation regarding recurring cause of action, operates as res judicata or not, the test is whether it decided a general principle that is applicable to the later years also or whether it was peculiar or special to that particular year, in other words, whether the consideration vary from year to year or such as would govern the subsequent years also.

CHAPTER – 7

CAUSE OF ACTION

A.I.R. 1932 Nag.

A.I.R. 1932 All.

A.I.R. 1929 All.

A.I.R. 1930 Cal.

A.I.R. 1963 Pat.16.

Held that…

1. Identity of causes of action.-

Section 11, C.P.C., does not require the causes of action to be the same nor the reliefs claimed to be the same before the doctrine of res judicata can come into operation; what the section requires is that the matters in issue shall be the same and it makes no distinction between question of fact and questions of law. In Abdul Ghani v. Nabendra Kishore, it has been made clear that the rule of res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. Mr. Wells says: “It is on the

principle that cause of action needs not be the same although the issue must be the same, that the rule rests, namely, that a suit on one promissory note or bond will be conclusive upon another executed under the same circumstances, if also sued on". In Bouchand v. Dias, Branson, C.J., said referring to a number of cases that in them, "the cause of action in the second suit was different from the cause of action in the first, but the former determinations were held to be conclusive because the same question was determined in the first suit on which the second depended. So long as the same question of right has been determined between the same parties, the identity of form of action is not requisite." Mr. Freeman says: "Whatever may be the form of action, the issue is deemed the same whenever it may in both action be supported by substantially the same evidence. If so supported a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different."

A.I.R. 1949 Pat.

Held that…

2. Same cause of action.-

"Cause of action", however, is not only the infringement of the right at a particular moment. The expression "cause of action" and "party of cause of action" must be taken as meaning respectively the material facts and any material fact in the case for the plaintiff. In Chand Koer v. Pratap Singh, their Lordships of the Privy Council have laid down as follows:

A.I.R. 1959 Pat.

A.I.R. 1951 Pat.

Held that…

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

Similarly it has been laid down that a cause of action should ordinarily mean the fact or facts which compel plaintiff to bring an action in court, but it is generally accepted that the expression means everything which if not proved gives the defendant an immediate right to judgment-every fact which is material to be proved to entitle the plaintiff to succeed and every fact which the defendant could have a right to traverse. In Halsbury's Laws of England the learned author says that cause of action means every fact which is material to be proved to entitle the plaintiff to succeed and that every fact which the defendant would have right to traverse forms an essential part of the cause of action which accrues upon the happening of the latest of such facts.

"A cause of action is to be regarded as the same if it rests upon facts which are integrally connected with those upon which a right and an infringement of a right have already been once asserted."

The expression "cause of action" can be reasonably used in connection with proceedings

other than suits and it must be construed with reference rather to substance than the form of action.

The decision in previous suit in which the cause of action was split up with a view to confer jurisdiction on an inferior court operates as res judicata in a subsequent suit between the same parties in which the same cause of action is not split up and consequently the suit is instituted in a court of superior jurisdiction. Similarly a decree on an award which is not strictly in accordance with the terms of reference will nevertheless operate as res judicata in a subsequent suit on the same cause of action.

Where a landlord obtained a decree for ejectment against a tenant on payment of statutory compensation but allowed execution of decree to become barred by time. Wallis, C.J., while dissenting from Kulti Ali v. Chindan, held that ordinarily when a person has a cause of action, it is merged in the decree, transit in rem judicatum and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his

rights are gone, and a fresh suit for ejectment is barred by res judicata. Similarly a subsequent suit for the same cause of action and the same subject-matter was held to be barred by res judicata, where under a compromise A and B were bound to pay maintenance to C every year, while A paid the whole amount for two years and then sued B for contribution. The appellate Court rejected the plaint as disclosing no cause of action because the compromise did not contain any clause as to contribution; A then sued again on the same cause of action and the same subject-matter.

It is necessary that the cause of action on which both the suits are based should be the same.

A.I.R. 1959 A.P.

Held that…

Thus res judicata cannot come into operation where the subject matter of the two suits as also the capacities in which they were brought are altogether different and the causes of action of the two suits are also not the same.

A.I.R. 1953 S.C.J.693.

Held that…

In a matter before the Supreme Court it was contended that the judgment of the Privy Council in the prior litigation could not operate as res judicata about the title to the four annas shares of the estate because the subject-matter of those proceedings was the compensation money (a sum of Rs.900) and not the property that is the subject-matter of the present suit. Their Lordships after quoting with approval a Privy Council decision in Bhagwati v. Ram Kali laid down in clear and emphatic terms that the test of res judicata is identity of title in the two litigations and not the identity of the actual property involved in the two cases.

A.I.R. 1954 S.C.82.

A.I.R. 1944 Lah. 282.

Held that…

At another occasion the Supreme Court in Sunder Bai v. Devaji, has approved and affirmed the

principle of law laid down in Mst. Sardaram v. Shiv Lal wherein it was held that where the right claimed in both suits is the same the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the right claimed in the two suits were different, that the subsequent suit would not be barred as res judicata even though the property was identical.

A.I.R. 1957 Pat.365.

A.I.R. 1952 Punj. 252.

Held that…

In the above ruling the first suit was only to establish a charge on a certain property, while the second suit was based on ownership and on those circumstances it was held that the second suit was not suit for the same right that was litigated upon the first suit, and that not only were the grounds of title different from those of the first suit but the right itself was different, that is ownership in the case and a charge for

maintenance in the other and, therefore, it was held by the Full Bench that the plaintiff could not be said to be litigating under the same title as in the first suit, simply because the house in respect of which the two suits had been fought out was the same.

A.I.R. 1957 Raj.321.

A.I.R. 1950 F.C.

A.I.R. 1934 P.C.

A.I.R. 1937 Mad.214.

A.I.R. 1918 Bom.1.

Held that…

But it is now a settled law affirmed by a long series of authorities of the Privy Council, Federal Court and various High Courts in India that a second suit for same relief for redemption of mortgage is maintainable even if a decree for redemption of mortgage had been obtained in a prior suit and had remained unexecuted or had become barred by lapse of time. So long as the right to redeem does not extinguish under Sec.60 of the Transfer of Property Act a second suit for the same relief

is not barred by res judicata. The extinguishment of the right of redemption can take place under the above section only by conduct of parties or by a decree of a court and in the latter case the decree, the meaning and the effect of the decree should clearly point out such extinguishment and it is only under such circumstances that prior decree can operate as res judicata to bar a subsequent suit for redemption of mortgage.

A.I.R. 1929 Oudh 172.

Held that…

3. Where causes of action are different- Whether res judicata.-

The test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter does not lie in the fact as to whether the two causes of action are different or the same.

A.I.R. 1929 Cal.445.

Held that…

Where the causes of action in two suits are different the estoppel by res judicata should be limited to matters distinctly put in issue and determined in the prior action and it should further be restricted to questions of fact and mixed questions of law and fact and should not be extended to pure questions of law.

A.I.R. 1935 Lah.369.

Held that…

Thus a Full Bench of Lahore High Court in Masjid Shahidganj v.S. G.P. Committee where a mutwalli of a mosque had filed a suit for possession of the mosque which was dismissed on the ground that the opposite party had acquired a title to it by adverse possession. The mosque subsequently having been demolished, another suit was subsequently brought on behalf of the mosque and the Muslim community for declaration of right to pray at the mosque and for its restoration. It was held by the majority of the

Bench (Din Mohammad, J., dissenting) that Sec.11, C.P.C., applies not only to the final decision but also to the issues. The real issue in the subsequent suit was whether the mosque in question retained its character as a mosque till when it was demolished. The decision of this issue depended upon the question whether the defendants had perfected their title by adverse possession and as a consequence the rights of all Mohammedans in the mosque had been lost, therefore even if there was no prayer for possession in the subsequent suit, it was barred by res judicata.

A.I.R. 1925 Mad.

A.I.R. 1954 Mys.

Held that…

Where the causes of action are different it cannot be said from the mere fact that the same relief is claimed in both, that the later suit is barred by reason of the earlier suit.

A.I.R. 1937 Oudh 263.

A.I.R. 1963 Raj. 119.

Held that…

Thus where the plaintiff's prior suit was for rectification of the sale-deed so as to show that the area of the property purchased was a certain figure and that possession over certain portion be decreed in his favour. In a subsequent suit it was prayed that portions of the building covered by the sale-deed in respect of which the defendant failed to deliver possession and wrongfully retained possession be decreed to him. It was held that though both suits arose out of the same transaction, the cause of action was different and the subsequent suit was not barred by Sec.11, C.P.C., or under O. II, r.2, C.P.C.

A.I.R. 1961 H.P.18.

A.I.R. 1963 Orissa 130.

Held that…

Where causes of actions and issues are different in such cases there are no conflicting decrees and the rule of res judicata is not attracted. Some of the circumstances may be enumerated where the

causes of action of issues were deemed to be different and the bar of res judicata was not applied. If the allegations made in the subsequent suit are not identical with the allegations made in the earlier suit, e.g. first suit for ejectment of tenant and second suit for possession against trespasser is not barred by res judicata.

A.I.R. 1953 Assam.57(D.B.)

Held that…

The decision of a prior suit between D and P for claim to an office will not bar by way of res judicata a subsequent suit between the son of D and son of P for the claim to the office wherein P claimed by virtue of his being the senior male member of the family and did not claim under his father D.

A.I.R. 1933 Rang.106.

A.I.R. 1926 Mad.

A.I.R. 1922 All. 401(1).

A.I.R. 1922 Upp.Bur.1.

Held that…

Thus where first suit based on contract of lease and second suit for compensation based on tort or where first suit was for declaration of right to possession and second suit was for partition or first suit as reversioner and second suit as window’s heir or first suit for declaration of title only and second suit for possession or first suit was for interest and the subsequent suit for mortgage amount or first suit by co-heir for possession against widow which was conditionally decreed and ultimately suit was dismissed for non-fulfillment of condition but a subsequent suit for possession against the donee was not barred by res judicata or first sent of ejectment decreed but decree allowed to become time-barred.

A.I.R. 1930 All.479.

A.I.R. 1927 Pat.58.

A.I.R. 1952 Punj.123.

A.I.R. 1961 All.266(D.B.)

A.I.R. 1957 A.P.

A.I.R. 1956 A.P. 141 (F.B.)

Held that…

The tenant meanwhile denied the title of the landholder a subsequent suit for ejectment on ground of forfeiture by denial of title, or first decree for cess does not operate as res judicata because cess is a recurring charge or first suit for arrear of rent and second suit for ejectment of the tenant or where in an earlier suit auction sale was challenged and in the subsequent suit private sale was challenged which came into existence subsequent to the auction sale and a fresh cause of action accrued in respect of the later sale-deed or where the earlier suit was instituted by A (the mother of the plaintiff in the subsequent suit) was a declaratory suit in a representative capacity. The cause of action was to remove the cloud on the title to the estate by reason of the alienation affected by her mother and the cause of action on which the subsequent suit was based was that on the death of the grandmother the plaintiff was entitled to recover possession of his grandmother’s properties.

A.I.R. 1925 P.C. 63.

Held that…

Illustrations

1. Heirs of a deceased Mohammedan sued his widow for immediate possion of his property held and retained in possession by the widow in lieu of dower debt, on the ground that the dower debt had already been satisfied. They also claimed mesne profits for same period before and during suit. The suit was decreed on condition that the plaintiffs were to pay to the widow certain amount as the balance of dower debt, within a certain time. The sum was not paid and the suit thus stood dismissed. The widow thereupon gifted away the property mentioning in the gift deed that she had become absolute owner of the property. It was held by the Privy Council that the effect of the non-payment by plaintiff in the prior suit had not the effect of conferring absolute estate on the widow and the decision in the prior suit did not extinguish plaintiff’s right to claim possession at any future time, a question

different from that adjudicated, i.e. a right to immediate possession.

A.I.R. 1935 Cal.607.

Held that…

2. A landlord finled a suit of ejectment of tenant after giving notice to quit. The relationship of landlord and tenant was not proved and the suit was dismissed. The landlord subsequently filed a suit for rent against the defendants for the same land. This suit was also dismissed on the ground that relationship of landlord and tenant was not established. Another suit by the landlord was subsequently filed in which he stated that the defendants were his tenant but the tenancy had been terminated by reason of the denial of the defendants as to their relationship having been given effect to by the final decisions in the prior suits. The plaintiff based his cause of action on the forfeiture of the tenancy on two datas of the final decision in the prior suits and prayed for possession on declaration of title. It was held that the subsequent suit was not barred by res judicata. The judgments

passed therein were no doubt res judicata, but res judicata on a very limited point, viz. On the point that there was no relationship of landlord and tenant between the plaintiff and defendants at the time when the notice to quit was server or for period in claim in the rent suit. It was not res judicata on the point of the plaintiff’s title or on the point as to whether there was relationship of landlord and tenant between the plaintiff and defendant at a time prior to the date when the notice was served on the defendants.

A.I.R. 1933 Rang. 106.

Held that…

3. The plaintiff instituted a suit against the defendant on the allegation that the latter had rented a room in the former’s house and claimed rent for a certain period. This suit was dismissed on the ground that the plaintiff did not prove tenancy. Subsequently plaintiff filed another suit against the defendant claiming compensation for use and occupation of that room by defendant for the same period. The lower court dismissed the second suit on the

ground of res judicata. It was held by the High Court that the first suit was based on contract and the second on tort and these two being mutually exclusive causes of action when plaintiff sued on one of them and failed he was entitled to sue on the other contrary cause of action and consequently the second suit was not barred by res judicata.

4. Where B was employed by N as his cash keeper and B and his father R jointly executed a bond to B as surety for the proper delivery of money's received by B for N and N afterwards took two others as partners and on defalcation by B after the two partners came in N and his partners sued B and R on their surety bond the defence was that no cause of action arises against B and R, the plaintiffs were suing on the bond which was given to N alone, and not to the firm as formed subsequently to the execution of the bond and the suit was dismissed because under Sec. 260 of the Contract Act the surety bond was discharged. Held such dismissal could not affect any cause of action based on the debt against A and R.

A.I.R. 1942 Oudh.354.

Held that…

5. Certain Hindu reversions brought a suit to recover possession of a share of certain land contesting a sale-deed executed by two widows, A and B. In that suit both the parties treated A alone as having title as a Hindu widow in the entire property sold and the defendants raised no plea based on title of B. The suit was decreed and a declaration was granted that the sale would be valid only for A's lifetime. In a subsequent suit for possession of the property brought on the death of the widow the defendants raised a plea based on the title of B. Held that the decree in the previous suit related to the transfer of the whole of the property sold and not to a portion of it and that the defence based on the title of B as a co-vendor was barred by res judicata.

A.I.R. 1940 Pat. 204.

A.I.R. 1929 All. 844.

A.I.R. 1961 Mad. 194.

Held that…

4. Cause of action accruing during the pendency or after the prior suit.-

There can be no res judicata regarding a cause of action that arose subsequent to the prior suit, or if a cause of action in a subsequent suit had not arisen on the date of the presentation of the plaint in the prior suit.

A.I.R. 1939 All. 52.

A.I.R. 1932 All. 169.

A.I.R. 1931 Cal. 788.

Held that…

Thus the decree in the previous suit awarding mesne profits up to the date of that suit can not be res judicata upon the question of mesne profits for the subsequent period because the cause of action for the two suits are quite different.

A.I.R. 1935 Cal. 792.

Held that…

The Calcutta High Court has enunciated the principle of divisibility of cause of action into prior and subsequent cause of action and has laid down that the cause of action of subsequent suit arising at the time of the previous suit, the previous suit does operate as res judicata in respect of the entire cause of action of the subsequent suit but where the cause of action is divisible into previous cause of action and subsequent cause of action only that part of the cause of action relied upon in the previous suit shall be barred by res judicata.

A.I.R. 1926 Lah. 668.

Held that…

Dismissal of the first suit for declaration of title is no bar to a subsequent suit for declaration of title by adverse possession which had matured subsequently. In all such cases where decree for possession was passed in favour of the plaintiff but the decree not having been executed within three years became unexcitable having become time-barred a fresh

suit for ejectment was not barred by res judicata because neither Sec.11, C.P.C., nor Sec.47, C.P.C., operate as a bar. The reason being that the plaintiff is not suing upon the same cause of action, he is alleging that he has obtained judgment and that the defendant is under a legal obligation to him under that judgment and that obligation arises out of matters subsequent to those litigated in the original suit. A decree determines questions between parties in litigation at the commencement of the suit, the plaintiff here is relying on something in his favour at the end of the suit and independent of questions originally litigated. Indeed, questions originally litigated cannot be reconsidered in the suit upon the decree and that is all Sec.11, C.P.C., provides.

A.I.R. 1927 All.421.

Held that…

In cases of alienations and transfers by a senior member of the family and the same being cancelled or set aside on the suit of other members the vendee or transferee for

consideration are not barred from maintaining a suit for recovery of money. Thus where plaintiffs purchased a certain property from a Hindu father and the sale was subsequently cancelled in a suit by the sons to set it aside on their depositing a certain sum in court. Plaintiffs there after sued the sons of vendor, for the balance of the purchase money. Held that the suit is not barred by the principles of res judicata as money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued.

5. Recurring cause of action.-

The right to sue for partition unlike other suits is a continuing right incidental to the ownership of the joint property. Therefore so long as the property remains joint notwithstanding the dismissal of previous suit one of the co-owners has a good cause of action to bring a fresh suit for partition.

A.I.R. 1923 All.761.

Held that…

A decision of a point of law does not operate as res judicata if the cause of action in a subsequent suit is different from that in the former suit as often happens in the case of recurring liability, such as maintenance allowance or even ejectment suits. Thus where a suit to eject a tenant accrues fresh every year, the previous decision that an ejectment suit was not maintainable in a Revenue Court cannot operate as res judicata. Thus where a joint owner fails to execute the decree which he obtained in a previous suit for partition, and brings a fresh suit for obtaining partition, it is not barred by previous non-executed decree. A decree-holder is not barred from bringing a fresh suit for possession of property for which he got a conditional decree previously and failed to execute it.

A.I.R. 1938 Mad.287.

Held that…

Similarly in a suit for partition to which parties were Indian Christians, a decree for 1/3 share was obtained by X in 1919 against her sister Y and her brother. The decree, however, was not executed as the parties had agreed in 1920 not to take any advantage of the decree which had been passed and had continued to be in joint possession of the properties treating the decree as if it had not been in existence. The parties, however, fell out in 1932 and X having been forcibly dispossessed instituted a suit under Sec.9 (now Sec.6), Specific Relief Act, to recover possession of the properties of which she was dispossessed by Y through her husband and her son and obtained a decree, Y then filed a suit for partition and possession of her share which was contested by X as being barred by res judicata by reason of the decree in suit under Sec.9 (now Sec.6), Specific Relief Act. It was held that the parties did not give effect to the decree of 1919 and continued in joint possession of the properties as per subsequent agreement, the second suit for partition was not barred. The decision in suit under Sec.9 (now Sec.6), Specific Relief Act, operated as res judicata only to the

extent of the finding given therein that she was dispossessed and nothing more and did not operate as a bar to the second suit.

A.I.R. 1926 Pat.288.

Held that…

The right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of the joint property. It may be that at one time the desire for partition may cease, circumstances may again occur which make it desirable or necessary that partition should take place. It was further observed that no question of title was determined in the previous litigation ad so no question of res judicata arises.

Even if the cause of action for a suit is a recurring one, every matter decided in a previous suit may be res judicata which was substantially and directly in issue.

A.I.R. 1945 Lah.210.

Held that…

6. Constructive res judicata- Whether applicable.-

The ordinary rule is that an alternative claim need not be added if there would be a distinct incongruity between the two claims and there would be a considerable incongruity if the plaintiff had been seeing on the basis that there was a valid sale in his favour and at the same time on the ground that the sale had been avoided at his instance. Thus where two distinct mortgages are created successively on the same property by the same debtor, in favour of the same creditor, the creditor may either sue on the first including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by Sec.11, Explanation 4, or O.II, r. 2, C.P.C.

A.I.R. 1931 Oudh 21.

Held that…

Similarly where the causes of action of the two suits are different the rule of constructive res judicata will not apply, e.g. where the

suit in the Revenue Court was for partition and the latter suit was filed in the civil court for a declaration of the plaintiff’s title as against strangers. It was held that the later suit was not barred by the principle of res judicata.

But in a suit for recovery of possession on the strength of title the plaintiff must establish his title in that very suit by urging and proving all that would go to establish his title. He cannot reserve one or more of such grounds for a future suit. Thus in a suit for possession if plaintiff sues for property on a false claim when he has a true claim and a cause of action for the same property of which he was aware, he must be taken to have abandoned his true claim and cause of action. Again, where a transaction of mortgage has become fully re-opened, so that the rights and liabilities of the parties can be dealt with by the Court before which the suit is brought in respect of that transaction, whether the suit is for foreclosure by the mortgagee or for sale by the mortgagee, or in the alternative for foreclosure or sale by the mortgagee or for redemption by he mortgagor, all questions

(including even claims for rent due on transactions inseparably connected with the mortgage) relating to the taking of accounts between the mortgagor and the mortgagee ought to be decided in one and the same suit and no second suit can be brought by either party arising out of that same transaction. Thus on a suit upon a mortgage where the defendant omits to put forward a counter-claim for any sum that may be due to him from the mortgagee arising out of the mortgage transaction a separate suit for recovery of that sum is not maintainable.

CHAPTER – 8

PARTIES TO THE SUIT OR PROCEEDINGS

SYNOPSIS

1. Decision in a suit is res judicata only between the parties and their privies.-

Parties to the suit or litigation may be of the following categories :

(a) Persons may be parties to the suit in which a decree or judgment has been obtained.

(b) Apart from the parties to the suit, persons who in the language of Sec.13 of the Civil Procedure Code, 1877 (now Sec, 11 of the present Code), claim under the parties to the former suit or, in the language of English law, privies to those parties. Privies are according to Lord Coke of three kinds-Privies to blood privies in estate, privies in law. In Wharton’s Law Lexicon, page 764, privies have been divided into six kinds:

(1) Privies in blood, (2) Privies in representation, as the executor or administrator to his testator or intestate, (3) Privies in estate, (4) Privies in respect of contract, (5) Privies in respect of estate and contract; (6) Privies in law.

(c) Persons who though not claiming under the parties to the former suit were represented by them therein. Such are persons interested in the estate of a testator or intestate in relation to the executor or administrator; shareholders in a company in relation to the registered offices of that company, members of a joint undivided family in such cases as those referred to in Jogendra v. Funindro. Where the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree may afterwards be considered as binding upon all the members of the family, their interests being taken to have been sufficiently represented by the party to the original suit."

(d) Strangers, neither privies to nor represented by the parties to the former suit.

In the first place the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment is clearly binding on classes (a), (b) and (c). Class (d) strangers to the former suit will be in no way affected by the judgment if it be inter parties; but if it be in rem passed by a competent court, they will be bound by and cannot controvert it.

In the second place the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them against the other. There has been a real battle but a victory unfairly won. In this, again classes (a), (b), (c) and, as regards judgment in rem, class (d) are in one and the same position, which is that of the parties themselves. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if fraud is proved.

A.I.R. 1964 Manipur 2.

Held that…

A matter to be res judicata must have been 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. It is a fundamental proposition of the doctrine of res judicata that a decision in a suit operates and can operate as such only between parties to that suit and their privies.

A.I.R. 1927 Lah.900.

A.I.R. 1927 P.C.

A.I.R. 1931 Lah. 161.

Held that…

Indeed the rule is generally in keeping with the existing law, in so far as the latter provides that unless the parties to the suits are the same or represent the same interest the decision of a matter in a prior suit does not bar the decision of the same matter in another suit.

A.I.R. 1927 Lah.259.

A.I.R. 1927 P.C. 252.

A.I.R. 1929 All. 500.

A.I.R. 1964 Tripura 19.

Held that…

Hence a decree obtained in a suit to which the parties litigating a subsequent suit were not parties is not conclusive and binding as against them. But a party who is privy to a decree is bound by the decree whether he has notice thereof or not. But obviously a person interested in litigation is not bound to apply to make him a party and in default he is not bound by the result of the litigation. But it is reasonable that the same set of persons or persons claiming under them, should be bound by previous proceedings concerning the same matter. There is no hardship in holding that a man shall be bound by that which would have bound those under whom he claims quoad the subject-matter of the claim, for he who feels the advantage, ought also to feel the burden (qui sentit commodum sentire debet etonus), and no man can, save in certain cases excepted by the statute law and the law merchant, transfer to another a better right than he himself possesses. By parties must be understood all

who are individually named on the record. Hence a person who has purchased the equity of redemption prior to a suit brought to enforce the mortgage is not bound by the decision therein if he was not himself made a party to the suit.

A.I.R. 1927 Oudh 354.

Held that…

But when an infant sues by his next friend, the infant is the party and not the next friend and the Court would look to the real parties in a benami transaction, and if they were the same, the action would be barred under this section. A party introduced in the record by fraud, and without his knowledge, would not be concluded. In determining the persons whose names are on the record, the time of the decision of the suit is looked at. Thus all those persons are deemed parties, whose names are on the record at the time of the decision. And a person intervening in a suit is considered a party, no matter at what stage of the suit he may intervene. But if at any stage a person withdraws himself by the leave of the Court, or

has his name struck off, or is dismissed from the suit, he cases to be a party, even though the order for striking off the name may have been given by mistake, and the name should have appeared in the final decretal order two years afterwards. But the wrong continuance of a person’s name as a plaintiff on the record after his withdrawal from the suit, will not affect the validity of the decrees passed against him on cross-petitions. And a person who will have died during the proceedings will not be a party, even if his name should have in ignorance of his death, remained on the record up to the decision, and a decision against him in such a case will not be res judicata against his representatives; though a subsequent suit on the same cause of action shall be barred under O.XXII, r.9(1) of the Code. Nor can a person whose name is not on the record when judgment is given or decree made, make himself a party by applying for the execution of the decrees. Persons other than parties to suit, in which a decree or judgment, to use the more general term, has been obtained, may be divided into three classes with reference to their position as affected by such judgment.

A.I.R. 1927 P.C. 108.

Held that…

A person who applied to be made a party but was refused is not bound by the decision in the suit. These classes are:

(a) Persons who in the language of the section claim under the parties to the former suit, or, in the language of English law, privies to those parties.

(b) Persons who though not claiming under the parties to the former suit were represented by them therein. Such are persons interested in the estate of a testator or intestate in relation to the executor or administrator; shareholders in a company in relation to the registered officer of that company, and in India members of a joint and undivided family, in such cases as those referred to in Jogendro v. Funindro.

A.I.R. 1932 Oudh 342.

A.I.R. 1932 Lah. 232.

Held that…

"Where the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interests being taken to have been sufficiently represented by the party in the original suit."

(c) Strangers, neither privies to nor represented by the parties to the former suit. When a judgment has established the right to any property between two parties, it is not open to a third person though not party to the judgment to set up the right of that party whose title has been found against as against the successful party. Such case forms the exception to the rule of res inter alias acta the decision as to the character of the plaintiff cannot be regarded as res judicata in a subsequent suit for maintenance when the defendants were not parties to those proceedings.

As a rule where a decree has been honestly obtained without frand it cannot be subsequently disputed by the parties thereto or their privies or by persons who were represented by such parties. Strangers to the suit are not bound by such a decree if it be a decree inter partes, but if it be a decree in rem and passed by a competent Court, they are bound by it and cannot controvert it. But where a decree has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may be set aside if the frand is proved. In the case of judgments in rem the same rule holds good with regard to persons who are strangers to the suit. And where a decree has been obtained by the fraud and collusion of both the parties to the suit, it is binding upon the parties. It is also binding upon the privies of the parties; except probably, where the collusive fraud has been on a provision of the law enacted for the benefit of such privies. But persons represented by but not claiming through the parties to the suit may,

in any subsequent proceedings, whether as plaintiff or defendant, treat the previous judgment so obtained by fraud or collusion as a mere nullity, provided the fraud and collusion be clearly established. The same rule applies with regard to strangers where the previous judgment is a judgment in rem.

A.I.R. 1932 Mad.

Held that…

It is unquestionable, as a general proposition, that where a person possesses an interest, acquired before the suit in an estate, which interest is not represented by any of the parties to the suit, the decision will not be res judicata against him. Thus a vendee from a party prior to a suit will not be bound.

A.I.R. 1962 S.C. 633.

Held that…

The Supreme Court has held that where Sec. 11, C.P.C., does not apply in terms because the parties in prior suit and the subsequent suit are not the same nor parties claiming through them; it would not be permissible to rely upon

the general doctrine of res judicata. The Court while dealing with a suit can be the provisions of Sec.11, C.P.C., and no other.

A.I.R. 1957 Ker.86.

Held that…

Where the parties in the two suits are different the prior finding cannot operate as res judicata.

A.I.R. 1960 Raj.

Held that…

A prior decision cannot operate as res judicata against a defendant where he would have no right of appeal from that the ultimate judgment being in his favour.

A.I.R. 1958 A.P. 507.

Held that…

Where in a previous proceeding for scaling down the debt of the mortgagor under Madras Agriculturists Relief Act, the parties were treated as debtor and creditor and the debt

under the mortgage was scaled down. In a subsequent suit for redemption of the mortgage by the mortgagor the defendants took the plea that the document was not a mortgage but lease. Held, that the previous suit between the same parties on the question of the nature of the document operated as res judicata.

A.I.R. 1957 H.P. 16.

Held that…

Where in an earlier suit between A and B relief was claimed on the ground that the parties held the land in lieu of rendering services, viz. Sevapuja to the deity and in subsequent suit brought by B against A and deity it was urged that parties were not identical. Held, that the right in the earlier suit was claimed through the deity in the earlier suit and parties in both suit are identical hence the prior decision operated as res judicata on the general principles of res judicata.

A.I.R. 1952 Nag.129.

Held that…

But a succeeding tenant is not precluded from moving an application for fixation of fair rent of the same premises about which the Rent Controller had fixed a fair rent (under C.P. and Berar Houses and Rent Control Order, 1949) at an earlier occasion with the outgoing tenant. The Rent Controller can always consider the circumstances whether the rent fixed is insufficient or excessive. Neither the earlier order of the Rent Controller fixing a fair rent operates as res judicata nor on the principles of natural justice a succeeding tenant was bound by a decision to which he was not a party.

A.I.R. 1921 Mad. 248.

A.I.R. 1953 Mad. 750.

A.I.R. 1953 T.C. 245.

Held that…

Where only one of the parties to the subsequent suit for instance defendant alone was involved in the previous litigation and the plaintiff was not a party thereto, the previous judgment although does not constitute res judicata yet

has abundant evidentiary value and the court has to pay attention to it.

A.I.R. 1958 Punj. 63.

Held that…

Where two brothers filed separate writ petitions against orders of allotment of land by Custodian of Evacuee Property in respect of different properties and both writs were dismissed and only one brother filed Letters Patent Appeal it was held that there was no question of conflicting decisions as the parties for all practical purposes were different.

A judgment of a superior court of record like a High Court has effect on two classes of persons. Firstly, as between the parties to the judgment and their privies it is binding and conclusive unless reversed by a superior court of appeal or amended by the Court itself, according to law. Moreover the original cause of action on the basis of which the action commenced is merged in the judgment and its place is taken by the rights created between the parties by virtue of the judgment.

A.I.R. 1960 Orissa 46 (D.B.).

Held that…

But as regards persons who are not parties to the judgment, and it becomes a valuable precedent on any disputed point of law, not merely as a guide but as an authority to be followed by all courts of co-ordinate or inferior jurisdiction administering the same system until it is overruled by a Court of superior jurisdiction or by a validly enacted statue. It has been pointed out in Halsbury's Laws of England, III Ed., Vol. 22, p. 796:

"the enunciation of the reason or principle on which the question before a court has been decided, is alone binding as a precedent. This underlying principle is often termed the ratio decidendi, that is to say, the general reasons given for the decision or the general grounds on which it is based, detached or abstracted from the specific peculiarities of a particular case which give rise to the decision. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to

the subject-matter of the decision which alone has the force of law.”

“Reciprocity” Test. – Mr. Spencer speaking of the English law says:

“Mutuality, or reciprocity, is often said to be a condition of estoppel by res judicata. This means that where A is said to be estopped as against B by a judicial decision, it has always been considered material, in the solution of the question, to inquire whether, if the decision has been the other way, B would have been estopped thereby as against A. This question has not yet received an authoritative decision in India.

A.I.R. 1963 All.

Held that…

2. Proper parties and necessary parties- Impleadment of.-

In respect of every suit there are certain persons who are essential to be impleaded as defendants; if they are not, no relief can be granted against them or in the suit. These

persons full into two classes, (1) of those against whom the relief is sought, and (2) those whom the law requires to be impleaded as defendants, even though no relief is sought against them. Under O. I, r. 3, C.P.C., all persons against whom any right to relief is alleged to exist should be impeaded as defendants. No relief can be granted against a person who has not been impleaded as a defendant. If relief can be claimed against two persons but only one is impleaded as a defendant relief can be granted against him only; not only can no relief be granted against the other but also the fact that the other has not been impleaded will not cause relief to be refused against the one impleaded, see R.9 of O.I. There are various provisions in statutes requiring certain persons to be impleaded as defendants, such as O.XXXIV, r.1,C.P.C., Secs.49,59,183 and 246 of the U.P. Tenancy Act. If these persons are not impleaded as defendants the suit will fail. Order I, rule 9, is subject to any special or local law, or any special form of procedure prescribes by any other law, vide Sec.4, C.P.C. Consequently if any law prescribes that a certain person must

be impleaded as a defendant, even though no relief is sought against him, the failure to implead him will be fatal to the suit, notwithstanding the provision in O.I, r.9. Persons who are not essential to be impleaded as defendants to a suit again fall in two classes, (1) of those who are in some way interested in, or connected with, the relief sought against others and (2) of others, who are not at all interested in, or connected with, it. Persons of the latter class must not be impleaded as defendants at all, but persons of the former class may be impleaded as proper parties at the discretion of the plaintiff by way of abundant caution, or to avoid future litigation and the relief will not be refused on the ground that they have not been impleaded.

3. Res judicata as between co-defendants.-

This section does not preclude the decision upon any issue from operating as res judicata merely because the issue is raised as between co-defendants if the matter involved

was directly and substantially in issue in a former suit and the other necessary conditions are satisfied. The words “between the same parties” in this section qualify not only the words “former suit” but the whole expression “in issue in a former suit”.

A.I.R. 1927 Rang.

A.I.R. 1931 P.C. 114.

A.I.R. 1932 All.643.

A.I.R. 1932 Cal. 271.

A.I.R. 1931 P.C. 231.

A.I.R. 1963 Guj.183.

Held that…

But in order that a finding in a case should be res judicata between co-defendants, three things are necessary, (I) that there should be a conflict of interest between co-defendants; (ii) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate his suit; and (iii) that the judgment should contain a decision of the question raised as between the co-defendants.

A.I.R. 1950 Assam 119.

Held that…

And the co-defendants must have been either necessary or at least proper parties in the former suit.

A.I.R. 1931 P.C.

A.I.R. 1943 P.C. 115.

Held that…

If the above three conditions are fulfilled it is immaterial whether the co-defendant did not enter an appearance in the earlier suit and also that he was not a necessary party to the suit, if the appellant was at all events a proper party to the suit and had the right to be heard if he so desired. If his legal position.

A.I.R. 1952 Pat. 250 (D.B.)

Held that…

Where conflict of interest between co-defendants was decided against defendant and he did not file appeal but filed a subsequent suit

the earlier decision would constitute bar of res judicata.

A.I.R. 1958 Assam 179 (D.B.)

Held that…

Thus where in a previous suit under O.XXI, r. 63, C.P.C., by the decree-holder against the claimant wherein judgment-debtor was also impleaded as a pro forma defendant, it was found that the property belonged to the claimant and not to the judgment-debtor and the finding was upheld in appeal. A subsequent suit by the successor of the judgement-debtor against the claimant was held to be barred by res judicata on the ground that a decision would operate as res judicata even as against a proforma defendant in a previous suit, when it is clear that his interest was in conflict with that of the other set of defendants and the plaintiff could not get relief without a decision of that conflict by the court. The test of res judicata between co-defendants will apply where an issue between co-defendants on the question which was necessary to be determined in order to give plaintiff the

relief he claims and the question was in fact so determined. And the following passage from Cottingham v. Earl of Shrewsbury[2] was quoted with approval by their Lordship of the Pivy Council in Minni Bibi v. Triloki Nath[3].

> "If a plaintiff cannot get at hisright without tying and deciding a case between co-deendants, the Court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each of them by any proceeding which may be necessary only to the decree the plaintiff obtains."

The same rule was reiterated by the Privy Council in a more recent case of Chandu Lal V. Khalilur Rehman[4], with the further observation that the doctrine may apply even though the party against whom it is sought to enforce it did not in the previous suit think fit to enter appearance and contest the question. But to this the qualification must be added that, if such party is to be bound by a previous

judgement and it must be proved that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. A matter raised and actually contested between co-defendants in prior suit will operate as res judicata in a subsequent suit in which such co-defendants are arrayed as plaintiff and defendant[5]. Another phase of the same question is that a decision will operate as res judicata between defendants inter se only if there was an active controversy between time and a judgement was given defining their rights and obligation inter se1. That is to say, for a decision in a previous suit to operate is res judicata between two co-defendants an adjudication defining their rights and obligations inter se is absolutely necessary[2]. That adjudication may however be actual or implied3. Where the position of co-respondents was that of co-defendants and that question not being in dispute before them the finding in the case could not be conclusive[4]. It is nevertheless necessary to establish that there was a conflict of interest among the defendants inter se5. It is further necessary that there should be a conflict distinctly and

expressly raised between them and the decision of that conflict as between them should be necessary for the disposal of the suit[6]. A judgement can operate as res judicata between co-defendants where there interests are conflicting. It is otherwise, however, where there is no conflict of interest and no decision as between the defendants themselves8, and still more where the defendant in the subsequent suit was not a necessary party in the prior suit and even the adjudication was obtained by a fraudulent concealment of the true fatcts[9]. It will be a fortiory case where a decision as between the defendants was not necessary to give the appropriate relief to the plaintiff and defendants. But for this effect to arise, there must be conflict of interests amongst the defendants and a judgement defining the real rights and obligations of the defendants inter se. without necessary the judgement will not be res judicata amongst the defendants, not will it be res judicata amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group[2]. The rule is, in fact, of quite a general

application that if a plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case and the co-defendants be bound[3]. 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 by any proceeding which may be necessary only to the decree the plaintiff obtains[4]. It is thus clear that when the same parties were contending in the former suit, in fact though not in form, as where they were co-defendants on the record, but their interests were different, and there was an issue between them, when in the position of plaintiff and defendant. On the same principle, a decision as to a common question, such as the tenure of a village community, in a suit by one member of the community against the other members would not be a res judicata so as to bar a subsequent suit involving that same question between the defendants, unless the defendants were distinctly at issue on the point, and acted as opposite parties, and the order made so as to affect the rights of the defendants among

themselves[1]. A decree for partition is not like a decree for money or the delivery of specific property, which is in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share[2]. Hence where in a suit for partition the decree declares the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defendants is as binding between the co-defendants them selves as between the defendants and the plaintiff[3]. But the decision in a previous suit for ejecting the defendants on the ground of trespass does not operate as res judicata on the question of the validity of the partition deed, where there was no contest between the defendants and where it was not necessary for one of them to raise the question of validity of the partition4. Similarly, where in 1911 the proprietors of one-third share[4] of a zamindari sued the tenure-holders for arrears of rent at the rate of Rs.1,518 odd on the basis of a lease which

described the area as 675 bighas and the latter contended that they were in occupation of only 400 bighas and the rent was accordingly only Rs.900 and it was subsequently agreed that the area was 545 bighas and the suit was decreed on those terms, and then the proprietors of the remaining two-thirds share of the zamindari sued the tenure-holders for arrears of rent, impleading the proprietor of the one-third share, under Sec. 148-A of the Bengal Tenancy Act as a pro forma defendant,the tenure-holders again set up the same plea and it was decided that the rent was only Rs.900 and in the present suit by the proprietors of the one-third share for rent, tenure-holders pleaded that the decree in the second suit operated as res judicata, it was held that it did not operate as res judicata inasmuch as the question of the amount of rent payable which was issue between the plaintiff-landlord and the tenure-holder in the second suit was not directly and substantially in issue between the pro forma defendants and the contesting defendants[5]. So also the decision in a previous suit for a declaration that the mortgage was without consideration and necessity to the

effect that all the consideration had not passed and that necessity was not proved does not operate as res judicata on the question of the validity of the mortgage deed, where there was no conflict of interests between the mortgagor and the mortgagee and no contest between them[6]. It is other wise, however, where a pusine mortgagee brought a suit on the foot of his mortgage and impleaded the mortgagor and the prior mortgagee as defendants to the suit and the mortgagor denied his liability under the prior mortgage, and an issue as to the validity and binding character of the prior mortgage was tried and decided against the mortgagor1. But an ex part decree on a bond obtained against two joint debtors does not operate as res judicata as between those two debtors, when the question of their respective liability is raised in a contribution suit brought by one of them against the other2. It will be a fortiori case where the decree in the former suit had been simply one dismissing the suit and saying nothing as to the merits of either of the rival defendants of the liability between two defendants inter se was left undetermined. In this connection recollect that

the fact that the defendant in the previous suit had no right of appealing against the bar decision because the suit was dismissed, will not affect the operation of the bar, when such defendant having the right to be joined as a plaintiff chose to contest the suit as a co-defendant[5]. A part from it, where a decision dismissing a suit in fact is wholly against the defendant, such defendant can appeal against it6. A decision of issue in a precious suit between co-defendants cannot operate as res judicata if such decision is obtained by collusion and fraud and under circumstances when parties cannot be said to be properly represented[7]. The judgement given in anearlier suit under O.XXI, r. 63, P.C., would operate as res judicata as between co-defendants, provided the three requisite conditions for the applicability of the rule of res judicata between co-defendants are satisfied[8]. But where compromise was entered into between plaintiff and eontesting defendants only the rest were treated ex parte and the determination of rights inter se was not necessay nor was there any such determination either directly or by implication. The compromise decree will not

operate as res judicata against non-contesting defendants, but it is evidence of fact that a suit was brought and also that compromise was entered into[9].

An ex parte decree can also operate as res judicata. And it will so operate between the plaintiff and the defendant. If a defendant does not appear or does not file a written statement, the claim will be deemed to have been derived. There can be no presumption that if the defendant does not appear it will be deemed in that he has admitted the plaintiff's claim. The matters at issued and decided in that case, therefore become res judicata between them. But an ex parte decree cannot operate as res judicata between co-defendants inter se as the conditions for the applicability of the principles of res judicata among co-defendants are not fulfilled[10]. Thus where a suit brought by plaintiff-creditor for recovery of debt against the widow and adopted son of the deceased debtor the adopted son remained ex parte throughout. The widow in her written statement had derived that the co-defendant to be an adopted son of her husband. The suit was decided against the widow and a

decree was passed against the assets of the deceased. The finding of the other co-defendant being an adopted son of the deceased, is res judicata between plaintiff and the widow but in a subsequent suit between the widow and the other co-defendant the question of being adopted son of deceased cannot operate as res judicata[1].

4. Res judicata as between co-plaintiffs.-

The principal res judicata is applicable in a dispute between the co-plaintiff[2]. But for a decision to be res judicata between co-plaintiffs the same conditions that are required in the case of codefendants are essential[3]. Accordingly it has been held that a finding to become res judicata as between co-plaintiffs must have been essential for the purpose of giving relief against the defendants[4]. It has even been held that the doctrine of res judicata can be applied only to questions which have been actively contested in the earlier of the proceedings[5]. It has som what similarly been hold that in the absence of

a conflict of interest between persons ranged as co-plaintiffs in a suit, the decision in the suit would not bind their successors as res judicata[6]. It has also somewhat similarly been held that the decision in a former suit on a point of fact, which was not directly and substantially in issue in that suit, cannot operate as res judicata in a subsequent suit as between parties who were arrayed on the same side in the former suit with no difference whatever between them[7]. As an instance of the cases in which a decision is binding on the plaintiffs[7] inter se, reference may be made to the case of Krishnan v. Kanan[8] in which a decision in a suit by the vendor and purchaser of a property against the persons in possession of it negativing the vendor’s title to it was held to be res judicata as to that title in a suit by the purchaser for the recovery of the purchase money and the cost incurred by him in the previous litigation.

As between paties arrayed on the same side in the previous litigation whether as co-plaintiffs or as co-defendants, a matter can be es judicata only if in the previous suit there was a matter directly and substantially in

issue between the co-plaintiffs or the the co-defendants and an adjudication upon that matter was necessary to the determination of the suit. It is well settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as res judicata between them or between parties claiming through or under them in any subsequent suit[9]. Similarly, it has been held that an issue may be res judicata between co-plaintiffs as well as co-defendants and although for an issue to be res judicata between co-plaintiffs there must be a eal contest between them yet when the interestsof various plaintiffs are common and no question of adopting two conflicting position as between themselves arises the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite positions had a full fight[10]. A female inherited some watan and non-watan lands from her father. A died leaving

behind her husband B and three daughters C, D and E, B obtained decree for recovery of watan lands on his own behalf and on behalf of daughters C, D, E. Subsequently C married and sued her father for 1/3 share. It was held that former suit by B did not operate as res judicata as against C because it was not necessary in the former case to decide the rights between daughters and the father inter se[1]. On principle the rule of res judicata will not apply unless there is a conflict of interest among the co-plaintiffs, and a judgement defining the real rights and obligations of the co-plaintiffs inter se. Further the adjudication inter se between the co-plaintiffs should have been necessary to give appropriate relief to the defendants[2].

5. Pro forma defendants.-

A person who is added as a pro forma defendant to a suit is concluded by the decision come to in that suit[3]. In other words, a person, who has been impleaded in a suit merely for the sake of form, will be a party to the suit, so as to be barred by a decision

therein[4]. It is sometimes mainly with that a person is made a party. The decision in such a case must therefore be treated as an adjudication of the right as between the plaintiffs on the one side and the defendants collectively and severally on the other except only so far as the decree itself contains any modification or reservation in regard to any of the individual rights[5]. A decision arrived at in a previous suit cannot operate as res judicata against a person who was in that suit merely a nominal defendant[6]. Thus where an issue relating to A's rights in the property claimed by B from C and others, in possession of the said property, is decided by a court unnecessarily against A who is not in possession of the property in dispute and from whom no relief is asked by B while the ultimate determination of the suit proceeds upon a different ground, its decision thereon does not become res judicata in a subsequent suit brought by A against B and others for recovering his interest in the property previously in dispute[7].

There is a divergence of judicial of opinion on the question whether an earlier

decision against a defendant, who was only a pro forma defendant and against whom no relief was claimed the earlier decision shall or shall not operate as res judicata against such pro forma defendant.

The Calcutta High Court relying on Privy Council decision in Minni Bibi V. Triloki Nath[1] observed on the relevant passage of the above case at page 166:

> "It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by……it could not affect her legal position."

And followed by two later decision of the Privy Council to the same effect in Maung Sein Done V. Ma Pan Nyun[2]. The above three decision of the Privy Council were given while cosidering the question of res judicata as applicable between co-defendants. The view of

Calcutta High Court finds support in Sethurama Iyer v. Ram Chandra Iyer[3],Mohendra Nath v. Mst. Shamsunnessa Khatun[4], Hafiz Mohammed v. Swarup Chand Hukum Chand[5], Firm Deoki Nandon Roy v. kalee Pershad[6], Manjur Mondal V. Ahmmad Mondal. A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the court to effectively and completely adjudicate upon the questions involved in the suit. In such a case, no relief is sought against him and the matter in issue between him and any other party. A decision in such a suit cannot be res judicata against him or his representatives-in-interest in subsequent proceedings[8]. In a case where a co-mortgagee field a suit against the mortgagor impleading other mortgagees as defendants, the suit was dismissed in default, subsequently the other mortgagees filed a suit against the mortgagor. It was held O. IX, r.9, was inapplicable in such a case, and the subsequent suit is not barred under the same[9].

6. Judgement against benamidar is res judicata against real owners-

A judgement against the benamidar is res judicata against the true owner[10]. In the absence of evidence to the contrary it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner[11]. The decision in the suit would be as much binding upon the real owner, as if the suit had been brought by the real owner[12]. The principle is the same whether the suit is instituted by or against the benamidor. The decision in the suit, in either case, is equally binding on the real owner[13].

The decision is conclusive between the parties both as regards the character in which the suit is brought and as to the rights declared by the decree. But a third party who is not a party to the suit may show that the suit was really carried on for his benefit[1]. A decree between benamidar and real owner, though collusive, would be binding on them[2]. But the rule of res judicata has been made applicable in cases of decree in favour of or against a benamidar where the real owner has allowed the

dispute to fought out between his benamidar and a third party and has abstained from coming forward[3].

A *benamidar* repesents the real owner and a decree , the person claiming to be beneficially entitled, though not a party is fully affected by the rule of res judicata. It is a well settled rule of law that unless there is an allegation of fraud or collusion the real owner is as much bound by the decree passed in a suit by or against farzidar (banamidar) as the farzidar himself and the onus to prove fraud is on the real owner. But if a transaction is not intended to be given effect to, or if a document of title is executed only as a sham and showy deed, there is no real purchaser, and the principles of a benamidar representing the real owner are not applicable to such a case and the previous suit for declaration of title and possession by the so-called benamidar would not operate as res judicata in a subsequent suit by the real owner. The distinction between a benami transaction and a sham transaction has been clearly laid down by their Lordship of the Supreme Court in Sree Meenakshi Mills Ltd. v.

Commissioner of Income-tax, in the following words:

> "In this connection, it is necessary to note that the word 'benami' is issued to denote two classes of transaction which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale-deed mentions X as the puchaser. Here the sale itself is genuine, but the real purchaser is B, X being the benamidar. This is the class of transactions which is usually termed as benami. But the word benami is also occasionally used perhaps not quite accurately, to refer to a sham transaction, as for example, when A pur[orts to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transaction is that whereas in the former is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor

continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary when a dispute arises as to whether the person named In the deed is the real transferee, or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be not who paid the consideration but whether any consideration was paid.”

7. Judgement against minor how far res judicata.-

In a suit instituted on behalf of, or against a minor, the minor is the party to the suit, and not his guardian or next friend who should have really instituted or defended it. Hence a decree passed against a mino properly represented is binding upon him. But a minor is not bared by res judicata where there was negligence of the next friend in the previous

suit as where he failed to putforward a plea on behalf of the minor which it was his duty to put forward and the suit was decided against the minor. But where no fraud or negligence is proved a previous decision will operate as a bar. A guardian ad litem who omits to set up a real defence on behalf of the minor and deliberately sets up a false plea instead, is guilty of gross negligence and a decision in such a suit will not be res judicata against the minor. Certain creditors of the defendant filed insolvency prtitions to adjudicative him insolvent. But before any order of adjudication was passed the creditors applied to withdraw the insolvency petitions on account of compromise entered into between the defendants and his creditors and the minor creditors nor any counsel had certified to the court that compromise was beneficial to the interest of the minor nor did the insolvency court consider the question that that compromise was beneficial to the minor and under the compromise the creditors were to accept only eight annas in a rupee in full satisfaction of the debts. Held that the order granting leave to withdraw the insolvency petition did not

constitute res judicata so far as the question whether compromise was beneficial to the minors was concerned, that the guardian acted in a manner highly prejudical to the interest of the minor. Hence the compromise was not binding on the minor and he was entitled by a subsequent proceeding to recover the full amount due.

Decree obtained against a minor represented by a guardian ad litem and if no negligence on the part of the guardian in conducting the previous litigation is made out, a subsequent suit by the same issue is clearly barred by Sec.11, C.P.C.

Whether a minor can avoid a decree passed against him on the ground of gross negligence of the guardian ad litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian ? The Madras High Court has held in affirmative. The same view was affirmed by the Calcutta High Court which has held that the minor’s right to bring such a suit is an exception to the ordinary rule according to which a decree can be set aside only on grounds of fraud and collusion and is based on board principles of justice, equity

and good conscience. Neither Sec. 2 or Sec. 44 of the Evidence Act nor Sec. 11, C. P.G., bars such a suit. The Lahore High court, the Patna High Court, the Travancore-Cochin High Court and Cochin High court, and Allahabad High court have affirmed the same view. The Allahabad High court in Siraj Fatma V. Mahmood Ali's case has further laid down the test to be applied in such cases:

> "The test of negligence should be the not doing of what a reasonable man guided by prudent considerations which regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would nor do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. The direct result of the negligence must be a serious prejudice to the minor and the negligence must not be merely such as might be innocently committed even by a reasonable person taking the ordinary precautions which he

> would have taken in his own case. Where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian, although not brought to the notice of the court at the time the decree can be avoided."

The Bombay High Court in the earlier decision shared the above view. But the latter decision of the same High Court have taken a contrary view. In view of the preponderance of authorities of the other High Courts the Bombay view does not lay down the correct law.

But whether the failure on the part of the guardian to file an appeal amounts to gross negligence it has been held that a guardian who after defending the suit bona fide and conducting it to the best of his ability elects to abide by the decision given by the Court without preferring an appeal against it holding it to be correct and that an appeal would be useless cannot be said to have acted negligently in not preferring an appeal. Similarly where the plaintiff's guardian was his own brother who was as much interested in success of the suit as the plaintiff was; and

there was no proof that the guardian acted negligently in conducting the suit, nor was there any proof of collusion. The only negligence alleged was after the decision of trial country by not preferring an appeal, it was held that negligence was a beach of duty caused by the omission to do something which a reasonable and prudent man guided upon those considerations which ordinarily regulate such conduct and which a reasonable or prudent man would not do. The standard by which it is determined whether or not a person is guilty of negligence is the conduct of a prudent man in the particular situation. Judging from this standard the guardian who failed to file an but who contested the suit to the best of his ability cannot be guide of any negligence much less gross negligence and the plaintiff in the subsequent suit is bound by the decree in the previous suit on the ground of res judicata.

Thus where sanction is accorded by the Court to bring about a compromise, it will be deemed to be beneficial to the interest of the minor, if it secures to the minor demonstrable advantage or averts some obvious mischief. No doubt in face of the certificate of the Court

onus lies on the plaintiffs to prove fraud or collusion, or that interest of minor was not properly safeguarded, or that the Court was not informed of all the circumstances when it accorded the sanction for compromise. But the sanction does not stand in the way of minor getting the compromise decree set aside if the compromise is against the interest of the minor and brought about by gross negligence.

Where in a declaratory suit by F against his brother G and vendees C and H on the allegation that G had no right to sell the joint property to C and H, and the sale-deed was void being without legal necessity and without consideration. The trial court decreed the suit. The lower appellate court holding the sale-deed to be valid dismissed the suit. The plaintiff field a second appeal against C and H, the vendees only. It was held that on the failure of the plaintiff to implead his brother G as a party to the second appeal, there was no appeal against the finding of the lower appellate court holding the sale-deed to be valid, which became final and consequently became res judicata between the plaintiff nd the brother G and must also be regarded as res

judicata between the plaintiff and the vendees to C and H who claimed through G.

When the person who appointed guardian for the suit of a minor defendant whose interest was adverse to that of the minor it could not be said that the minor was properly represented in the suit. Therefore minor was not a party in the proper sense of the term.

Such a decree if passed in the suit is a nullity so far as the minor is concerned.

In a case in which proposed guardian has expressed his unwillingness to be the guardian and the Court proceeds without appointing another person as guardian, the minor has not been represented in the suit. The decree in such a suit cannot operate as res judicata.

8.Parties in subsequent suit claiming under parties in former suit.-

A suit by or against parties who claim under or through the parties in the original decided case is barred by this section. But in order to estop a party in a subsequent suit by the decision in a former suit against another

party on the ground that the former claims under the letter within the meaning of this section it must be show that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interest belonging to others which are subordinate to him. A decision against him will bind interests acquired from him subsequently and all subordinate interests represented by him whensoever acquired. As to when one party can be said to claim under another, it may be broadly observed, that a person is not deemed to claim under another, if in fact he does not claim under that other, though he might have done so and his interests were almost identical with that other. The question as to exact cases in which he can be said to so claim is of substantive law, and only brief reference will be made here to such aspects of it as have come before the Courts in British India with reference to the doctrine of res judicata. Thus a decision as to a person being the legitimate son of another in a suit against that other is res judicata in a suit against him by another son of that other. But

the donee of a house can not be estopped as being privy in estate by a judgement obtained in an action against the donor commenced after the gift. It is, however, a well settled rule of law that when both parties in the subsequent litigation claim through the same person, there is no bar of res judicata. In order that a decision in a suit between A and B may operate as res judicata in a subsequent suit between A and C it is necessary to show that C claims under B by a title arising subsequently to the commencement of the first suit. Thus a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced after the date of the purchase, mortgage, lease or gift. Where rights claimed in both suits are the same, if the plaintiff claims title through the other person, in whom Court found title is not barred as res judicata.

The phrase “between the parties under whom they of any of them claimed” in Sec. 11, C.P.C., must of necessity refer to parties who have obtained the same property in respect of which the previous decision was given. If the

property in the two suits was different a transferee of one property is not bound by the decision as between the parties interested in another property. If the law were otherwise, it might work great injustice to bona fide transferees of property even though that property is not the subjective-matter of pending litigation. In effect, it would amount to an unwarranted extension of the doctrine of lis pendens embodied in sec. 52 of the Transfer of Property Act.

A plea of res judicata is of no avail to a defendant, where the plaintiff does not claim her share in the pension through her mother but she claims it through her father. In an earlier suit failure on the part of the mother(of the plaintiff) to assert that the defendant was not entitled to make any deductions in the pension does not therefore operate as constructive res judicata on the ground that the plaintiff does not claim from her mother but from her father.

Where in a prior suit there was an issue as to whether H had been validity adopted by M. This issue was found in favour of H by the decree based on the compromise and the award,

between H and his adoptive mother, widow of M on the one side and by the ancestor of the defendants in the subsequent suit, on the other. The same issue was sought to be raise in the subsequent suit. The title put forward in the later suit was not different from and independent of the title put froward in the earlier suit, because the plaintiff in the later suit, viz M claim under and from H himself being his natural father. Held that the compromise decree in the prior suit would operate as res judicata on H and also against M when he claims from and under H. the plaintiff M cannot therefore succeed unless the adoption of H is found to be invalid. The decision on this question in the earlier suit concludes it, and therefore it operate as res judicata against the plaintiff also in the subsequent suit.

A person though he was himself not a party to the previous litigation but claims through the persons who were actually parties to the earlier suit is equally bound as much as the person who were actually in that suit.

9.Hindu son does not claim under his father.-

A Hindu son in a joint family becomes entitled by reason of his birth and in his own right, to a right which he can enforce against his father, and he does not claim under his father within the meaning of this section. Therefore the dismissal of a suit for redemption of a mortgage of a joint family property brought by the father in a joint Hindu family alone would not be a bar to a subsequent suit for redemption by the sons, inasmuch as the sons' title was not through their father, but was separate and independent. It has no doubt been held that a decree obtained against a Hindu father for a debt is binding against the other members of a Hindu family; but that depends, "more on the obligation of a Hindu son to pay his father's debt not improperly incurred, and upon the presumption in some of these cases that the action was bought against the father as the representative and the family property. Where the plaintiff had no title to the land in dispute when the decree in the previous suit was passed against his father and

his title to the said land came into existence on the death of his father under a sanad, which created a tenure of successive life estate, the decision in the prior suit cannot operate as res judicata against the plaintiff.

Under the Mitakshara law sons by birth an equal ownership with the father in ancestral immovable property and the sons can enforce their right by a partition even against their father’s wishes. The sons have independent coparcenary rights of their own in ancestral property. They do not claim through the father nor are their rights derived from or through their father. This principle has been modified to a large extent by another rule of Hindu law that a son is bound to discharge the debts of his father if not tainted with immorality to the extent of his interest in the family property. Therefore where a creditor enforces the pious obligation of the sons to pay their father’s debts by proceeding against the sons interest in the ancestral property he must prove that there was a real debt of the father in existence, if the factum of the debt is denied by the sons. The burden of establishment that there was a real debt of the father in

existence rests upon the creditor who seeks to make the sons' interest liable.

But there is a great distinction between cases in which a Hindu father sues in respect of a contract which he is empowered under the Mitakshara law as manger to make on belief of the family and cases in which a father sues in respect of rights of which he can only hold in an equal measure with other coparceners. The question as to whether a Hindu father sufficiently represents all the coparceners in a given litigation is a question which has to be decided with reference to the circumstances of the case. In case of a Hindu family where all have rights it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action, or bring an action by his guardian before; the court looks to explanation VI to Sec.11, C.P.C., to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors with the assent of the majors. Where the mortgage executed by the deceased father of a joint Hindu family is not found to be for

legal necessity and a simple money decree is passed against the estate of the deceased in the hands of the sons and as against grandsons the mortgage suit is dismissed (the debt not having been shown to be for illegal or immoral purpose) the decree can be executed against the interest of subsequent born grandsons to contend on the strength of explanation VI to Sec.11 C.P.C., that the decree of dismissal against the interest of the grandsons in existence at the decree operated as res judicata against their interest as well.

10. Co-heirs do not claim under each other.-

A decision in a suit by one of several co heirs does not bind the others. Where in a suit a person claims the whole estate for himself and assets his exclusive title to it and repudiates the interests of all the other heirs of the previous owner, he cannot be held to have represented the interests of the other heirs for the purpose of Sec.11, C.P.c.

But where two persons field a suit on death of a third person that they were three

brothers and forward a pedigree in their support, the pedigree was not proved and it was decided that they were not brothers. In a subsequent suit the heirs of one the above two persons alleged they were heirs of the deceased and pleaded the same pedigree. It was held that the persons through whom the heirs contested in the subsequent suit were parties to the first suit, that in the first suit the question of relationship was directly and subsequently in issue as it was head and finally decided by a court which had jurisdiction to try the subsequent suit, and hence the rule of res judicata in Sec.11, C.P.C., applied and the subsequent suit was barred.

11.Co-owners co not claim under each other.-

Co-owners are held not to claim under each other. A judgement rendered against one co-owner, does not therefore bar a suit against another co-owner.

12. Co-tenants do not claim under each other.-

A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants.

13.How far administrators represent deceased’s heirs and legatees.-

It is a general rule, that an administrator represents the deceased’s heirs relating to the deceased’s property, even if there is an irregularity in his appointment. Hence a decree against an administrator binds the estate and his successors.

Karnavan.- The Karnavan or managing member of a Malabar trawad(family) is in similar position to a Hindu father under the Mitakshara law. Hence a decree against a Karnavan if not impleaded in a representative capacity in respect of the trawad property does not necessarily bind the members not actually bought on the record.

14. How far tansferor and transferee claim under each other.-

A transferee claims under the transferor, and is bound by any decision against him prior but not subsequent to the date of the transfer but the transferor cannot be said to claim under the transferee, and therefore cannot as such be estopped by a decision against the latter.

15. How far lessee and lessor claim under each other.-

A lessee claims under his lessor and his successors-in-interest, but the lessor cannot be said to claim under the lessee and therefore cannot, as such, be estopped by a decision against the letter. But a lessee under a lease granted before a suit brought by or against his lessor is not bound by the decision therein against the latter, if he(the lessee) was not himself a party to the suit. A decree against a registered tenant will not bind the real owner unless he claims through that tenant.

Since the lessee does not occupy a representative capacity and the lessor cannot be said by a lesser against a third person cannot operate as res judicata in a subsequent suit by the lessor against the same person.

16. Shebait of an idol bound by a decision in a suit to which his predecessor was party.-

The shebait of an idol can hardly be said to claim under his predecessor, but a decision obtained against him, is considered binding on his successor. Where a shebait has incurred debts in the service of an idol, for the benefit and preservation of its property his position is analogous to that of a manger of an infant heir, and decrees properly obtained against him in respect of debts so incurred are binding upon succeeding shebait. But a decree by consent against the shebait of temple as such who to the knowledge of the plaintiff has been dismissed from temple is not binding on the properties of the endowment in the hands of his successor-in-office. Where in a suit for recovery of possession of certain property the

trustee of a temple who was a defendant omitted to put forward a valid defence on behalf of the temple and an ex parte decree was passed against the temple and a fresh suit was filed by the succeeding trustee to establish the rights of the temple in respect of the very same property, it was held that the second suit was barred by res judicata as the decree passed in the prior suit was the result of gross negligence on the part of the then trustee. Where a mahant impeaching an alienation of muth property by his predecessor has been dismissed the decision binds the succeeding mahant and the suit for possession challenging the sale will be barred by res judicata under Sec. 11, C.P.C., in the absence of collusion or fraud. Where certain deities are not properly represented in a suit, decisions in proceeding in which they are not properly represented will not bind them and no remedy available to them will be barred by reason of the proceedings.

17. How far mortgagor and mortgagee claim under each other.-

A mortgagee claims under the mortgagor, and is bound by any decision against him prior but not subsequent to the date of mortgage but a mortgagor cannot be said to claim under the mortgagee, and therefore cannot as such be estopped by a decision against the latter, unless he is a party. The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, a subsequent litigation to which he is not a paty, consequently the decision in the suit is not binding on the mortgagee. Any decision obtained against a mortgagor after the execution of a mortgagee deed cannot operate as res judicata against the mortgagee, if he (the mortgagee) was not a party to the suit. Much less will a decision between a tansferee of the mortgagor and a third person operate as res judicata between the mortgagee and each transferee when the same question arises in a subsequent suit. The mortgagee cannot be considered to be litigation under the same title in the subsequent suit as the mortgagor

did in the earlier suit. Nor can he be said to be litigation under the same title as the transferee of the mortgagor. When in a mortgage suit a mortgagor claims only a paramount title and raises a plea of misjoinder on that basis and succeeds in getting the suit dismissed against him which really means in law, his dismissal or discharge from the suit, on such plea, he forfeits his right of redemption, if any, in respect of the said mortgage and becomes disentitled to claim such right in any future proceeding. This was laid down by the Judicial Committee in the well-known case of Nilkant Banerji v. Suesh Chandra, which has always been followed.

As a mere mortgagee, he would not be bound by any earlier decision against the mortgagor if his(mortgagee’s) title arose prior to the suit in which the decree against his mortgagor possessing only the equity of redemption has not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage. The doctrine of res judicata would however not be applicable unless the mortgagee could be said to be claiming under the mortgagor in the

previous suit filed against the mortgagor. In a sense it could be said that the mortgagee is a person claiming under the mortgagor if in an execution of a decree against the mortgagor the mortgagee purchases all the interest of the mortgagor. But as observed by Mahmood J., in Sita Ram V. Amir Begum:

> "The plaintiff in the present suit could not be treated as a party claiming under his mortgagors within the meaning of Sec. 13 of the Civil Procedure Code (now Sec. 11 of the present Code),and that section must be interpreted as if after the words 'by a title arising subsequently to the commencement of the former suit' had been interested."

Mahmood J., relies on observation of an American writer Mr. Bigelow. It is worthwhile referring to what that learned author says on this point:

> "Having ascertained the effect of judgement estoppels upon the actual parties to the record, let us now inquire into the effect and operation of personal judgements against those who were not

strictly or nominally parties to the former suit, but whose interests were in some way affected by it. And first of privity, which by Lord Coke, is divided into privity in law, i.e. by operation of law, as tenant by the courtesy; privity in blood, as in the case of ancestor and heir, and privity in estate, i.e. by action of the parties, as in the case of feoffox and feofee. These division are only important in deciding the extent of the doctrine of privity and as the rule of law, are not different in questions of estoppel in these divisions, it will not be necessary to present them separately. But it should be noticed that the ground of privity is property and not personal relation. Thus an assignee is not estopped by judgement against his assignor in a suit by or against the assignor alone, instituted after the assignment was made through, if the judgement has preceded the assignment the case would have been different, hence privity in estoppel arises by virtue of succession. Nor is a grantee of land affected by the judgement

> concerning the property against his grantor in the suit of a third person begun after the grant. Judgement bars only those whose interest is acquired after the suit, excepting of course the parties."

Similarly it has been held in numerous decision that a mortgagee will not be affected by an adjudication made between the mortgagor and another person without the mortgagee on record in a suit filed subsequently to the creation of the mortgage. The mortgagee no doubt is a person claiming under a party because of the mortgagor becoming a party in a proceeding subsequently instituted. Having created a mortgage the mortgagor could in a subsequent proceeding only represent, the equity of redemption which alone vests in him and not the mortgagee interest which vests in the mortgagee.

18. Landlord and tenant.-

A recognition by a thicadar of the purchase of a portion of a tenancy by a tenant and its amalgamation if made in good faith is binding on the landlord. It is not necessary

that such a recognition to be binding must be for the benefit of the estate. A previous decision as to the question of the area of a tenancy is res judicata in a subsequent suit between the parties. But a previous decision in which the question as to the nature of tenancy was raised but was not decided is not res judicata in a subsequent suit between the parties. The decision is a previous suit for rent, whether ex parte or inter partes, operates as res judicata in a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objections were taken by a party. When the defendants have been defeated in a severalty the question is res judicata in a subsequent suit. But a previous decree awarding rent at a certain rate for the suit period is not res judicata as to rate of rent in a subsequent suit. It is evidence in so far only as the rate of rent allowed in that case is concerned. But the decision in a rent suit in which the title of a person is in issue for the purpose of deciding his right to receive a share of the rent, operate as res

judicata in a subsequent civil suit by him relating to the property. An ex parte decree in a suit for rent which is afterwards satisfied by the tenant operates as res judicata on the question of relationship of the landlord and tenant between the parties in a subsequent suit for ejectment. A suit brought by a tenant against a third person does not operate as res judicata in a subsequent suit brought by the landlord against the same person, for the tenants does not occupy representative capacity and the landlord cannot be said to be a person claiming through the tenant. A decision that the terms of the tenancy include a valid and binding term as to the payment of interest on arrears of rent will also operate as res judicata.

19. Grantor and Grantee.-

Since the transferee of a grantor of a licence is not bound as such by the licence under Sec. 59, Easements Act, it follows that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor

has failed by reason of his failure to prove the ground on which he sought he ejectment.

20. Judgement-debtor how far represented by attaching creditor and execution purchaser.-

A judgement- creditor attaching and selling the property of his debtor does not represent that debtor as regards that property, even though he has often to rely on and support the debtor’s title to it; his position thus being like that of a purchaser at a sale arrears of revenue who is held not to claim through the defaulting proprietor. But it is not so in case of auction-purchasers at an execution sale. An auction purchaser at a court sale acquires only the right, title and interest of the judgement-debtor and while he is not a representative of the judgement debtor for the purpose of Sec. 47, C.P.C., he is a party claiming under the judgement-debtor for the purposes of Sec.11. Attachment does not create any specific charge on the property attached. It does not, by itself, give the attaching decree-holder in strictness a title

to the attached properties but it is the basis of the decree-holder's right to assert the judgement-debtor's interest in the property attached and the right created in favour of the decree-holder by attachment is a claim under the judgement-debtor within the meaning of Sec. 11, C.P.C. After attachment of property of judgement-debtor a suit by plaintiff for declaration that it belonged to him and the judgement-debtor was also made a party and the suit was decreed in plaintiff's favour. A subsequent attachment in another decree against the same judgement-debtor was bound by the previous judgement in declaratory suit and also the subsequent attaching creditor as well as the auction-purchaser on the principles of res judicata. Although the orders passed in execution are governed by Sec. 11. C.P.C., the order affects only parties or their privies and not strangers who had not derived their title from the parties where the execution and the decree-holder appeals against the order without joining the auction-purchaser, the auction-purchaser would not be bound by the decision in appeal, where the mortgagee's title arose prior to the suit in which the decree against the

mortgagor was obtained, and the mortgagor possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee, the mortgagee is not bound by the decision in the suit. An auction-purchaser does not obtain any title to the properties purchased until confirmation of the sale by the Court so as to render him a claimant under the person whose rights are sold. Thus where though there was an order passed by the Court confirming the sale, that must be deemed to have been vacated on the Court having allowed the application by the petitioner to restore his application to set aside the sale which had been dismissed for default. The order of confirmation was consequent on the dismissal of the application to set aside the sale and when that application was restored to file, the order confirmation became automatically cancelled. Similarly the position of an auction purchaser is merely of a person who had bid at a court auction sale which is sought to be set aside by an application field in that behalf and which is pending. The confirmation of sale can only be after that application is dismissed. The

auction-purchaser, therefore, has no title to the properties till confirmation of sale and he can not be regarded as a person claiming under the judgement-debtor.

21. a son does not claim under his father under customary law.-

Under the customary law a son that has a right in his ancestral property, and cannot be said to be said “claiming under” his father within the meaning of this section.

22. Nature of title derived from a party.-

This section contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. There is nothing in the section to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should invoice the consequence of being dismissed. On the same principle, purchaser, mortgagee, or donee of a property is

not estopped by a decree obtained in a suit against the vendor, mortgagor or donor commenced after the date of the purchaser, mortgage or gift.

23. Litigation under the same title.-

The section requires as one of the conditions for the plea of res judicata to be supported, that the parties should be litigation under the same title in the subsequent suit as they were litigation under in the first suit. But the words under comment do not refer to the identity of the grounds of action, but mean that the question must have been raised and decided in the same right, that is to say in the right of the parties to the second suit, and not in the right of any other person. From which it follows, that in order that the rule of res judicata may apply the disputed title between the two parties must be the same in both cases. And where in a subsequent suit the parties are not litigation under litigation under the same title, the decision padded in a previous suit is not res judicata. Or, in other words, where in a

subsequent suit the parties litigate under a title different to that under which they endeavoured to support their claims in a previous suit, the decision in the latter suit will not operate as res judicata in the subsequent suit. For instance, it has been repeatedly held that a judgement against a party used as an individual will not be an estoppel or in a subsequent suit in which he may sue of be sued in another capacity of character; as in the letter case he is in contemplation of law a distinct person and a stranger to the prior proceeding and judgement. Thus a decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment or operate as res judicata in a subsequent suit against him as representing the community, or operate as res judicata in a subsequent scheme suit under Sec. 92, C.P.C. or operate as res judicata in a subsequent suit brought in the capacity of a trustee for the purpose of the recovery of the property impressed with a trust. Similarly, in Muhammad Din V. Rahim Gul the plaintiffs in the two suits were held to be acting in different capacities, when in the

former they promoted with others a joint claim of prescription to certain property, whereas in the latter they propounded a private and exclusive title of ownership to that property. Similarly in Suraj Kuar V. Nagina Singh the occupancy tenants were held to be litigation, in different capacities in the two suits, when in the former they disputed the right of original proprietor’s successors to dispossess them of the proprietary rights, whereas in the latter they claimed restoration of their occupancy rights. In Ahmad Khan V. Bhagbhari, a person impleaded as the representative of the one of the heirs of a certain person was held not to have been a party in his own right as heir to that person. And the dismissal of a claim made by any one as the heir of a person does not bar a claim as his son’s heir. In Ishri Dat V. Har Narain, a person claiming under two deeds of sale, one of which was executed simply as the other was held invalid for want of registration, was held to claim under different titles. On the same principle, if a purchaser of one of the mortgaged properties is a party in a suit for the recovery of the mortgage amount by a sale of

all the mortgaged properties he may afterwards purchase from a person claiming to be the owner of the equity of redemption in them, who was not a party in the owner of the equity of redemption in them, who was not a party in the former suit.

But a Hindu reversioner, who brings a suit during the lifetime of the female heir for a declaration that a particular transaction is invalid after latter's death, and on the issue being raised about his alleged relationship with the last male holder his suit is dismissed on the ground that he failed to prove his alleged relationship as a reversioner, cannot maintain a suit for possession as the actual heir after the death of the female heir as in the subsequent suit he does not litigate under a different title. Similarly, in Rafiq-un-nisa V. Absul Shakur the plaintiff in the subsequent suit was held to be litigating under a different title, where he sued for recovery of money by sale of a property alleging that he had obtained an assignment of the mortgagee rights held by another over the property, and the suit was dismissed on the ground that the deed obtained him did not amount to an

assignment, but created only a sub-mortgage of the mortgagee rights, and he instituted a fresh suit for sale as a sub-mortgagee. Bibi Wasilan V. Mir Syed Husain is another instance in which the parties were litigating under different titles. Where in a former suit between a reversioner to the estate of a widow and a purchaser from her, an issue was raised as to whether there was legal necessity for the widow's alienation and it was decided adversely to the purchaser but the reversioner's suit failed for a moiety of the property because it was not found that that moiety had passed to him then, and he failed another suit after that moiety had passed to him; it was held that the question of legal necessity was res judicata as in both the suit the plaintiff litigated as the owner of the revision and the defendant as the purchaser from the widow. Where a suit for maintenance under britipatra was dismissed on the ground that the document did not bind the estate, a second suit under the same document for a declaration of his right to maintenance is barred on somewhat similar grounds. Where a suit was bought by two persons as members of the public for a

declaration that certain property was Wakf property and it had been decided that it was not so, a subsequent suit by any other member is likewise barred. It has somewhat similarly been held that a decision in a suit by a saranjamdar for possession of India situate in saranjam village having been dismissed, a subsequent suit by the brother of the previous sarajamdar for the same relief, is barred. It has also somewhat similarly been held that whrer it is necessary to establish or deny a custom in a family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly thrashed out in the presence of all branches of the familym tha matter cannot be again raised by the descendants of those branches even though cetain branches did not take an active part in the contest, but contended themselves with admitting that the custom existed. But where a suit is brought by a person to recover possession form a stranger of math property claiming it as heir of deceased mohunt, but he does not produce any certificate of succession to establish his heirship and the suit is

thereupon dismissed, the dismissal is no bar to a suit by him as manager of the math om behalf of the math. Similarly the dismissal of a suit brought by a son against his father for maintenance claimed under an agreement is no bar to a suit by him against the father for a declaration that he is enttitled to maintenance out of certain lands in the hands of the father held under a sanad from Government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family. The Official Assignee does for certain purposes represent the insolvent, but he has other capacities such as the representative of the body of creditors; and in each case in order to determine what particular character he holds regard must be had to the circumstances. If in a case he is litigating under the same title under which the insolvent had previous litigated, he may be held to be the legal representative of the insolvent and the decision in the previous case would operate as res judicata against him. But where in a suit the Official Assignee claims certain properties as belonging to the insolvent and, therefore, available for the

benefit of all the creditors, he cannot be deemed to claim under or be litigating under the same title as the insolvent. The words “between parties under whom they or any of them claim litigating under the same title” cover a case where the latter litigant occupies by succession the same position as the former litigant. The words of the section do not make any distinction between different forms of succession. For the purpose of this section, it cannot be said that the decision on a plea of jus tertii is a decision between the parties litigating under the same title, when the jus tertii is put forward and actually relied on a later case by such third person. The phrase “litigating under same title” means litigating in the same capacity. If the parties are litigating in the same capacity it does not matter whether the transfer attached in one case is a mortgage and in the other case a gift. The subject-matters of the two suits need not be the same. The words mean that the demand should have been of the same quality in the second suit as in the first one. A party cannot be said to be litigating under the same title within the meaning of Sec. 11 where in the

previous suit he was litigating in the capacity of a reversioner and in the subsequent suit he claims as owner.

Their Lordship of the Supreme Court in Sunder Bai V. Devaji Shankar, while considering the interpretation of the term “litigatimg under the same title” thus observed : “The real ratio governing such class of cases is to be found in a decision of Full Bench of the Lahore High Court in Mst. Sardaran V. Shit Lal, where it was held that where the right claimed in both suits is the same the subsequent suit would be barred as res judicata though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as res judicata even though the property was identical. It is, therefore, clear that the plaintiff in the case before us was litigating in the same title, i.e. in the same right as the adopted son of Shankar though that claim of his was sought to be based on a later adoption than the one in the former suit.”

A person having two capacities, one as a Karnavan of a jarwad and the other as an uralan of dewasworm filed a suit against another shrine claiming that the defendant shrine was subsidiary shrine owing allegiance to the plaintiff dewasworn and bound to render homage to it by making certain recurring payments. Another suit had been previously instituted against the same defendant for the same relief. But there the uralan figured as plaintiff suing on behalf of the institution. In the later suit he figured as plaintiff suing through trustee (who happened to be the same person in both suits). In both the suits the right put forward was on behalf of the dewasworn and not in his capacity as the Karnavan of the jarwad. In both the suits, the two shrines were plaintiff and defendant respectively and were represented by the same individual. “Litigating under the same title” means “litigating under the same capacity of same right”.

The reliefs were identically the same. Held that the later suit was barred by the principle of res judicata. Where the plaintiff challenged the sale in execution in both the suits as an infingement of his right of

ownership, in the first suit he maintained that he was the sole owner, while in the subsequent suit, he claimed to be a member of a joint family. According to O.2,r.1, C.P.C., the plaintiff was bound to frame the suit so as to get a final decision on the subject-matter in dispute and prevent further litigation as far as possible. The subsequent claim was not so dissimilar that its union with the claim in the precious suit would have led to confusion. The suit was therefore barred by constructive res judicata. Where A filed a suit against the trustees and mahant of a certain temple on allegations that certain attached properties belonged to him and not to the temple and obtained a decree in his favour, subsequently certain worshippers of the temple sued the heirs of A for declaration that the said property belonged to the temple. It was held that no doubt the plaintiffs worshippers were not successors of the trustees and mahant of the temple who were defendants in the prior suit but the plaintiffs worshippers did not claim any personal right of their own nor they had set up a jus tertii but sued for the benefit of the temple. Therefore the title

litigated was same thought the agency asserting the title previously was different from that asserted now. The defendant was a lessee in actual possession and enjoyment of the village, was liable to pay land revenue and was sued by the lessor for the recovery of rent. The lessee was subsequent to the decision in the suit appointed lambardar and the lessor sadar lambardar. In a fresh such suit by the lessor to recover rent for the subsequent years claiming the amount of enhanced land revenue it was held that the parties were " litigating under the same title" within the meaning of Sec.11 and subsequent suit was barred by res judicata. The mere fact that the lessor and the lessee acquired the additional capacity of sadar lambardar and lambardar respectively, would not alter the nature of the suit and would be barred by res judicata. A person pleading his right to possession as purchaser in a prior suit and suing for possession and later on his right to possession as usufructuary mortgagee of the same property was held to be litigating in the same title for purpose of res judicata. In each of the two suits he is litigating in his individual

capacity for his own self and in his own interest, consequently the bar of res judicata will apply.

24. Litigating in different characters or capacities –

One who, thought in name a party to both proceeding, is shown to have litigated in different characters or capacities is in contemplation of law, not one person, but two. Though physically the same, he is jurally a different person in the second litigation from the person he was in the firs or, in the more accurate phraseology of the civilians, he wears separate and distinct personae, and plays separate and distinct parts, in the two proceedings; whence it follows that a judgement recovered by him in one character cannot be set up as a bar to a claim subsequently made by him for the same relief in another character any more than in estoppel cases, where a similar diversity of persona appears, a res judicata can be set up as an estoppel. Conversely, whenever the former judgement has been recovered by one who, though physically

distinct from the plaintiff in the subsequent proceedings, is yet cited to him in interest, as in the case of master and servant, or two common informers, both representing the public in a sense, there is, in eontemplation of low, one persona only, and the identity of parties is accordingly established. There is, of course, no diversity of personae within the meaning of the above rule, merely because the party litigates as plaintiff in one of the proceedings, and in the other as counter-claimant, or by way of set-off. It has even held that a who has accepted statutory compensation in proceedings before a court of summary jurisdiction to which he was not strictly a party at all, is barred from afterwards suing in a civil court for damages beyond the limited amount which the Magistrate had jurisdiction to award. Where the plaintiff instituted a suit claiming as a reversioner and subsequently instituted another suit claiming title as owner, it was held that the plaintiff was suing in a different capacity in the latter suit for the purposes of Sec.11, C.P.C.

Where the parties are not litigating in the subsequent suit under the same title under

which they litigated in the former suit the plea of res judicata must be overruled. Where the claim made in the two money suits was on hand notes different from the one, on which the claim was made in the small cause suit. Therefore it was held that the parties were not litigating under the same title and bar of res judicata will not prevent the Small cause Court from going into the question of fact again. Even when the plaintiff in the later suits was the plaintiff in the previous suit, and the first and second defendants in the later suit were parties to the prior suit. But the plaintiff had brought the previous suit in a capacity different from that on the basis of which he instituted the later suit. In the prior suits he claimed to be the nearest presumptive reversioner to the estate on the death of the window while in the later suit, on the death of the window he claims to be the nearest reversioner entitled to succeed. A finding that on the date of the previous suit the as plaintiff was the nearest presumptive reversioner cannot operate as res judicata in the later suit for possession. Where a Mohammedan window was allowed by a previous

order to hold her husband’s property till her life-time in lieu of her dower debt and could resist the claim of the creditors till her dower debt was discharged. The prior order will not operate as res judicata in a subsequent claim by the decree-holder when the widow has transferred the husband’s property by gift purporting to convey absolute ownership with possession to the donees. The res adjudicated in the earlier case being different from the latter, res judicata will not apply. Former suit for title on dhardhura custom and subsequent suit for title on other basis no question of res judicata. Wherein a suit for possession by a monk as representative of the Sanghas of ‘Kyaungdaik’ is dismissed, a subsequent suit by him for possession in the capacity of the presiding monk is not barred by res judicata. First suit for declaration as owner and subsequent suit as mortgagee to enforce the mortgage, titles in both suits held different, bar of res judicata could not apply. First suit as owner against person in wrongful possession having been dismissed a subsequent for accounting as co-sharer was not barred by res judicata. A decision in a suit for

possession and management of a certain estate against certain persons in their personal capacity does not bar a subsequent suit against the same persons as shebaits and manager and in respect of the property of the idol. Where in a former suit the respondents had claimed the right to property as full owners of it by survivorship on death of R and they did not claim as reversioners of R, not did they allege that R was a separated brother, in a subsequent suit the respondents claimed title as reversioners of R treating him as a separated brother and accepting that the widow of R had succeeded to the property of R as R’s heir as a limited owner and the respondents claimed title as reversioners of R on the death of the widow, the last limited owner. It was held that the title in the two suits was clearly different and the doctrine of res judicata did not apply. Plaintiff in both suits in different capacities no question of res judicata arises.

25.Explanation VI-

Explanation VI of the present section is exactly the same terms as the corresponding

Explanation V of sec. 13 of the Code of 1882, which says that “where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating” The Explanation was first enacted as Explanation V of Sec.13 of the Code of 1877 in which Sec. 30 (now O.I,r.8) was first enacted. Section 30 again was taken with an important modification from O.XVI, r.9, of the new Rules of the Supreme Court which embodied the practice of the Court of Chancery in representative suits, as explained by Lord Eldon in Cockburn v. Thomson O.XVI, of the Rules of the Supreme Court under the Judicature Act provided that “ where there are numerous persons having the same interest in one cause of matter, one of more of such persons may sue or may be authorised by the Court of a Judge to defend in such cause or matter, on, behalf or for the benefit of all persons so interested,” and where a plaintiff properly so sues, the persons whom he represents are bound. This rule was reproduced in Sec. 30 of the Code of 1877, with this important modification that the

permission of the Court is required to enable the plaintiff to sue in such a case, whereas under O.XVI, r.9, no such permission is required, in the case of plaintiffs. It therefore follows that in India the Legislature considered that that a plaintiff ought not to be allowed to represent the order parties interested in the case mentioned in the section without the leave of the Court. Section 30 and the Explanation were, as mentioned above, enacted at the same time, and must be read together, and it has sometimes been stated that the Explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given under Sec.30. The Madras High Court thus sometimes held that a decision in a former suit against a Karnavan sued as representative of the family was not res judicata on account of the Explanation, except when the procedure prescribed by Sec.30 had been followed. But a bother construction of the Explanation was adopted sometimes and in an early case it was held, that a decision in a suit against a Karnavan as such in respect of certain property of the tarwad in his possession would be

binding on the junior members of the family, as they would be deemed to be claiming under him, and Forbes and Kernan, JJ., said, " Explation V is not limited in its language to a suit under Sec.30...In such suits the party suing or defending must have permission of the Court to sue or defend, and must in the plaint of defence purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those interested who are not parties to the suit." And that decision has been followed in Vasudev v. Sankaran in which a Full Bench of the Court has broadly held that when a Karnavan sues or is sued in his representative capacity, and acts honestly, the other members of the tarwad are bound by the decision though they may not have been parties to the suit, and the procedure prescribed by Sec. 30 was not followed. It must then be taken as settled that the Explanation applies not only to cases where leave of Court has been granted under O.I., r.8, but also to causes where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others. Hence a decision in a suit, instituted

and conducted bonafide by some only of agraharamdars of a village against the zamindar and the other agraharamdars for a declaration as to the kuttubadi payable by them to the zamindar, is res judicata against the representative of an agraharamdar who was defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the appeal or the second appeal. It is said that this Explanation does not refer to the case of a defendant at all but only to the case of a plaintiff. But it is not in terms so limited. In the first of the last cited cases, Innes, J., observed that the Explanation did refer to bona fide defences, but bona fide claims. There does not appear, however, to be any sufficient grounds for such a restriction and the observation was dissented from by Kernan , J., the other member of the Bench, whose view has found approval in subsequent cases. But be that as it may, a right to relief can be said to be " claimed in common" under the Explanation only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-

plaintiffs under O.I., rr. 1, 4(a). A suit cannot be maintained by one person on behalf others standing in the same relation with him in the subject of the action, unless the relief suoght by him is beneficial to those whom be seeks to represent and such others are necessarily interested in the relief suoght. The rule of English law is thus stated in Deniell's Chancery Practice. " In order to enable a person to sue on behalf of himself and others who stand in the same relation with him to the subject of the action, it is generally necessary that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent; where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief suoght such a suit cannot be maintained. As to the expression "in common" the Calcutta High Court is in favour of placing a restricted signification on it. It holds that the explanation does apply where the right claimed under one title, but prescriptive one which each person claims individually in respect of his own house and premises, and that it is applicable only to cases where several

different persons claim an easement or other person right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or a right to take water from the same spring of well. The Punjab Chief Court, on the other hand, takes a broader view and, in Chet Ram v. Bahal Singh, Barkley, J., observed that the contention that this "Explanation only applies to suits for right of way, easements and the like" has no foundation either in the language of the section of in the principles of interpretation of statutes. It has been held sometimes that the Explanation is applicable only to the cases n which the private right claimed by the parties in the former suit was expressly claimed and purported to be claimed in common for themselves and others; and that it does not mean that a judgement obtained against a co-sharer in the property is binding against another co-sharer in the property, and clearly it would not be so where the first suit did not purport to have been litigated bona fide in respect of a right claimed in common by more than one person. The reason for inclusion of public rights in this

Explanation is to give effect to suits relating to public nuisances under Sec.91, C.P.C. The expression “public right” means a right in which many members of the State, i.e. public at large, are interested; whereas the community, that is, a certain class of persons. The essence of a litigation, which is carried on by a private party for injuries sustained by him in the exercise of a right common to him and others, is that there is a public right and that the party suing has suffered special damage in enforcing that right. The fact that in obtaining this individual remedy, it is not open to him to get a declaration embodied in the decree that the right is a public one, will not affect the principle of res judicata. Hence, where the Court gives a finding in such a suit that the right is a public right, it becomes res judicata in a subsequent litigation by virtue of this Explanation. But if the plaintiff suing for a declaration that he is owner of a piece of land free from any right on the part of the public to sue it as a highway, choose to bind the public he must comply with the provisions of O.I., r.8 and must observe the conditions on which permission is given by

the Court under that rule. Explanation 6 is not controlled by O.I, r.8. Hence, if a suit field or defended by some alone as representing a class or community, though without any permission applied for and obtained under O.I, r.8, is allowed by the opposite party and by the Court to proceed in that character and if it is bona fide conducted as a representative and if the issue, the evidence and the judgement dealt with the right as one litigated for the whole class, then the judgement in the suit binds the whole class and operates as res judicata with reference to a subsequent similar suit field or defended by some on behalf of the class after permission obtained under O.I.,r.8. In order to make Explanation 6 applicable, there ought to be community of interest claimed on the strength of a common title and the claim must have been made in good faith for enforcement or defence of that common right on behalf of all persons having such common interest. The words “bona fide” in the Explanation can only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of due and caution be applied to one

who puts forward only his own right as one of a body of persons who have equal right with himself.

In order to bring a suit within Explanation VI to Sec.11, C.P.C., it is essential to prove the following :

(1) That there must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit;
(2) That the parties not expressly named in the suit must be interested in such right, and
(3) That the litigation must have been conducted bona fide on behalf of all parties interested.

If a representative suit governed by O.I, r.8, C.P.C., is failed, but the prescribed procedure is not followed, the decision may not bind the other persons on whose behalf the suit was brought. Explanation VI to Sec.11, C.P.C., because there may be a suit in which a person claims a right in common to himself and others though not governed by O.I, r.8, C.P.C. Therefore Explanation VI to Sec.11, C.P.C.,

applies not only to representative suits governed by O.I.,r.8,C.P.C., but also to other suits.

The distinction between a suit which is expressly a representative suit under O.I, r.8, C.P.C., and a suit in which there is no such claim but to which Explanation VI to Sec.11, C.P.C., may apply has been recognised by the Judicial Committee in Kumaravelu Chettiar v. Ramaswami Ayyar. At page 189 their Lordship said:

> "As to authority they are impressed by the fact even before the Code of 1908 there were several decisions- Thanakoti v. Maniappa may be selected as typical in which the view was taken that if what may be called an O.I, r.8 suit was to have the benefit of the Explanation the conditions of the rule must have been complied with fully. While in other cases in which it might superficially be supposed that the opposite view had been taken it will be found that the question at issue was not so much whether where none of the conditions of the rule had been complied

with the benefit of the Explanation could be extended to the decree in a suit expressly within the terms of the rule-which in the present case-as whether to bring the decree within the Explanation the conditions of the rule had not to be observed even in a suit which while within the words of the Explanation was not within the words of the rule at all. And the result of the decision has shown that the Explanation is not confined to cases governed by the rule but extends to include any litigation in which apart from the rule altogether parties are entitled to represent interested persons other than themselves. Oder I, rule 8, applies when a suit can be brought against 'numerous' parties. If there are only two parties O.I,r.8,C.P.C., cannot apply.

"Under the Hindu law, only a next reversioner can file a suit would bind the whole body of reversions. It would be necessary in such a suit for the plaintiff to claim that he was suing on behalf of the reversioners. But Explanation VI to Sec.11, C.P.C., does not only persons when

such a suit is bought but it also applies whenever a person claims a right private or public, in common to himself and others, provided he does so bona fide. Thus when a suit is borught by a remoter reversioner who challenges an alienation made by a Hindu widow on the ground of its being without legal necessity, if the plaintiff expressly claims the right in common to himself and others similarly situated and has field the suit bona fide, Explanation VI applies because all the requirements are satisfied."

The following observations of their Lordships of the Pivy Council in Lingangowda Patil Dod-Basangowda Patil v. Basangowda Bistam Gawda Patil, at page 56 are very helpful in the regard:

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age and then bring an action by his guardian before, and in each of these cases,

> therefore, the Court looks to Explanation VI to Sec.11, C.P.C., to see whether or not the leading member of the family has been acting either of behalf of minors in their interest or if they are majors, with the consent of the majors".

The principle that a suit by a reversioner is always in a representative capacity and that a finding arrived at in that suit binds all the reversioners and all those who derive their title from them is now well established.

Explanation VI to Sec.11, C.P.C., refers to a case in which the person sought to be bound by the decision is deemed to be represented in the previous suit by virtue of proceedings having been taken under O.I., r.8, C.P.C., or otherwise. If the plaintiffs to nominee are different persons in the earlier and later suits, but in both cases they are representatives of the same public as such, the plaintiffs in both cases are in substance the same. Where the previous suit was not representative and the person sought to be bound by the decision arrived at in the case cannot be deemed to have been represented in

that litigation, Explanation VI to Sec.11, C.P.C., can have no application. Broadly speaking Explanation VI to Sec. 11, C.P.C., applies only to cases in which there is some indication that the suit was of a representative character and the observations of their Lordship of the Privy Council in Amissah V. Karbah are helpful in this regard:

> "Their Lordships do not doubt that an action by or on behalf of a family may result in res judicata but such an action, if it is to bind absent or future members of the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court."

If a person is impleaded as a party in his capacity as the person representing the entire family, the whole family must have been bound by that decision, otherwise the family cannot be said to have been properly represented if other members of the family were lift out.

26.Result stated.-

From the case-law bearing upon Explanation VI the following propositions appear to emerge:

First- Where the plaintiff or the defendant sues or is sued in a representative capacity, which attaches to him under the general law, the decision binds the entire body whom he represents. These are cases of administrators, trustees, shebaits, mutawallis, the Official Assignee for certain purposes, Hindu widow representing her husband’s estate a holder or inam lands and the like.

Second-Where a person acting in a representative capacity has no such authority under the general law, if his litigation is to be representative one to bind others, he must get some other authority to assume representative characters; such authority need not necessarily be express, it may be implided.

Third.-Such authority, if it is to be had from the Court is ordinarily obtained

> in the form of an order under O.I., r.8, of the Code. But it need not necessarily be in that form. If the suit is filed in a representative form and it is allowed to proceed in that character without objection and, if a general issue is framed

so as to put in issue the right of the whole class in whom it is alleged to exist, and the evidence adduced is of a general character and the findings in the judgement are general is nature, that judgement is binding on the whole class notwithstanding that no leave under O.I,r.8, has been obtained.

27. Decree against widow when binding on reversioners.-

It is now settled by consensus of authorities that where the estate of a deceased Hindu has vested in a female heir, a decree fairly and property obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir; and where merits are tried and trial is

fair and honest, a Hindu lady otherwise qualified merely owing to a personal disability or a disadvantage as a litigant. In other words, a decree obtained on a fair trial, in a suit by or against a Hindu widow, daughter or mother, in possession of the estate of the last full owner, operates as res judicata as regards the question tried in the suit and is consequently operative against the ultimate eversiones. The leading decision on the point is that by their Lordships of the Pivy Council in Katama Natchiar v. Rajah of Sivaganga, in which Turner, L.J., in delivering their Lordships, Judgement, spoke of it as a general rule " that, unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit". This rule was adhered to in a later case by Lord Romilly who, however, added that it was the duty of the widow as heiress not only to represent but also to protect the estate, as well in respect of her own as of the reversionary interest. These cases down an equitable rule which has been

adopted by all the High Courts. But, inasmuch as the widow’s estate is ordinarily a limited one and as she represents the reversioners only in some special cases, it must be shown that the litigation was one in which the entire interest was as stake. Such is necessarily the suit in which she sues for recovery of the inheritance or attacks the factum or validity of an adoption which, if good, would divest her estate. But in a litigation which is qualified and personal to a widow in possession of life estate or arises out ofacts of her own affecting the estate, the widow, whether, she be plaintiff or defendant, does not represent the estate fully so as to give rise to a bar of res judicata against the reversioners. The principle that where a Hindu widow in whom her husband’s estate has vested, represents the estate in a litigation, to which she is a party, the decision in each litigation, fairly and honestly conducted, given for or against her will bind the reversioners, is applicable only if the widow did as a matter of fact, truly represent the estate in the prior litigation, but if in such prior suits, she was litigating an absolute title to the estate

inconsistent with her position as a Hindu widow inheriting her husband’s estate and with the interests of the reversioners in general, she could not be said to be representing the estate or the reversioners and the decision will be binding on the reversioners. A Hindu widow can not be deemed to represent her husband’s estate so as to bind the reversionery heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. She represents the estate as against the strangers for the purpose of protecting or preserving it. A decree obtained by a mortgagee against a Hindu widow alone , on the basis of mortgage not executed by her for legal necessity cannot bind the reversioners. Nor are the reversioners liable to pay the costs of the mortgage suit to the extent of the amount of the mortgage money which was taken for legal necessity. It has somewhat similarly been held that suits against the widow for arrears of rent or maintenance chargeable to the estate were personally against the widow and did not involve the rights of the reversiners. In this connection a question arises and has been considered in several cases

whether a compromise decree binds the reversioners. It was at one time held that it did not. Since a compromise was a contract and a decree on a compromise was indistinguishable from a alienation inter vivas which did not bind the reversioners, how could it then become(it was said) more binding by the fect that it was embodied in a decree. But a compromise decree may still be a fair decree more fovourable to the reversioner than what a decree might have been if passed on contest. It cannot therefore be asserted as a general rule that no compromise binds the reversioner. The more correct rule would appear to be that though the reversioner as such cannot ipso facto reject a decree passed on compromise, the question whether he is or is not bound by such a decree depends upon whether it answers the general test. Moreover a compromise may amount to a family settlement and the reversioner will then be bound by it. It is immeterial whether it is called a compromise, for a even compromise is valid if it is a fair settlement of rival claims. It has been so held by the Privy Council in which the reversion had connected on the strength of the earlier cases

that a compromise was indistinguishable from an alienation, but the Privy Council overruled this contention holding the compromise had been made under the advice of the District Officer and that as a settlement of the family dispute it bound the reversioners. These cases have overruled the contrary view held by the Indian Courts and settled the rule that a decree passed on a fair compromise will equally bind the reversioners if it is a fair settlement. It is not an alienation or subject to its restrictions. A compromise out of court stands on the same footing and its validity is subject to the same test, viz. It is valid and would bind the reversioners if it is compromise made for the benefit of the estate and for the personal advantage of the heiress. But though the limited owner’s right to compromise a claim is now beyond controversy, it must be a compromise and not merely an alienation in the guise of a compromise. Every compromise pre-supposes a bona fide claim and if there was no claim there could be no compromise. This is no exception to the rule that a compromise is binding if it is fair and made with due regard to the interest of the reversioners. However

that may be, it is quite clear that a compromise or an award decree will bind the reversioners if the conditions, which make a decree against a limited owner binding on the estate, are absent. Similarly, a decision in suit against the Hindu widow holding a life estate under the will of the her husband is not binding on the remainderman under the will. Wher the relief sought by revesioners against cerrtain widow is a personal one and no declaration has been sought for avoiding any particular transfer and there was no finding that any transfer was or was not for lega necessity, the mere dismissal of a suit for injunction cannot operate as res judicata in respect of a suit for possession after the death of the widows. A new cause of action arises in favour of the actual reversiones at the death of the widows and the second suit is not barred. On a line with these decisions the case of Pahar Singh v. Shamser fang, in which it was held that judgement in the remote eversioners, suit did not operate as res judicata on the question of adoption against the nearer reversioner (and their representatves) who were arrayed on the side of

the defendants and who could not very conveniently appeal from the dismissal particularly when they were denying that these was any collusion between them and the adoptive mother. Nor is a decree, for possession of properties in favour of plaintiffs, who had acquired title under the adopted son and who alleged dispossession by the widow after such acquisition of title, binding on the reversionners. A claim for the widow after such acquisition of title, binding on the reversioners. A claim for possession by way of denunciation of alienation by a previous holder of land is based on a different cause of action from a claim for redemption and is no bar to a suit for redemption of a mortgage by representative of the mortgagor. A Hindu woman cannot in a suit on a mortgage of the property executed by herself deny that she had power to alienate the prperty, and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. Where in a suit instituted agaisnst a widow for possession of immovable property it was open to her to plead

the invalidity of an adoption but she failed. She must be held to have raised it, and the question as to adoption is res judicata in any subsequent suit between the reversioners to her husband's estate and the alienees. Where, however, a Hindu widow sued for a declaration that a certain execution sale was not valid and binding, but it was dismissed not on the merits but on the grounds that it was barred by Sec.47, C.P.C., a suit by the reversioners after the widow's death was held not be barred by res judicata as there was no adjudication on the merits in the prior suit. If in a previous suit brought by a person claiming to be next reversioner on the ground of an illegal relationship it is held that there is no relationship between him and the deceased and on that finding the aliention made by the female owner was not declared as invalid against the reversioner, it will not be open to the same man when inheritance opens by the death of the last female owner who intervened between him and the last male owner, to contend that previous finding on the issue of heirship specially raised and decided is not binding. Similarly, if the Court held that the

alienation was invalid but refused a decree to the plaintiff on the ground that he was no reversioner it is not permissible for the same party to contend that he is the immediate heir when the last limited owner dies. But in such a case if it held that the plaintiff was the reversionaty heir and on such a finding a decree is awarded that the alienation was not binding on the estate it is not open to the defendant was not binding on the estate it is not open to the defendant or a person claiming through her to contend in the subsequent suit by the same reversioner, for possession on the death of last female owner that he was a stranger to this family.

The right of a widow succeeding to her husband’s property is that of an owner of property and powers are though limited but so long as she is alive no one has any vested in erest in the succession. A reversionay heir although having only a contingent interest is recognized as having a right to bring a representative suit against the widow for the conservation and due administration suit against the widow for the conservation and due administration of the estate so that the corpus

may go unimpaired to those entitled to reversion. The law permits the institution of suits in the life-time of the female owner to remove a common apprehended injury, to interest of all the reversioners and whenever action is taken by the presumptive reversioner it is in a representative capacity on behalf of all reversioners. A reversioner can question the acts of the Hindu widow without waiting for her death because evidence by lapse of time be not available for that purpose. The next immediate reversioner should have the right of the suit in the first instance. A more distant reversioner can bring such a suit if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. The reverssioner is bound by the decision against the female heir in her representative capacity. The right of a reversioner to impeach an alienation by a qualified Hindu female owner and his right to impeach on adoption by a Hindu widow rest in essence on identical ground, viz, the necessity to protect the reversionary interest and in both the cases the reversioner occupies a representative position and any decision in a

litigation fairly and honestly conducted, given for or against Hindu females, who represented the estate although they had only a qualified interest. Similarly where a suit by the widow challenging the surrender executed by her on ground or fraud and misrepresentation against R the next reversioner on the allegation that R was not her husband’s sister’s son, the suit having been dismissed, because the widow made admission in the Court that R was her husband’s sister’s son. It was held that decision will not operate as a bar of res judicata because the question whether R was her husband’s sister’s son or not was not litigated by the widow representing the estate on behalf of the future reversioners to the estate and also because the question was not decided on merits, on the basis of evidence on record.

In deciding a question of res judicata a widow represented the estate in such a manner as to bind the reversioner by an earlier decision against her, the test would be afforded by the fact whether or not the widow put up a bona fide and serious contest in the earlier suit. If the answer is in affirmative, i.e. a bona fide and serious contest, it will

constitute res judicata and shall be binding on the reversioners also, otherwise not.

It is quite true that a Hindu widow though owning only the limiting estate represents the absolute estate for certain purposes, and that a decree in a suit concerning the absolute estate if obtained against her without fraud or collusion would be binding on the reversioners; but if a suit though concerning the absolute estate, is determined upon a ground personal to the female heir, for instance, if a suit brought by a Hindu widow to recover possession of immovable property appertaining to her husband’s estate is dismissed on the ground of its having been alienated by her in favour of the defendant in the absence of legal necessity being shown, the decree in such a case ought not to bind reversioners in subsequent suits for recovery of absolute estate which vested in the reversioners. Similarly it has been held that in cases in which the suits either conducted of defended by a widow are personal to herself and originate in her own acts do not bind the reversioners who claim not through the widow but from the last male owner. Thus where the estate of a deceased Hindu was partitioned

between his two widows A and B in 1895. B died in 1897 and after her death her share was enjoyed by daughters and their sons. In 1910, there was a suit by one of the daughters of B against suit by the adopted son to recover possession of the property which had gone into the possession of B, it was held that in the previsous litigation it could not represent the estate of her deceased husband as whole, and, therefore the decision against her in the previous suit was not res judicata against the adopted son of his father and not though A. Similarly Hindu widow who failed to recover possession of the property sold in execution of a decree and in a subsequent suit by reversioners, it was held that the previous suit by Hindu widow for recovery of possession in her own right which she enjoyed for many years and from which she was dispossessed does not operate as res judicata against a reversioner to recover possession of property. A decree or order of a competent Court fairly and properly obtained against a Hindu widow which may bind the succeeding reversioner, must involve a decision of a question of title and not a mere question of possession.

In a nut-shell the principle may be summarised that in order that a decree fairly and properly obtained against a widow may have the effect of res judicata against the reversioners, the suit in which the decree was made should have been in respect of the estate represented by her, but if the suit was in relation to anything which she may have done herself to the prejudice of the reversionay heirs or in her personal rights, she cannot be said to be litigating in respect thereof as representing the estate. A widow cannot be deemed to represent the estate so as to bind the reversionay heirs of her husband, in resect of anything which she may have done herself to the prejudice of said reversionary heirs. She represents the estate as against strangers, for the purpose of protecting or preserving it, but if the purpose had no connection with the protection or preservation of the estate and is only a personal affair originating from her own acts she cannot bind the reversionary heirs of her husband. With a view to find out whether the widow represented the estate in litigation one to look into the nature of allegations put forward and the issues raised, tried and

decided in the former suit. Was it a claim by or against the widow personally or whether it raised the question of her inheritance ? If the contention raised were of the latter type connected with her inheritance and the trial was with reference to them the widow would surely be regarded as representing the estate. If not, the litigation must be deemed to be personal to her and not binding the estate.

A decree obtained against the widow in her capacity as the holder of the estate of her husband in a suit fairly obtained is binding upon the succeeding heirs. Hence where in a suit by a widow a finding of fact as to whether certain adoption was valid or not is fairly and honestly fought out and so far as the question of adoption was concerned the widow was representing the estate as otherwise she had no capacity whatsoever to challenge the adoption, a subsequent suit by a reversioner on the death of the widow is barred by the rule of res judicata. The principle of the above decision was reiterated in Chaudhai Risal Singh v. Balwant Singh, Lingowda Dod Basangowda v. Basangowda Bistongowda, Mst. Urbasi Dharauni v. Chandra dharam. But the limited owner having

claimed full ownership acts against the interests of the reversioners. Thus where in a suit brought by the next presumptive reversioner for cancellation of a deed executed by the limited owner under the terms of which she acknowledged her daughter-in-law as the owner of the estate, it cannot be said that the limited owner represents the estate and any decision obtained in such suit would not operate as res judicata between two rival reversioners who claim to be entitled to the estate.

28. Reversionera's suit in a representative capacity.-

Since the reversioner's suit is a representative suit in which he represents fully the whole reversion it follows that a decision given in his suit operates as res judicata against reversioners. This is the logical outcome of the identity of interest on the part of the general body of reversioner, near and remote, to get rid of the transaction which they regard as destructive of their right. In this view " it is impossible to

resist the conclusion that if the right litigated is a common right, and if that litigation has been honestly conducted, the other reversioners are affected by the law of res judicata. This is a logical result of the decision of the Judicial Committee. A suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is brought by him in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate. A decree in such a suit is, therefore, binding not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reveresioners on the one hand and the transferee of his representative in title on the other. This is so, not because one reversioner must in that case be deemed to claim though another, but because the reversioner who sues represents the others and Explanation VI comes into operation. A suit instituted in the interests of an estate and for the benefit of not only the plaintiffs, but all persons who come to succeed after them, is a representative suit and the decision arrived at therein, in the absence of any fraud of

collusion, is binding on subsequent reversioners and operates as res judicata. But it has been held, in a suit brought by persons alleging themselves to be the nearest reversioners against a Hindu widow and her transferees to set aside an alienation made by the widow of the estate of her deceased husband, that the fact in a previous suit of similar character bought by the father of the plaintiffs the widow and her transferee did not set up the defence that the plaintiff was not in fact the nearest presumptive reversioner was no bar to the setting up of this plea in the present suit. One reversioner cannot be said to be claiming under another reversioner within the meaning of Explanation VI. Therefore a decision in a previous suit that a person is not a reversione of an alienor will not operate as res judicata in a subsequent suit by another reversioner to challenge an alienation by the same alienor.

A suit by a reversioner for declaration that alienation made by a widow or other limited heir is void, except for her life is always a representative suit on behalf of the reversioners then existing or thereafter to be

born, and that all of them have a single cause of action arising on the date of the alienation. The litigation is in respect of a private right claimed in common to himself and others and therefore Explanation VI to Sec.11, C.P.C., clearly applies.

A decree fairly and properly passed in such a suit, whether it is for or against the revesioner suing, operates as res judicata for the whole body of reversioners. Inasmuch as a decree obtained or finding given in favour of a reversioner enures for the benefit of all members of the reversionary body, a decree passed or finding arrived at against him injures the right of other reversioners as well.

Declaratory decree in favour of the reversioners to the estate of Deceased in regard to a gift by the widow and a suit by the subsequently adopted son to recover possession of the property gifted on the strngth of declaratory decree. It was held that the reversioners had represented no one but themselves and that the adopted son did not claim through them but directly through his

adoptive father. Section 11, C.P.C., therefore, had no application. A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived against him injures every body concermed.

Wherein a suit by a Hindu widow against reversioner H it was contested by H on the ground that he had perfected his title by adverse passession for over 12 years. But although the suit was neither instituted against H as a manager of joint family nor contested by H as such manger but the case was contested by H that the house belonged to him and his brother F jointly. It was held that earlier decision operated as res judicata in a subsequent suit for possession by H for himself and for the benefit of brother F.

29. Suit by one member of a Hindu family including manager:-

The manager of a joint Hindu family possesses the right to represent the family in

a suit affecting the joint family. Hence a decree obtained by or against a manager will be presumed to have been obtained by or against him in his representative capacity and as such will bind the whole family. In some cases, however, the Courts seek to distinguish the case of the father and any other manager, holding that while the former may, the latter cannot, bind the family by any decree passed against him. But the Privy Council have held that apart from certain textual powers possessed by the father such distinction has no legal support. In the case of a Hindu family where all have rights it is impossible to allow each member of the family to litigate the same points over and over again and the Court has, in each case, to look to Explanation VI to see whether or not the leading member of the family has been acting either no behalf of minors in their interest or, if they are majos, with the assent of the majors. That one member may possess the right to represent the family in a suit affecting the joint family has even been recognized by the Privy Council who said: Their Lordships “ think that this case can not in any degree be likened to those which sometimes

occur in India wherein the interest of a join and undivided family in issue, one member of family has prosecuted a suit or has defended a suit and a decree has been passed in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." A fortiori a decree for partition made in a suit instituted by a member of joint Hindu family is res judicata as between all co-sharers who are parties to the suit. But a decree against the father will not operate as res judicata in a suit, by the sons to set aside the sale in respect of their shares in the property, for a son in an undivided Hindu family, except in Lower Bengal, does not claim under his father. It has somewhat similarly been held that the dismissal of a suit for redemption of a mortgage of joint family property brought by the father in a Hindu family alone would not be a bar to a subsequent suit for redemption by the sons. But a decree in a suit on a mortgage obtained against a Hindu mortgagor whose minor undivided sons are bot made parties to the suit, is binding on the

minor sons as res judicata, inasmuch as they were sufficiently represented by their father in the first litigation. But a statement by a mortgagee’s pleader in a suit brought for recovery of a mortgage debt against a Hindu father and his sons that the sons may be discharged so far as their interest in the joint family property was concerned and a simple money decree passed against the father does not estop the decree-holder from proceeding against the joint family property in execution, nor does the decision in that suit operate as res judicata n a subsequent suit brought brought by the sons for a declaration that the joint family property was not liable to attachment and in execution of the simple money decree passed against the father. But the dismissal of a suit by the father to set aside an execution sale of the jagir bars a suit by the son on his succession for the same purpose. But where a sale by a Hindu father was set aside in a suit by the sons on their depositing a certain sum and the vendee sued the sons of the vendor, for the balance of the purchase money, it was held that the suit was not barred by the principles of res judicata. An alienee

of a portion of a joint family property is not barreed by res judicata from suing to enforce his right by the fact that in a previous suit by another alienee of some other items belonging to the joint family for possession of those items he was impleaded as a party an dfailed to enforce his remedies. Where a judgement of a competent court is passed after a fair and bona fide contest against the defendant’s father, who held a particular jagir for life, as representing the estate and not in his personal capacity, the decree is binding on the defendant who succeeds to the jagir, although he may not claim the jagir under his father, and he is estopped from questioning the title of other persons decided in the previous suit against his father. A plea of res judicata as regards question of validity and consideration for the mortgages the son it he does not claim the family property through his father but claims it by reason of his birth as a co-parcener in the family.

A mere alienation by a coparcener of his share in the joint family property or a suit by a non-alienating coparcener to have it declared that his share is not bound by the alienations

or even a suit for partial partition by such a non-alienating coparcener to recover his share from the alienee would not by itself affect a division in status between himself and the other coparcener. An alienee can bring a suit for general partition, and such a suit would not be barred be res judicata by reason of the decree in the previous suit for partial partition brought by a non-alienating coparcener. It is well settled that the joint family would be bound by a decree property passed against the manager of the family either in respect of a family property or a family debt.

Where the father was not litigating in the previous action in a representative capacity there would not be in effect a party to the previous litigation hence no bar of res judicata will be created in any subsequent suit. Similarly when the sons are called upon to discharge the pious duty of the sons to discharge the personal decree passed against their father on the alleged personal debt of the father the sons are entitled to show that debt was non-existing, fictitious or illusory. The father while defending a suit filed against

him by a creditor for recovery of the debt not incurred by him for the benefit of the family does not represent his sons, not even qua the plea of non-existence of the debt, which may or may not be raised by him, and the sons are not bound by the decree in respect of this plea under the principles embodied in Explanation VI to Sec.11, C.P.C., moreover the right to challenge the existence of the debt, if conceded to the sons does not work any hardship on the creditor because he can by impleading the sons in the suit brought against the father, have the matter adjudicated upon in the presence of the sons. But where the nature of the decree or the existence of the debt was not denied it was observed by their Lordships of the Supreme Court in Sidheswar Mukherjee v. Bhubneshwar Prasad, that the money decree passed against the father certainly created a debt payable by him. If the debt was not tainted with immorality it was open to the creditor to realise the dues by attachment and sale of the sons coparcenery in the joint property. Similarly Kapur, J., in Surindra Nath v. Sarilia Hindi Mahajani School, held that where there has been bona fide contest between

the father and the creditor or where a decree has been fairly obtained it is not open to the son to reagitate the question of the existence of the debt.

Where a reversioner brings suit he represents the entire reversionary body; the estate and every one who is interested in the property after the death of widow. Such an action may not bind the reversioners in case it can be shown that the suit was collusive, but the result certainly binds the transferee against whom the decision is rendered. This distinction was made by their Lordships of the Privy Council in Mata Prasad v. Nageshwar Sahji and Kesho Prasad Singh v. Sheo Pragash Ojha. Between the reversioners suing and the transferee, the decision obtained is for the benefit of the reversioners it that decision is against the transferee. There is no need for another suit to establish the same points, provided the earlier suit was in a competent Court and all other conditions of Sec. 11, C.P.C., were satisfied.

Similarly any member of the joint family can bring a suit to reclaim property from a

trespasser for the benefit of the family as a whole. Explanation VI to Sec.11, C.P.C., applies to such cases.

30. Decree against manager of endowment, shebait or trustee.-

From the fact that the manager represents the trust in all suits affecting its interest, it follows that decrees fairly obtained by or against the manager as representative of the trust equally bind both his successor and the trust. But before applying the principle of res judicata to such judgements, Court should be satisfied that the judgements relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tied and decided in the suits which led to them. A decree obtained by one of the trustees on behalf of a trust against the other trustees, either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property, is binding as much on the trustees who are parties to the suit as on all

persons interested in the trust for the shebait as representing an idol is binding on the succeeding shebait in the absence of fraud of collusion. It has even been held that a decree obtained in a suit against the shebait of an idol, where the shebait is not expressly described as such and representing the idol, but where, as a matter or fact, he sets up no title adverse to that of the idol and defends the suit on behalf of the idol, is binding upon the idol. But a suit between members of a Hindu family, the plaint describing both plaintiffs and defendants of a family idol, and praying for a scheme for the management of property stated to be debutter and the performance of the worship, can not be regarded as a suit in which the idol is plaintiff. Consequently, a finding therein that the property was not proved to be debutter raises no res judicata in a later suit in which the plaintiffs are the same and another family idol, represented by a shebait (one of the defendants in the earlier suit), and the prayer is for a declaration that the properties were owned by the idols as debutter property. Nor does a decision that a will purporting to create a religious endowment

and to appoint shebaits was wholly valid bar, the question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under the will. However, the decision in a previous suit failed by certain worshippers under Sec.14 of XX of 1863 for removal of trustees is res judicata in a latter suit by certain other worshippers under O.I, r.8, C.P.C., for declaration that certain temple endowments were public property. It has also somewhat similarly been held that a previous adjudication between the two sections of a place wherein the parties represented other members of the caste under Or. I, r. 8, as to their respective rights to the office of a local temple concludes not only the temple trustee in the absence of fraud of a, but also all the members of the communities of all time. It has somewhat similarly been held that a trustee of a devawsam, a karnam, a holder of watan lands, an administrator of the estate of a deceased person, a shebait, a holder of saranjam lands, represents each his successor, therefore a decree against him will bind his successor. On the same principle a

decree against the karnavan of a tarwad in his representative capacity binds the other members of the tarwad. It is doubtful whether the froad proposition enunciated in Fenkins v. Roberston as explained by Vaughan Williams,J., in In re South America and Mexican Co., namely, that " persons instituting a suit on behalf of the public have no right to bind public by a compromise decree, though a decree passed against them on contest would bind the public" is applicable in India to suits of a representative character falling within the purview of Sec.92, as read in the light of Explanation VI. A decree allowed to be passed against a temple owing to the gross negligence of the trustee does not operate as res judicata in a latter suit by the succeeding trustee on behalf of the temple.

Where Government land on being transferred in trust, vested in the Municipality and belonged to it and a decree was passed against Municipality granting a declaration to the plaintiffs that they had obtained an indefensible title by adverse possession. It was held that the decree obtained against the Municipality operated as res judicata in a

subsequent suit by government as the Municipality represented the title for the time being and was constituted a trustee. Wnere a suit by a mahant impeaching an alienation of math property by his predecessor has been dismissed, the decision binds the succeeding mahant and his suit for possession challenging the sale will be barred by Sec.11, C.P.C., in the absence of collusion or fraud. A house belonging to the deosthan was sold by N and B, the two trustees of the deosthan to the plaintiff R for Rs.2000 and plaintiff was put in possession of the house. Another trustee G and C pujari of the deosthan instituted a suit for declaration, that the sale in favour of R was void, and for possession. In defence R contended that in the event of sale being found to be void deosthan should be put on term to pay Rs.2000 to R. The suit was decreed unconditionally. There was no appeal. Subsequently R filed a suit for recovery of Rs.2000 against N and B and deosthan. Held that the controversies and the issues in the prior suit were between the deosthan and the vendor R and the issue whether N and B should be ordered to refund was not raised in the pleading hence

the judgement in the first suit could not operate as res judicata. That a compromise made bona fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioners quite as much as a decree on contest. Only if a compromise is shown to be either collusive or not fairly obtained that the same is not binding in a future litigation. It is competent for the plaintiffs in a representative suit brought in accordance with the provisions of O.I, r.8, C.P.C., to compromise the suit and a compromise decree in such will bind the persons who are requested through parties on the record of the suit and will operate as res judicata, provided the compromise or settlement is bona fide. Though the idol is the owner of the properties the right to sue or be sued is vested in the shebaits. Thus the mere omission to describe the defendants as shebaits in the debutter estate when the defendants could not be parties to the suit except in their capacity as shebaits and could not enter into any compromise save in that capacity.

The question whether an ex parte decree against a limited owner or a shebait of a muth

or a manager or a trustee of a temple or charity owner or a charity stand on a better footing than a consent or compromise decree against such limited owner, shebait, etc. it is been held that it does not make any difference in principle. A decree obtained against a limited owner or a shebait of a muth or a manger or a trustee of a temple or charity, without the necessary and appropriate issues raised, tried and decided could not bind the reversioners, or the succeeding shebait or manager trustee and it could be re-opened in a subsequent suit.

A shebait has no authority to annihilate the interest of the deities in the endowed properties and enter into a compromise wholly prejudicial to the interest of the deities, hence the compromise petition and the decree based thereon are in consequence void and illegal and cannot operate as res judicata.

31. Other representative suits or proceedings-

It has somewhat similarly been held that a decision in a suit,by some members of the public, for a declaration that certain property was waq f property, is res judicata against a suit by or against a benamidar is res judicata against the other members. It has also somewhat similarly been held a decision in a suit by or against a benemidar is res judicata against the real owner. It has creditors as well as the company, and if an order is made against him upholding the claim of a particular creditor to a charge on the company’s properties so represented. The Municipal Board represents the public in disputes about wells and other things which are used in them; and any decision between the Mnicipal Board and the defendants in a previous litigation about such a well, will operate as res judicata against the letter even if the suit is brought by other persons and not by the Municipal Board.

CHAPTER – 9

COMPETENT COURT

1. Court meaning of :-

The word “Court” has not been defined any where in the Code of Civil Procedure. By looking into the judicial pronouncements one finds that the word “Court” should be understood in its ordinary legal sense “a place where justice is judicially administered” (Stroud). There is nothing in the Code of Civil Procedure which would indicate that the term “Court” has been used in the Code in any special or enlarged sense. Thus the conception of Court is closely associated with the judicial functions which it performs and thereby acts as a court. Therefore it clearly follows as a logical consequence that administrative officers are not court. Thus for instance, a senior subordinate Judge does not exercise his powers in view of any authority delegated to him by the provincial Government, but in view of the statutory provisions embodied in the Civil Procedure Code.

2. Competence of Court. :-

Whatever estoppel by record is said to arise out of a judgment, it is presumed that the Court which pronounced the judgment had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise.

AIR 1964 Pat 452

Therefore there is a distinction between an inherent want of jurisdiction in a court and want of jurisdiction on grounds which have to be determined by the court itself. The first make a decree a nullity which can be ignored and need not to set aside (separately). The second does not make the decree a nullity, but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be impeached collaterally. A Court which is empowered by law to try a suit, has power to try it rightly or wrongly the validity of a decree does not depend on whether it embodies a correct decision. A judgment of a court having jurisdiction over the subject-matter and the parties to the suit and having territorial and pecuniary jurisdiction, however, erroneous,

cannot be a mere nullity and cannot be collaterally challenged.

AIR 1950 ALL 488

It must be noted that the jurisdiction of a court Sec.11 of the Code of Civil procedure is not to be considered in same light as one would consider a case proceeding under Sec. 115 of the Code of Civil Procedure. A decree without jurisdiction under Sec.11, Civil Procedure Code, must be a decree in which a Code had no jurisdiction to entertain, and the mere fact that the Court acted illegally or with material irregularity in the exercise of its jurisdiction will not affect the jurisdiction of the Court under the provisions of that section.

1. Exclusion of the jurisdiction of Civil Courts to entertain civil suits- What amounts to. -

AIR 1964 Sec.322

In dealing with the question whether civil court’s jurisdiction to entertain a suit is

barred or not, it is necessary to bear in mind the fat that there is a general presumption that there must be a remedy in the ordinary civil courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of civil courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not b itself necessarily exclude the jurisdiction of the civil courts to deal with a case brought before it in respect of some of the matters covered by the said statute.

2. Reference under Land Acquisition Act to Civil Court -If it can decide validity of reference. -

As pointed by the Privy Council in Nussewanjee Pestonjee v. Meer Mynoodeem Khan, wherever jurisdiction is given to a court by an

Act, and such jurisdiction is only given upon certain specified terms contained in the Act itself, “ it is universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise.”

In deciding the question of jurisdiction in a reference dismissed by the District Judge on the ground that it was made after the expiry of the period of two months prescribed by proviso (b) to sub-section (2) or Sec.18 of the Travancore Land Acquisition Act, 1089. The question for determination was whether he had the jurisdiction to do so.

It was further held that the District Court is certainly not acting as a court of appeal or revision; it is only discharging the elementary duty of satisfying itself that a reference which it is called upon to hear and decide is a valid and proper reference according to the provisions of the Act under which it is made. That is a basic and preliminary duty which no tribunal can possibly avoid.

3. Power of Tribunals of limited jurisdiction to decide their own jurisdiction. -

It is well settled that, unless the Legislature expressly confers upon a tribunal of limited jurisdiction the excessive power to decide facts upon which it can assume jurisdiction to do a certain act or to pass a certain type of order, it has no jurisdiction to decide those preliminary or jurisdictional facts finally. While it has necessarily to come to its own conclusions on those facts in order to exercise its jurisdiction relating to matters within its exclusive jurisdiction, its decision on those fats is liable to be challenged in the civil court. A tribunal of limited jurisdiction can not have unlimited power to determine the limit and to assume jurisdiction or, in other words, it cannot usurp jurisdiction on a wrong decision relating to jurisdictional facts.

4. Concurrent jurisdiction – Meaning of. -

The proposition of the rule of concurrent jurisdiction was explained in the leading case on the subject of Mst. Edun v. Mst. Bechun, wherein Sir Barnes Peacock, C.J, observed as follows:

"It appears to me therefore that the rule which is laid down, viz. that to render a judgment of one Court, between the same parties upon the same point conclusive in another Court the two courts must be courts of concurrent jurisdiction. The concurrency of jurisdiction is a necessary part of the rule which creates an estoppel in such a case. "

it is quite clear that in order to make decision of one Court final and conclusive in another court, it must be a decision of a Court which would have had jurisdiction over the matter in subsequent suit in which the first decision is given in evidence as conclusive.

5. Plea of res judicata extends also to judgments of Court of exclusive jurisdiction. -

The plea of res judicata is not limited to the provisions of this section, nor is it limited to a judgment of a court of concurrent jurisdiction being pleaded as bar to the subsequent suit which is dealt with in the said section but it extends also to a judgment of a court of exclusive jurisdiction.

The judgment of a court of exclusive jurisdiction directly upon the point is conclusive upon the same matters between the same parties, Coming incidentally in question in another court for different purposes,

Section 11, C.P.C., embodies the doctrine of res judicata, as already pointed out earlier that the section is however not exhaustive and the doctrine of res judicata has often been invoked and applied to cases not strictly within the compass of that section. The maxim that no man should be vexed twice over the same cause (Nemo debet bis vexari pro una eadem

causa) is considered to be a principle of law which has to be given effect to and followed without being unduly restricted by the terms of the statute as enacted in Sec.11, C.P.C.

6. Preferential jurisdiction. -

The plea of res judicata should be given effect to it the Court which passed the decree in the first suit is a court of jurisdiction competent to try the subsequent suit, whenever its inability to entertain the subsequent suit arises, not from incompetence, but from the existence of another Court with preferential jurisdiction.

7. Question of exclusive jurisdiction of a tribunal – Determination of – Fundamental principles. -

The following tests or fundamental principles should be borne in mind in deciding cases, where the question of exclusive jurisdiction of a tribunal is raised:

1. the general law of the country is not altered by special legislation made

without particular reference to it, though a statute passed for a particular purpose must, so far as that purpose extends, override general enactments.

2. If there is a manifest absence of jurisdiction in the tribunal which makes a determination, the civil courts will have jurisdiction to adjudicate upon the matter.
3. It is for the Court of general civil jurisdiction to determine what is the scope of the authority given to a statutory tribunal and to investigate the question as to whether a special or subordinate tribunal has acted within the limits of its jurisdiction.
4. Even where jurisdiction is given to the statutory tribunal to determine certain facts so as to give itself jurisdiction, it will be for the Court of general jurisdiction to adjudicate as to what are the powers which the statute has given to such an authority or tribunal.

8. Erroneous decisions of courts of exclusive jurisdiction how far operate as res judiacata. -

As early as 1853 Coleridge, J.held in Bunbury v. Fuller, as follows.

“It is general rule that no Court can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits of its jurisdiction depends; and however, its decision may be final on all particular making up together that subject-matter which, if true is within its jurisdiction and however necessary in any case it may be for it to make a preliminary enquiry whether some collateral matter be or be not within its limits, yet upon the preliminary question its decision must always be open to enquiry in a superior Court, ”

9. Whether declaratory decrees operate as res judicata. -

An important question of law is often raised that a prior declaratory decree may not

operate as res judicata under Sec.11, C.P.C., the former decision is binding on the parties to the subsequent suit under Sec.35, Specific Relief Act, raising as it does the same question between the same parties. That is, in other word, whether Src.35 of the Specific Relief At must be read subject to Sec. 22, C.P.C., or otherwise. There is a difference of judicial opinion on this point.

Section 35 of Specific Relief Act reads:

> “A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees on the persons for whom, if in existence at the date of the declaration. Such parties would be trustees.”

10. Decisions of Probate Courts how far res judicata in civil courts. -

A court acting under Act V of 1881 is a court exercising a special jurisdiction and the

proceeding is of as special character even when it is a contentious proceeding and is quite distinct from a suit in a civil court to cause or prevent a will from being operative as a disposition of property. It is a preliminary proceeding to determine whether the whole document propounded or any, and if so what part of it is the will of the testator. Hence a decision under the Act does not operate as res judicata in subsequent suit to establish title. It is held that in such cases the question before the Court is one of representation of the estate and not of distribution and it is only for the purpose of determining the former question that the Court is called upon to decide whether a party would be entitled to the whole or any part of the estate. Consequently, the decision come to by the Court as to the right of a party to inherit does not operate as res judicata in a suit for administration or for possession of the property belonging to the estate. A question of status decided in such proceeding can be gone into again in a regular suit. It must not, however, be supposed that in no case can the

decision of the Probate Court operate as res judicata in a subsequent regular suit.

A plea of res judicata on general principles can be successfully taken in respect of judgment of probate courts. It is obvious that these courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute. When a plea of res judicata is founded on general principle of law all that is necessary to establish is that the Court that heard and decided the former case was a court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit.

11. Decisions of criminal courts whether operate as resjudicata -

The decision of a criminal court does not operate as res judicata in a civil suit in respect of the same cause of action. It is a general rule which has been acknowledged and followed in India as well as in England that a judgment in a criminal case (unless indeed,

admissible as evidence in the nature of reputation) cannot be received in a civil action to establish the truth of the fact upon which it is rendered, and that a judgment in a civil action cannot be given in evidence for such a purpose in criminal prosecution. In fact the courts have held that a proceeding of criminal court is not admissible as evidence; that a civil court is bound to find the facts itself, that a conviction in criminal case is not conclusive in a civil suit for damages in respect of the same act, that a civil court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document, that a suit for money forcibly taken from the plaintiff by the defendant is maintainable in the civil court, notwithstanding the defendant’s acquittal in the criminal court on the change of robbery, that in a suit for damages for assault, the previous conviction of the defendant in a criminal court is no evidence of the assault and that the factum of assault must be tried in the Civil Court. But an order by a Magistrate under Sec. 146 of the Criminal Procedure Code declaring a party to be entitled to possession of certain lands, is

conclusive on the point of actual possession in a subsequent in a civil court.

Thus in a suit of compensation for malicious prosecution the plaintiff has to prove independently of the acquittal that the prosecution was malicious and without probable and reasonable cause and further that the prosecution must be proved to be false to the knowledge of the defendant. It has been held that in such cases the judgment of the criminal court can be looked at merely to establish the fact of acquittal, but the ground of acquittal cannot be looked at by the civil court, it lies upon the civil court itself to undertake an entirely independent enquiry before satisfying itself of the absence or otherwise reasonable and probable cause.

CHAPTER – 10

HEARD AND FINALLY DECIDED

1. Heard and finally decided –Meaning and scope General.-

One of the essential for the operation of the rule of res judicata as laid down in Sec.11 of the Code of Civil Procedure is that the former suit should have been heard and finally decided. “Res judicata” said Romilly in Fenkins v. Roberson, “by its very words means a matter upon which the Court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion, res judicata signifies that the Court has, after arguments and consideration, come to a decision on a contested matter.” Therefore, it is clear that in order to substantiate a plea of res judicatait is not enough that in order to same and that the same matter is in issue, it must also be shown that the matter was heard and finally decided. In other words an adjudication on merits, no matter on what ground, is the

sine qua non for the operation of the rule of res judicata in a subsequent suit.

A mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is obiter dictum and cannot be said to be a decision on any issue, and is, therefore, not res judicata.

When a question at issue between the parties to the suit is heard and finally decided, the judgment given on it is binding on the parties at all stages of the suit.

2. No matter left undecided is deemed decided.-

A matter cannot be considered to be finally decided, unless in point of fact it was actually decided by all the tribunals before which that particular matter came for decision. And no matter can be deemed to be decided which is left expressly undecided, or as to which the party raising it is refereed to a separate suit. The general effect of the decisions may be said to be that a question though raised in

the previous suit between the same parties does not become res judicata if is has not been adjudicated upon but on the other hand has been left open. Indeed this was conceded by the Calcutta High Court in a case decided as far back as in 1880. And this decision was followed by the Punjab Chief Court in Saiful Rahman v.Umar – ud - Din. And the rule will apply where the original Court decided an issue, but the judgment is superseded on appeal, the Appellate Court dismissing the suit on some preliminary point, and considering that the original Court should not have decided the issue.

3. Suits allowed to be withdrawn with liberty to bring fresh suit whether res judicata.-

When plaintiff brings a fresh suit after withdrawal of the first suit with permission of the court to file a fresh suit the defendant cannot plead res judicata in the subsequent suit. If has down by their Lordships of the Privy Council that where though a claim was included in the prior suit, but judicially

considered or adjudicated upon it, the claim had never been judicially considered or adjudicated upon between the parties, and all that happened was that the plaintiff elected not to proceed with that action for the purpose but to seek a judicial decision in other proceedings, the claim is not barred by res judicata as the judgment shows on its face no decision as regards that particular issue. Same principle will apply where permission, to withdrawn the suit with liberty to file fresh suit is given by an appellate Court.

4.Decision to be res judicata must be final and not Provisional or interlocutory.-

To constitute res judicata the decision must have been final. A judicial decision is deemed final when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution. The decision of a suit on a preliminary point does not bar a subsequent suit on the same cause of action. But the decision on the preliminary point on which the

suit fails is res judicata in regard to that point itself in a subsequent suit. A preliminary decree or judgment, or a decision upon a motion in the course of a trial, cannot ordinarily result, if the case goes no further, in precluding the parties from drawing the matter into issue again. The case must have gone to a complete termination, so that nothing more is necessary, for the purpose of the suit to settle the rights of the parties or the extent of those rights. In England interlocutory orders do not have the force of res judicata for the reason that they do not dispose of or terminate the cause.

5. Provisional orders how far final.-

A provisional order grows into a permanent one, when steps are not taken, or, being taken, fail to displace it within a certain time, becomes no doubt, res judicata after the lapse of that time, just as where an appeal is not made in the absence of an express provision to the contrary. But provisional orders, such as are passed on claims to attached property which become conclusive if a suit is not bought to

set them aside within certain period, would not be final; if the suit should be dismissed not on the merits, but simply as the attachment had been withdrawn and therefore the matter of dispute came to an end, and there remained no object on which adjudication could operate. The validity of an order made at one stage of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage.

6. Where a decree is appealed from, it is the appellate decree which should be looked at to see whether a matter is res judicata. -

It had already been remarked that upon appeal a matter ceases to be res judicata and becomes res sub judice. The appeal destroys the finality of the decision, the judgment of the lower Court is superseded by the judgment of the Court of appeal, and in deciding whether a decree operate as res judicata it is the appellate decree that should be seen. Thus it

has decided that where a decision of a lower Court is appealed to a superior tribunal, which for any reason does not think to decide the matter, the question is left open and is not res judicata. It has also been held that when the judgment of a Court of first instance upon a particular issue is appealed against that judgment cases to be res judicata and becomes res sub judice and if the Appellate Court declines to decide that issue and disposes of the case on other grounds the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed, b the Court of appeal.

7. Consent decrees may be res judicata.-

This section is not strictly applicable to compromise decrees, as it applies in terms to what has been heard and finally decided by a court. A consent decree, however, has to all intents and purposes the same affect res judicata as a decree passed in invitum. In other words a consent decree is as binding on the parties to the proceeding in which it is made as a decree made after a contentious

trial. This has been held repeatedly by the Privy Council as well as by the High Courts. Thus it was held by the Privy Council in Radhika v. Nilamani, that when a state of facts is accepted as the basis of a compromise, where a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not after wards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise. This case has been followed in other in other cases. It is thus clear that a consent decree until set aside, operates as an estoppel and the parties are not entitled to give the go-bye even to a particular clause in an existing decree on the ground that the clause, if resting on no higher authority than the agreement between the parties, would be bad in law.

A compromise decree is res judicata in so far as it relates to matters within the scope of the suit, and in regard to extraneous matters it is a legal record of the agreements between the parties and as such available to them as evidence. But where a suit for

partition is dismissed under a compromise which was not carried out, a second suit for partition is not barred by res judicata. The right to bring a suit for partition is a continuing right incidental to the ownership of the joint property. Where a plaintiff practically withdraws his claim having come to terms with the defendat, the dismissal of his suit does not operate even as a consent decree.

8.Finality of ex-parte dectee.-

An ex parte decree will operate res judicata if it has not been set aside according to law and has become final. For the purposes of res judicata it is immaterial whether the suit is decided ex parte or after contest. It is well established principle that decree once passed cannot be challenged by a separate suit except on the ground of fraud practiced on the court.

When the decrees where ex parte in the sense that after filing their written statement and taking part in the proceedings for a considerable time the defendants defaulted in appearance during the last stage. An ex parte

dectee will operate as res judicata in respect of all grounds of defense against the actual claim in the suit as also all matters inconsistent with such claim which might and ought to have been raised. Thus the questions whether there were two separate tenancies or only one and whether the Court of Small Causes had jurisdiction to try a suit for ejectment were not merely incidental or ancillary to the plaintiffs claim in the prior suit but went to the very root of his claim for ejectment as brought.

CHAPTER – 11

COMPROMISE AND CONSENT DECREES – WHETHER RES JUDIATA

1. Meaning.-

A compromise decree is not a decision by the court. It is the acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that the decision of the court is impellent in it. In other words, consent decree is merely the record of a contract between the parties to a suit, superadded by the seal of the court.

2. Compromise decree and res judicata.-

Section 11 of the Code does not strictly apply to consent decrees as it applies to what has been heard and finally decided by a court.

3. Compromise decree and estoppel.-

Though a consent decree does not operate as res judicata, such decree is as binding upon the parties thereto as a decree passed in invitum. If the compromise is not vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed at such compromise is binding to the parties. There is no distinction between decrees passed after contest and decrees passed on compromise. Compromise decree will, therefore, create an estoppel by conduct.

4. Conclusions.-

A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. The following observations of Mulla have been approved by their Lordships of the Supreme Court in Sunderabai v. Devaji. “The

present section does not apply in terms to consent decrees; for it cannot be said in the cases of such decrees that the matters in issue between the parties have been heard and finally decided within the meaning of this section. A consent decree, however, has to all intents and purposes the same effect as ‘res judicata’ as a decree passed ‘in invitum’. It raises an estoppel as much as a decree passed in invitum.”

DECREE OBTAINDED BY FRAUD

1.Fraud : Meaning.-

AIR 1994 SEC. 853

A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is cheating intended to get an unwarranted and undeserved advantage. “Fraud is an extrinsic collateral act, which vitiates the most solemn proceeding of Courts of Justice. ”

1.Fraud and res judicata -

If a party obtains a decree from a court by practicing fraud, he cannot be permitted to invoke the doctrine of res judicata. A judgment may be res judicata and my not be impeachable from within, but it may be impeachable from without.

2.Nature -

The fraud may be either fraud on the part of the party in whose favour judgment o decree has been made; or fraud on the court pronouncing the judgment or passing the decree. Such fraud, however, must be actual and positive, a meditated and intentional contrivance to keep the opposite party and the court in ignorance of the real facts of the case and the obtaining of the decree by that contrivance. In other words, such fraud should be external and apparent, consisting of representation designed and intended to mislead and not a mere concealment of fact or irregularity in conduct of proceedings.

CHAPTER – 12

BAR BY FOREIGN JUDGMENTS IN CIVIL CASES Sections 13 & 14 OF C.P.C

1. Foreign judgment – Meaning and Scope. -

A foreign judgment is the judgment of a foreign Court, which term is in India, applied to every "Court situated beyond the limits of India which has no authority in India and is not established or continued by the Central Government." It is doubtful whether the order of a Special Commissioner appointed by an India Ruler within his territory, is a foreign judgment within the meaning of this section or whether it is a mere Executive act.

2. Clause (a) – Foreign judgment to be conclusive must be of Court having jurisdiction. -

In order that a judgment may be valid and entitled to the recognition of foreign tribunals, it is indispensable that the Court

pronounced the judgment should have a lawful jurisdiction over the cases, over the subject of the action, and over the parties to the action; and if the jurisdiction fails in either of these respects, the judgment will be a nullity.

Rejecting the plea that conclusiveness of a foreign judgment set up as a bar where that judgment was delivered after the suit in which it is pleaded was instituted. The Supreme Court thus laid down the law on the point. The language of Sec. 13 of the Code of Civil Procedure 1908.

3. Execution of decree. -

A decree of a foreign Court may be enforced by proceedings in – execution in certain specified cases, vide Sec. 44 of the Civil Procedure Code. But the language of that section does not compel a British Court to grant execution of a decree of a Native Court. The language of the section is permissive in form; it did empower the then Governor – General in Council to direct that such a decree shall in all cases be executed by the British

Court. It is competent to the executing Court to refuse execution of a foreign decree sought to be executed in India, under Sec. 44 on the ground that such decree was passed without jurisdiction. Or that it was vitiated by fraud or thee were some other circumstances mentioned in this section. In other words an application under Sec.44 for the execution of a decree of a foreign Court may be resisted on any of the grounds mentioned in this section. But where the defendant has voluntarily submitted to the jurisdiction of a foreign Court he cannot resist the application for execution of a decree of such Court on the ground of want of jurisdiction.

CHAPTER – 13

LIS PENDENS IN CIVIL CASES

SECTION 10 C.P.C.

No Court shall proceed with the trial of any suit in which the matter in issue is also directly suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation – The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

1. Object of the section.-

The purpose of this statutory provision is to prevent a collision between courts, and to secure to the parties a certain

and unfluctuating adjudication of their rights, and at the same time avoid the vexation of unnecessary suits.

2. Rate of lis pendens not co-extensive with that of res judicata. -

The rule contained in this section forms no part of the rule of res judicata, though the reason upon which it is based is in some respects similar in principle to the doctrine of res judicata. The distinction between the two rules, however, is vast. The rue in this section relates to matters which have passed into rem judicatam. The one bars only a “suit” the other bars both the trial of a “suit” and of an “issue” subject to their respective conditions.

3. No Court shall proceed with the trial. -

The words “proceed with the trial of ” are substituted for the word “try” which occurred in the corresponding section of the old Code. This change indicates that it is only

the trial of the suit that is not to be proceeded with. It does not dispense with the institution of a suit within the proper time when the law requires such institution. In other words, this section does not bar the institution of suits but only their trial, and in this respect there is no substantial difference between the language of the new and the old Codes.

4. Matter in issue. -

Matter in issue under Sec. 10, C.P.C., means the entire matter in controversy not merely one of the several issues in the suit. Therefore a court has no power under this section to stay a suit on account of some of the issues which it involves being also issues in another pending suit. This section cannot b applied if the matter in issue is not the same in the two suits and the parties do not fill the same legal position. It is however, not necessary that the relief sought in the two suits should be identical. If the matter in issue in the two suits is the same, the later

suit must be stayed without regard to the relief sought.

5. Same parties. -

This section requires that the earlier suit shall be between the same parties as the later or between parties under whom they or any of them claim litigating under the same title, that is to say, this section applies only when the plaintiff and the defendant are the same in both suits. This section does not apply where the two suits are not between the same parties or between parties under whom the or any of them claim litigating under the same title even though some of the questions in the two suits are the same. Where the same person sues in different capacities, it is the same as if thee were different persons.

6. Litigation under the same title. -

This section requires, among other things, that the suit should be between parties litigating under the same title and the issue should be the same in both suits.

7. For the same relief.-

The effect of the omission of the words “for the same relief” in the present Code in not to make a change in the existing law. What the section intended is that if all the matter in dispute are substantially the same them the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation. So where a second suit is instituted for the same relief, such that the matter in issue in it is also directly and substantially in issue in a previously instituted suit between the same parties, the proper procedure is to stay it pending the decision of the earlier suit.

8. For the same cause of action.-

The pendency of another action between the same parties for the same cause of action might be set up by way of defense.

9. Bar of trial.-

This section does nor bar the institution of a suit, it merely provides that when two suits are pending only one can be allowed it merely provides that when two suits are pending only one can be allowed to proceed and the suit first filed takes priority. But it does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent or when a litigation regarding rent for a previous year is pending in second appeal before the High Court.

CHAPTER – 14

LAW AND PRINCIPLE OF RES JUDICATA IN CRIMINAL CASES

Section 403, Cr. P.C., including Sec.26 General Clauses Act.

Section 403, Cr. P.C.,

(1) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sect.236, or for which he might have been convicted under Sec.237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Sec.235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last – mentioned offence,

if the consequences had not happened, or were not know to the Court to have happened, at the time when the was convicted.

(4) A person acquired or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with any tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent

to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of Sec.26 of the General Clauses Act, 1897, or of Sec.188 of the Code of Criminal Procedure, Act V of 1898.

CHAPTER – 15

OPINION OF SR.ADVOCATE

SHRI K.B.SANGHVI

After the research of this doctrine my view is that principle of Res- Judicata is not only a legal maxim or provision of law, but in fact it is a basic concept of law. Res judiata is a legal principle incorporated in so many statutes and in fact it can be said that the source of res judicata is from the principle of natural justice – an uncodified law of the nature from ancient time. In fact res judicata is based on the maxim of roman jurisprudence which says that there should be the end of law suits. Res judicata is described in Latim Maxim “Memo debt bis vaxary pro una eteademcausa” i.e. no man should be condemn twice for the same causes. In short, res judicata is a principle founded on ancient precedent is dictated by a wisdom is for all time. The basis aim to incorporate this principle in various statute is to put end of endless litigation and to see that there should be a end of certain litigation and person involved in litigation

should be sure that once a judgment on merit ends the problem otherwise there will be no security for any person who has to face endless litigation. That is why principle of res judiacta is not a technical principle but a fundamental doctrine to end the endless litigation. In fact res judicata is estople against the frivolous and false litigation on the same cause and with an intension to harass the rivalry litigation. So, this doctrine is really a rule of convenience and basically it is founded on equity justice and good conscience.

"Res judicata" is the exact word used in Section - 11 of the Code of Civil Procedure and in fact Section – 11 is a Caveat against the law court not to try any suit or issue in which the matter directly or substantially in issue which has been decided in former suit between the same party. So Section – 11 clearly prohibits legal battles if the same battle has fought in merits and decided by the competent court. It puts stop on further litigation. Only conditions for application of Section – 11 are that litigation should be between the same parties and issue decided in former suit should

be a subject matter of the second suit them law court will throw away the matter later subsequently instituted inter alia holding that prior judgment is at least binding to the same parties in further and future and future litigations. It is required to be noted that, it is not necessary that there should be two suits for invoking Section – 11 but there are also cases in which doctrine of res judicata can be invoked in the same proceeding. Suppose an interlocutory application was decided on merits in suit and become final after the exhausting of all appellate jurisdictions them same kind of application subsequently field in same suit is also prohibited under Section – 11 is applicable in all suits directly and substantially and issue decided on merits. This provision is meant to curb unless litigations, once the matter is decided on merits. So this is a safe guard against all future litigations and judgment on merits full stop the all future litigations so in fact res judicata is a live insurance of further litigations.

As stated earlier in every important statute there is a presence of this principle

of res judicata in various forms. To begin with, the source of all the laws that is our Constitution of India. Article – 20(2) is in fact a modified version of res judicata in Criminal jurisprudence. Article – 20(2) of Constitution of India provides that “No person shall be prosecuted and punished for the same offence more than once”. Taking the shelter of this constitutional provision, there is a provision in Criminal Procedure Code under Section – 300 of the Code Section – 300 of Code of Criminal Procedure provides that person once convicted or acquitted not to be tried for same offence. This provision is incorporated under Chapter – XXIV under the heading of General provisions as to inquiry and trials. Section – 300 is a Criminal Procedure version of res judicata principles and Section – 300 of C.R.P.C. governs the entire principles of Autrefois acquit and autrefois convict. Australian principle “Principle of issue estopple” has been followed in India. Though there is no provision of prohibition of successive bail application but India Court has developed legal precedent by cantina of judgments especially from Apex Court that once

a bail application is decided on merits, same cannot be entertained on same grounds. So, for successive bail application one has to show the change of circumstances from escaping the criminal principles of res judicata and unless ad until new set of circumstances are show, India Court has never encouraged successive bail applications one the bail application was decided on merits. This principle applies not only application for regular bail under Section – 437 and 439 of C.R.P.C. but also applies to Anticipatory bail under Section – 438 of C.R.P.C.

Same principles of res judicata was incorporated in another form in Evidence Act from Section – 40 to 43 of Evidence Act. The previous judgment relevant to bar a second suit or trial is a provision to curb various litigations, though of the same nature, but instituted under the various provisions of different laws. Decision of Civil Court in respect of civil rights of the parties bars criminal complaint regarding the same taking the shelter of Section – 40 of the Evidence Act. Section – 11 of the Code of Civil Procedure is a Caveat against the Court whereas

Section – 115 of Evidence Act is a Caveat against the litigating parties to curb the future litigations once the matter is decided finally. If a litigating party make certain declaration in a proceeding them in future litigation of that party is estopped from taking the contrary plea. So this is a one kind of principle of res judicata. Estopple can be against the conduct behavior and certain stands taken in the proceedings and further that party can not be permitted to have the contrary plea which it has taken earlier. So this principle also aim to curb the problem and successive future litigation and especially to stop the party from taking the contrary plea each and every time. Though estopple is not operating against the statute but any kind of declaration of the fact by litigating party estopped from changing its version subsequently and that is called estopple.

In service jurisprudence same principle is applicable in respect of departmental inquiry. A civil servant once change sheeted subsequently cannot be charge sheeted on the same grounds. So, if a second departmental inquiry is contemplated after the completion of

first inquiry then if it is on the same ground, court will stay the further department proceedings. In service jurisprudence this modified version of res judicata is called as principles of double jeopardy.

So, principle of res judicata is a pious principle intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same questions. Doctrine of res judicata is also applicable to quasi judicial authorities too. The principle of res judicata can be invoked not only in separate subsequent proceedings but they also get attracted in subsequent stage on same proceedings. The rule of res judicata will prevent a defendant from setting up in a subsequent suit, a plea with was decided between the parties in previous suit. It is essential that former judgment must be that of a court of competent jurisdiction. So in fact doctrine of res judicata can be term as a rule of conclusiveness of judgment as to the points decided in every subsequent suit of the same parties.

CHAPTER – 16

CONCLUSION

It is no doubt true that the rule of res judicata as indiated in Sec.11 of the C.P.C has some technical aspect for instance the rule of costuctive resjudicata may be said to be technical, but the basis on which the said rule rests is founded on consideration of public policy. It is 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 for the public interest that individuals should not be vexed twice over with the same kind of litigation.

It is clear that the doctrine of resjudicata applies to static situations and not to charging circumstances.

The bar of resjudicata will apply only when it is pleaded and proved In fact the underlying object of the doctrine of resjudicata is that the parties are not made to defend the same cause of action twice over when it had been concluded on merits by a court of competent jurisdiction.

CHAPTER – 17

SUGGESTIONS

After conducting all this research on the subject, we seek an iota of catholicity, we feel like suggesting theme which are already existing in the court or which should come into force because of the change that has been shopping the global scenario.

(1) TEST.-

A Statutory and simple test to apply in defer meaning whether the previous decision operates as resjudicata on principles analogous thereto is to find out whether the first court could go into the question agitated in the subsequent suit. If it could the decision would operate as resjudicata between the parties but if it could not the subsequent suit would not be barred by resjudicata. Therefore when a suit is filed by the party or through Advocate, before filing a suit an affidavit should filed with the

suit that they have not filed any suit regarding the same cause or by same parties previous this suit.

(2) PROPER INTERPRETATION OF LAW AND CASE LAW.-

It is the duty of the Advocate to come with clean hand but some times Advocates are handicap because parties have no idea about the matters. Actually when matter comes before the Advocate. They have to properly interpreate before the court.

Each case law has its own valuation Relevant case law study should be cite and interpreat.

(3) MERIT SHOULD BE PRESERVED.-

The merits of the controversy in issue in the suit and do not of course put on end to it even in part. It is the duty of the court of preserve the merit.

(4) TO AVOID ABUSE OF PROCESS.-

When matter comes before the court, it should be not registered by the registrar it

the case was decided first, though it registered when judges come to know about the previous matter, at very first hearing stage it should be not be rejected but returned to the parties with clear reason.

(5) AT FINAL ARGUMENT.-

This plea should be taken by party, but even later stage this doctrine should be consider even after final argument.

(6) BURDON OF PROOF SHOULD NOT LIE ONLY ON THE ASSERTER.-

The onus is on the party who contends that an earlier decision operates as resjudicata between the parties. He has to establish that the matter in issue in the subsequent suit was also in issue in the former suit and it had been heard and finally decided between the same parties by a competent court. Mere bald assertion is not sufficient.

(7) PENAL ACTION.-

If parties are aware about the previous suit, intentionally they have not prefer to

file appeal against the order passed by the lower court. After some time they filed a fresh suit such parties should be penalize by fine.

(8) ISSUE OF RESJUDICATA SHOULD BE HEARD AS A PRELIMINARY ISSUE.-

The issue of resjudicata can be decided as a preliminary issue for abuse the process of law courts are busy if this issue can decided as early clear picture may come before the court.

If one issue is decided in favour of a party and it is sufficient for the disposal of the suit and the suit is disposed of accordingly a decision another issue against him should not aperate as resjudicata.

(9) JUDGMENT MUST FIELD WITH DECREE.-

At the time of considering resjudicata, decree without judgment is not give the support of resjudicata. It is essential that the former judgment must be that of a court of competent jurisdiction judgment must field with a decree. A plea of resjudicata can only be founded on a valid decree.

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