

(2005) 06 BOM CK 0096

In the Bombay High Court

Case No : Writ Petition No. 5867 of 2004

Anandrao Raghoji Malewar

APPELLANT

Vs

Heilmittel Pharmaceuticals

RESPONDENT

Date of Decision : 06-06-2005

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 9 Rule 7, 11, 47
Constitution of India, 1950 — Article 226, 227
Provincial Small Cause Courts Act, 1887 — Section 26
Specific Relief Act, 1963 — Section 6, 6(1)

Citation : (2005) 5 BomCR 637 : (2005) 4 MhLj 868

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : S.D. Khati, for the Appellant; S.C. Sangamnerkar, for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—In this writ petition under Articles 226 and 227 of Constitution of India, the petitioner/original defendant in the Regular Civil Suit Number 1039 of 1998 challenges the order dated 23-11-2004 passed by 7th Joint Civil Judge (Jr.Dn.), Nagpur, rejecting application for permission to amend his application raising objection u/s 47 of C.P.C. It appears that present respondent filed on 29-7-1998 a suit for recovery of possession u/s 6 of Specific Relief Act against present petitioner. The respondent has stated that it is tenant in the premises of petitioner and it continued in peaceful and actual possession of said premises up to 20-7-1998. On that day they found that their locks on tenanted premises were broken and the respondent had taken forcible possession of suit premises and, their machinery installed in suit premises and other goods and raw material were found thrown in adjacent premises belonging to one Shri Pohane. After making police complaint, on or about 29-7-1998 the respondents filed Civil suit mentioned above for restoration of possession. The respondent also applied for grant of mandatory temporary injunction of

restoration of possession and the same came to be granted by trial Court and was maintained by Appellate Court. Writ Petition No. 3815 of 2002 filed by present petitioner challenging this grant came to be dismissed on 26th November, 2002. Thereafter, respondent Started proceedings for restoration of possession by executing that order and, petitioner opposed it by filing application/objection u/s 47 of C.P.C. respondent moved application at Exh. 94 under Order VII, Rule 1 l(d) of C.P.C., contending that as the respondent is claiming to be tenant and is seeking recovery of possession, Small Causes Court alone has jurisdiction and Civil Suit before Civil Court was not tenable. Said application was considered by trial Court on 21-1-2004 but as on that date nobody appeared for petitioner/defendant, it was adjourned to next date. On 6-3-2004 again defendant remained absent and the trial Court disposed of that application. Thereafter the defendant filed on application for amendment (Exh. II) and sought leave to amend his objection u/s 47 C.P.C. This application was opposed by present respondent and the trial Court after hearing both the sides was pleased to find that objection sought to be added was already moved vide Exh. 94 and had been disposed of on 6-3-2004. The trial Court therefore on 23-11-2004 held that it has already decided said issue and as it had jurisdiction to take cognizance of the suit, application moved by petitioner was not tenable. It is this order which is challenged in present writ petition.

2. I heard Advocate S.D. Khati for petitioner/defendant and Advocate S.C. Sangamnerkar for respondent/original plaintiff. In view of the nature of controversy, both the Advocates agreed to submit the Xerox copies of their reliances and accordingly, with consent, matter was heard finally for disposal at admission stage itself.

3. Advocate S.D. Khati contends that the earlier order passed on 6-3-2004 did not decide the issue at all and the objection has been dismissed in default. He therefore argued that principles of res judicata were not attracted and the subsequent application for amendment to the objection could not have been rejected on that ground. He further stated that in view of provisions of Section 26 of Provincial Small Causes Courts Act, the Small Causes Court alone had jurisdiction to take cognizance of suit filed by present respondent and Civil Suit u/s 6 of Specific Relief Act was untenable. He has relied upon the judgment of Hon"ble Apex Court reported at Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, and Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, , in support of his contention.

4. Advocate S.C. Sangamnerkar has contended that the order of trial Court is just and proper, and the present petitioner is unnecessarily delaying the restoration of possession by raising frivolous grounds. He has tried to demonstrate how the rulings relied upon by petitioner are not relevant. He has relied upon rulings reported at Y.B. Patil v. Y.L. Part, AIR 1977 S.C. 392, and Arjun Singh v. Mohindra Kumar, AIR 1964 S.C. 998, to substantiate his stand that principles of res judicata or analogous thereto apply between two stages in

same suit and application which is already dealt; with by Court cannot be repeated. He has further stated that there is no substance even in the point sought to be raised by petitioner because suit for restoration of possession u/s 6 of Specific Relief Act filed by respondent, is not based on title but only on previous possession. He has invited attention of this Court to Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, relied upon by petitioner and also to Division Bench judgment of this Court in case between the Syndicate Bank Vs. East India Hotels Ltd., as also between Faijulbee Hajeel and Others Vs. Yadali Amir Shaikh Ansari, . He made the grievance that unnecessarily the respondent is being denied fruits of order passed in its favour for last several years. He has argued that the order disposing of objection passed on 6-3-2004 has become final and said order cannot be allowed to be opened or reviewed through such application for amendment . He contends that what can not be done directly should not be allowed to be done indirectly and in support relies upon judgment of Hon''ble Apex Court in case between Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, .

5. From facts stated above it is apparent that petitioner defendant moved application under Order 7, Rule 11 (d) of C.P.C. and contended that Regular Civil Suit was not maintainable. He asserted that jurisdiction is only with Small Causes Court. He did not remain present at the time of hearing of that application and ultimately, finding him absent on 21-1-2004 and thereafter on 6-3-2004, the learned trial Court disposed of that application. Thereafter amendment application has been moved with a view to incorporate very same challenge in objection already filed by petitioner u/s 47 C.P.C. before trial Court. By impugned order, said amendment application has been rejected. Question is if the objection is already overruled by learned trial Court, rightly or wrongly, whether petitioner can be permitted to reagitate the same through such indirect method. The issue of propriety of moving another application for same purpose in same proceedings is being considered little later. However, it is clear that having failed once to obtain orders in his favour, the petitioner cannot be permitted to undertake again and again same exercises because it would be against the principle of finality attached to such interlocutory/interim orders. Petitioner did not challenge the order dated 6-3-2004 or did not apply for restoration of his objection under Order 7, Rule 11(d). What petitioner could not have done directly, he cannot also be permitted to do indirectly. Observations of Hon''ble Apex Court in paragraph 87 in case Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, assume importance. Said observation read:

87. The second ground of challenge that there was no valid session of the House cannot be accepted for the reasons given above. It has also to be stated that it is not open to the respondent to challenge the orders of detention collaterally. The principle is that what is directly forbidden cannot be indirectly achieved.

(Emphasis added)

6. Even otherwise, in the facts of present case and in view of the judgments

cited by parties, it would be better if this Court considers whether there is any substance in the objection being canvassed by petitioner about the jurisdiction of Small Causes Court alone. When the plaint as filed by respondent before trial Court is seen, it is described as suit for recovery of possession u/s 6 of Specific Relief Act. In prayer clause, respondent has only claimed restoration of possession and he has not claimed any declaration about his status as tenant. Relationship of landlord-tenant is pointed out as part of history to show entry into the premises. The suit, therefore, is not by a tenant against his landlord for restoration of possession. While considering application under Order 7, Rule 11(d), the Court is concerned with case as pleaded by plaintiff and not with defence. In his objection under Order 7, Rule 11(d), petitioner has specifically placed reliance upon the Apex Court judgment reported at Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, . The Hon"ble Apex Court was considering two different cases but the controversy was identical. Tenant/licensee in possession wanted to protect said possession against threats of dispossession and the Hon"ble Apex Court found that the question of relationship between parties or question of title of occupant was very much involved in such suits and therefore, the suits Were not maintainable before Civil Court. Necessary discussion in this respect is contained in paragraph 4, 13 and 19 of the report as under:

"4. The appellant-plaintiffs filed Suit No. 1290 of 1984 in the Bombay City Civil Court against the respondent-defendant for permanent injunction on the ground that the appellants are in possession of the suit shop. That the respondent-defendant is tenant of the suit premises being Shop No. 4, Meghji Vallabhadas Trust Building, Bhavanishanker Road, Dadar, Bombay. That the defendant took the same premises in December, 1974 on rent and put the appellants into possession thereof under an irrevocable license/tenancy agreement. It was agreed that plaintiff No. 1 had to pay licence fee to the defendant or to the landlord. The plaintiff further averred that due to some difference of opinion between the parties, the defendant started threatening the appellants that he would physically throw them out of the suit premises and hence the suit of permanent injunction restraining the respondent-licensor from disturbing the possession of the plaintiff-licensees of the suit premises.

5. We are not concerned with the defence of the respondent on merits for resolving the present controversy about the jurisdiction of the City Civil Court to entertain such as suit. Jurisdiction of the Court has to be decided at this stage on the averments in the plaint on demurrer taking them to be true.

13. So far as the first condition is concerned, a comprehensive reading of the relevant averments in the plaints in both these cases leaves no room for doubt that the plaintiffs claim relief on the basis that they are licensees on monetary consideration and the defendants are the licensors. The first condition is clearly satisfied. Then remains the question whether the third condition, namely, that the suits must relate to the recovery of possession of immovable property

situated in Greater Bombay is satisfied or not. It is not in dispute that the suit properties are immovable properties situated in Greater Bombay but the controversy is around the question whether these suits relate to recovery of possession of such immovable properties. The appellants contended that these are suits for injunction simpliciter for protecting their possession from the illegal threatened acts of respondents-defendants. Relying on a series of decisions of this Court and the Bombay High Court, Guttal, J., Pendse, J. and Daud J., had taken the view that such injunction suits can be said to be relating to the possession of the immovable property. Sawant J., has taken a contrary view. We shall deal with these relevant decisions at a later stage of this judgment. However, on the clear language of the section in our view it cannot be said that these suits are not relating to the, possession of the immovable property. It is pertinent to note that Section 41(1) does not employ words "suits and proceedings for recovery of possession of immovable property". There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property". The words "relating to" are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1). In this connection, we may refer to Blacks' Law Dictionary, Super Deluxe 5th Edition. At page 1158 of the said dictionary, the term "relate" is defined as under:

"to stand in some relation, to have bearing or concern, to pertain, refer, to bring into association with or connection with."

It cannot be seriously disputed that when a plaintiff-licensee seeks permanent injunction against the defendant-licensor restraining the defendant from, recovering the possession of the suit property by forcible means from the plaintiff, such a suit does have a bearing on or a concern with the recovery of possession of such property. In the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, , a Division Bench of this Court had to consider the connotation of the term "relating to", Tulzapurkar, J., for the report has culled out propositions emerging from the consideration of the relevant authorities. Proposition No. 2 has been mentioned as under:

"Expressions such as "arising out of "or "in respect of or "in connection with" or "in relation to" or "in consequence of or "concerning " or "relating to" the contract are of the widest amplitude and content and include even question as to the existence, validity and effect (scope) of the arbitration agreement."

In Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, , another Division Bench of this Court consisting of Sabyasachi Mukherji (as he then was) and G.L. Oza, JJ., had an occasion to consider this very question in connection

with the provisions of Sections 3 and 4 of the Swadeshi Cotton Mills Co. Ltd. (Acquisition and Transfer of Undertaking) Act, 1986. Sabyasachi Mukherji, J., speaking for the Court, has made at the following pertinent observations in paragraphs 49 and 50 of the report:

"The words "arising out of have been used in the sense that it comprise purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrases in the same clause or sentence, a method followed in good drafting. The word "pertain" is synonymous with the Word "relate", see Corpus Juris Secundum , Volume 17, page 693. The expression "in relation to " (so also "pertaining to"), is a very broad expression which presupposes another subject-matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see State Wakf Board, Madras Vs. Abdul Azeez Sahib and Others, , following and approving Nitai Charan Bagchi v. Suresh Chandra Paul, (66) C.W.N. 767; (Sahu) Shyam Lal Vs. M. Shayamlal, and 76 Corpus Juris Secundum 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject-matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to being into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."

It is, therefore, obvious that the phrases relating to recovery of possession as found in Section 41(1) of Small Causes Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently, in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Causes Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits.

19. Analogy drawn by Sawant, J., from cases u/s 6 of the Specific Relief Act, 1963 on the clear averments in the plaints in present cases is also not apposite. It is trite to say that Section 6 of the Specific Relief Act gives a summary remedy to the plaintiff to seek restoration of possession from the defendant within six months of illegal recovery of possession by the defendant, without referring to the title of the plaintiff and defendant. It is purely a possessory suit wherein

status of the party is irrelevant. In such type of suits the plaintiffs is not required to prove his title or a superior right to possession as compared to the defendant and has only to that he was in possession of the suit, immovable property and he was illegally dispossessed within a period of six months prior to the date of the suit. Once the plaintiff proves this case, he becomes entitled to succeed and can get status quo ante and restoration of possession of the suit premises through the assistance of the Court. In given cases, even injunctions suits purely based on previous peaceful possession and subsequent threatened dispossession may stand on an entirely different footing and might not attract the sweep of Section 41(1) of the Small Causes Courts Act or for that matter Section 28 of the Bombay Rent Act. But the present suits are not of that type. They are suits clearly based on the allegations that the plaintiffs are licensees on monetary considerations and they apprehend to be dispossessed, not in accordance with law, at the hands of defendant-licensors. Such suits as we have discussed earlier, clearly attract the applicability of Section 41 of the Small Causes Courts Act as both the conditions for its applicability, namely, that they are suits between licensees and licensors and they relate to recovery of possession of immovable properties situated in Greater Bombay are complied with. Consequently the conclusion is inevitable that the aforesaid suits as filed by the appellants were not cognizable by the City Civil Court, Bombay and they could be entertained only by the Small Causes Court, Bombay, and fall within the exclusive jurisdiction of the latter Courts."

(Emphasis added.)

7. From discussion, in paragraph 19 it is apparent that suit of present respondent is tenable before Civil Court and the objection sought to be raised by petitioner in this respect is without any substance. Similar controversy is also considered by two Division Benches of this Court in *Syndicate Bank Vs. East India Hotels Ltd.*, as also between *Faijulbee Hajeel and Others Vs. Yadali Amir Shaikh Ansari*, . In latter judgment, the Division Bench held that suit u/s 6 of Specific Relief Act which is based on allegation of dispossession and which is for recovery of possession of immovable property continues to be within the jurisdiction of Civil Court despite the fact that parties may happen to be fulfilling the character of a landlord or tenant or a licensors or a licensee. The question of title of parties including the title of a tenant does not arise in such a case and will naturally be not decided in the suit. It is not necessary to refer to this ruling in more detail because the *Syndicate Bank Vs. East India Hotels Ltd.*, mentions this judgment in paragraph 20. It also considers the judgment of Hon"ble Apex Court reported at *Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale*, . In paragraph 41, the Division Bench has observed that :

"The object of Section 6 of the Specific Relief Act is to discourage people from taking law into their own hands howsoever moved their title may be. Although the Civil Court are empowered to decide the disputed rights of the parties as per procedure prescribed under the Code of Civil Procedure, 1908, Section 6 of

Specific Relief Act provides for recovery of possession in a summary manner. u/s 6(1) of the Specific Relief Act, without establishing title, a person can file suit and obtain decree for possession by establishing that he was in possession of the immovable property within six months prior to the filing of the suit and that he has been dispossessed otherwise than in due courses of law."

In paragraph 44, the Division Bench of deserves:

"44. The jurisdiction of the Court to entertain the suit is to be determined on the basis of averments made in the plaint. As notice above, in the present case the principle relief plaint in the suit is that having handed over possession the defendant has no right to the said area and plaintiff in possession of said area as a true owner is exclusively entitled to it. As a consequential relief, the plaintiff has sought a declaration, that the decree passed u/s 6(1) insofar as it directs the plaintiff to hand over possession of the said area to the defendant is in operative, and incapable of execution. As a historical background the plaintiff has narrated that initially there was a relationship of licensor and licensee between the plaintiff and the defendant and that on expiry of licence there were disputes between the parties, but, ultimately the defendant has handed over possession of said area to the plaintiff. The reliefs claimed in the suit are not based on these facts but are based on the fact that defendant has handed over possession and the plaintiff in possession is entitled to declaration that defendant has no right whatsoever to the said area and the plaintiff as a true owner is exclusively entitled to it."

Bench ultimately concluded that Civil Suit was tenable and not barred due to Presidency Small Causes Courts Act, 1882. Thus, it is clear that the objection sought to be raised by petitioner about absence of jurisdiction in Civil Court is clearly misconceived and the petitioner is making roving efforts to delay the further progress of Civil Suit,

9. Next question which falls for consideration is whether the petitioner can reopen the question of jurisdiction again in view of earlier order dated 6-3-2004. It is well settled that principles of res judicata apply between two stage of same proceedings/suit. In paragraph 4 of Y.B. Patil v. Y.L. Patil, AIR 1977 S.C 392, the Hon"ble Apex Court has observed thus:-

"4. In appeal before us Mr. Gupte on behalf of the appellants has contended that the High Court was in error in not interfering with the order of the Tribunal whereby the revision petition filed by the appellants had been dismissed. It is urged that the Tribunal in affirming the findings of the Assistant Commissioner and the Deputy Commissioner regarding the question of the appellants being strangers qua the land in dispute took a very restricted view of Section 79 of the Act dealing with revision. This contention, in our opinion, is not well founded. The High Court at the time of the decision of the earlier writ petition on 18-12-1964 recorded a finding and gave directions to the Tribunal not to reopen the questions of fact in revision. The Tribunal while passing the order dated September 12-9-1967 complied with those directions of the High Court. The

appellants are bound by the judgment of the High Court and it is not open to them to go behind that judgment in this appeal. No appeal was filed against that judgment and it has become final. It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceedings becomes final, it would be finding at the subsequent stage of that proceedings. In view of the High Court judgment dated 18-12-1964, the Tribunal while passing the order dated 12-9-1967, disposing of the revision petition filed by the appellant, could not reopen the questions of fact which had been decided by the Assistant Commissioner and the Deputy Commissioner. The High Court, in our opinion was right in holding in the judgment under appeal that the concurrent findings of fact arrived at by the Assistant Commissioner, the Deputy Commissioner and the Tribunal cannot be set aside in the writ petition. The appeal consequent fails and is dismissed but in the circumstances with no order as to costs."

(Emphasis added)

10. Similarly, in *Arjun Singh v. Mohindra Kumar*, AIR 1964 S.C. 998, the Hon"ble Apex Court has observed in paragraph 12 and 13 as under:

"12. If the correctness of the order of the Civil Judge in disposing of the application filed by the appellant on May 31, 1958 were questioned in an appeal against the decree in the suit, these principles and the observations would have immediate relevance. But it is not as if the distinction here drawn between the type of interlocutory orders which attain finality and those that do not, is of no materiality in considering whether a particular interlocutory order is of a kind which would preclude the agitation of the same question before the same Court in further stage of the same proceedings. Dealing with the decision of the Privy Council in *Ram Kirpal Shukul v. Rup Kuan*, 11 Ind. App. 37 and *Bani Ram v. Nanhu Mal*, 11 Ind.App. 181 & *Hook v. Administrator General of Bengal*, 48 Ind.App. 187: AIR 1921 P.C. 11, which are the leading cases in which the principle of res judicata was held applicable to different stages of the same proceedings, Das Gupta, J., observed:

"It will be noticed that in all these three cases, viz., *Ram Kripal Shukul* case, 11 Ind.App. 37, *Bani Ram*'s case, 11 Ind.App. 181 and *Hook*'s case, 48 Ind.App. 187 : A.I.R.1921 P.C. 11, the previous decision which was found to be res judicata was part of a decree. Therefore thought in form the later proceeding in which the question was sought to be raised again was a continuation of the previous proceeding, it was in substance, an independent subsequent proceeding. The decision of a dispute as regards execution it is hardly necessary to mention was a decree under the CPC and so in *Ram Kripal*'s case, 11 Ind.App. 37 and *Bani Ram*'s case, 11 Ind. App. 181 such a decision being a decree really terminated the previous proceedings. The fact therefore that the Privy Council in *Ram Kripal Shukul*'s case, 11 Ind.App. 37 described Mr. Probyn's order as an interlocutory judgment, does not justify the learned Counsel's contention that all

kinds of interlocutory judgments not appealed from become *res judicata*. Interlocutory judgments which have the force of a decree must be distinguished from other interlocutory judgment which are a step towards the decision of the dispute between parties by way of a decree or a final order."

13. It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunctions or Receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not in that sense decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally, only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principles of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under Order IX, Rule 7, would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the Appellate Court. In that sense, the refusal of the Court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of *res judicata*, does not, apply, it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same relief might be disallowed by the Court does not however necessarily rest on the principle of *res judicata*. Thus, if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of rule of *res judicata*, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection on the ground that no new facts have been adduced to justify a

different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts, the Court would be competent, nay would be bound to take those into account and make an order conformable to the facts freshly brought before the Court."

(Emphasis added)

11. Thus, the procedure also gives sanctity to the interlocutory orders passed by Court earlier in the process of adjudication of suit and no fresh application for same purpose can be filed. Here, the effort of present petitioner is to seek a second order on same challenge though his earlier application raising it is already disposed of. The trial Court is therefore justified, in refusing to allow him to attend his application u/s 47 C.P.C. In the case of *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, , the Apex Court has held:

"It is well-known that the doctrine of res judicata is codified in Section 11 of C.P.C. but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 and in many other situation also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata. and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata. also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication, then also the principle of res judicata on that issue is directly applicable. When any matter which might and. ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided."

In *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.)*, Andheri and Others, Hon"ble Apex Court held that in view of Explanation IV to Section 11 C.P.C. it could not be said that the earlier judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was absent in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined therein but as to every matter which the parties might and ought to have raised in offence or defence and ought to have got it decided as incidental to or essentially connected with the subject-matter of the litigation between them. The Honourable Apex Court in the case of *P.K. Vijayan Vs. Kamalakshi Amma and Others*, has held that it is a sheer abuse of the process of

the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties do raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res judicata to prevent raising of the same at a later point of time and thereby it must be deemed that they are waived.

12. Thus, considering the aforesaid well recognised principles of law, the objection sought to be raised by the petitioner through amendment is hit by res judicata. Otherwise, the party interested in delaying the decision of the suit will be in position to move identical or similar applications on several occasions during pendency of suit and the courts will be helpless spectators unable to monitor and control it. For same reasons, the party cannot be permitted to reopen the same issue indirectly by moving application of different type or in different form like in the form of amendment application as is done by present petitioner. The procedural law and doctrine evolved with a view to put an early end to the litigation cannot be permitted to be frustrated in this fashion. Petitioner ought to have taken appropriate timely steps for restoration of his Order 7, Rule 11(d) objection or to challenge it, but he can not be permitted to move in circles in same suit to the prejudice of respondent/plaintiff.

13. Advocate S.D. Khatri has relied upon Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, in support of his contention that principles of res judicata are not attracted when such challenge goes to the very root of jurisdiction of the Court. Perusal of said ruling reveals observations of Hon'ble Apex Court as under :-

"9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Pankin, C.J., observed in Tarini Charan Bhattacharjee and Others Vs. Kedar Nath Haldar, .

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

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

10. It is true that in determining the application of the rule of res judicata the

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

11. In the present case the decision of the Civil Judge, Junior Division, Borivali that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous, see Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, . If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature."

(Emphasis added)

14. Thus, the Hon"ble Apex Court has not considered the issue of interlocutory order at two stages between same proceedings. The Hon"ble Apex Court has considered the situation in the subsequent litigation. If the arguments of learned Counsel for petitioner are accepted, it will never put an end to the suit and parties may continue to fight on interim orders only.

15. In the light of discussion above, I find that the order dated 23-11-2004 passed by Court below does not call for any interference in writ jurisdiction. There is no merit in this petition and the same is accordingly dismissed without any orders as to cost.