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**(2007) 06 AP CK 0029**

**In the Andhra Pradesh High Court**

**Case No : Appeal Suit No. 138 of 1991**

G. Basava Reddy

APPELLANT

Vs

Smt. K. Parvathamma and Others

RESPONDENT

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**Date of Decision : 07-06-2007**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11, 80  
Constitution of India, 1950 — Article 226, 32  
Hyderabad Tenancy and Agricultural Lands Act, 1950 — Section 47  
Limitation Act, 1963 — Section 21(1)

**Citation : (2007) 5 ALD 730**

**Hon'ble Judges : C.Y. Somayajulu, J**

**Bench : Single Bench**

**Advocate : C.S.K.V. Ramana Murthy, for the Appellant; K. Pratap Reddy, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

C.Y. Somayajulu, J.—First respondent filed the suit for a declaration that the sale proceedings of the land in S. Nos. 62, 63, 450, 451 and 334 and the house situated therein at Juntapally village (hereinafter referred to suit property) for recovery of arrears of the excise dues from her father are null and void and are not binding on her, and for a consequential injunction restraining respondents 2 to 4 and the appellant from dispossessing her from the suit property which was decreed by the trial Court. Aggrieved thereby the third defendant in the suit preferred this appeal. For the sake of convenience, I would hereinafter refer the parties to the appeal as they are arrayed in the trial Court.

2. Plaintiff (1st respondent) instituted the suit initially against the Government of Andhra Pradesh represented by its Collector (Excise) Hyderabad District (first defendant) and the Tahasildar Tandur (second defendant). Subsequently she filed I.A. No. 489 of 1974 to add the appellant as third defendant in the suit which was allowed vide order dated 23-7-1974. Later K. Lakshamma (fourth respondent) was added as the fourth defendant, vide order in I.A. No. 396 of

1978 dated 7-3-1979. After the death of the fourth defendant, defendants 5 and 6 (respondents 5 and 6) were brought on record as her legal heirs as per the order dated 10-6-1980 in I.A. No. 850 of 1979 and later Anantaiah (seventh respondent) was added as seventh defendant as per the order in I.A. No. 29 of 1981.

3. Tirumala Reddy, father of plaintiff, entered into a contract with the erstwhile Hyderabad State to supply 600 Khandies of Gulmoha flowers at Rs. 21 /- (O.S.) per Khandi, and failed to supply the contracted quantity. So the Excise Commissioner levied a penalty of Rs. 80/- per Khandi, on the father of the plaintiff, based on which the first defendant claimed an amount of Rs. 19,866-2-0 from him and put the plaint schedule property to auction, whereat the third defendant figured as the highest bidder on 16-5-1962 and the sale was knocked down in his favour. So father of the plaintiff filed W.P. No. 554 of 1962 seeking a writ of prohibition against defendants 1 and 2 from concluding the auction in favour of the third defendant in respect of the suit property inter alia contending that inasmuch as Gulbarga District, in the erstwhile State of Hyderabad, where the supply of Gulmoha flower Khandies was to be made by him, stood transferred to Mysore State under the States Reorganization Act and so it is the Government of Mysore only, but not the first defendant (State of Andhra Pradesh), that can claim the amount from him and in any event since the first defendant vide G.O.Ms. No. 194 dated 2-2-1958 Revenue (T) Department, had written off all the arrears or penalty of excise contractors accrued up to 1-11-1958, and as the auction was held "without observing the required formalities", defendants 1 and 2 and the excise officials may be prohibited from concluding the auction held on 16-5-1962. As her father died during the pendency of that writ petition plaintiff brought herself on record as his legal representative in that writ petition, which was disposed of accepting the suggestion of the Government Pleader that first defendant can proceed with collection of the amount demanded, and in the event of the writ petitioner" succeeding in the attempts with the Government of Mysore in having the claim for penalty written off, first defendant has to refund the amount to the writ petitioner, without the necessity of the writ petitioner filing a suit for recovery of the amount collected. Alleging that the claim made to the Government of Mysore is pending, plaintiff filed W.P. No. 1307 of 1967, questioning the sale in favour of third defendant inter alia contending that as the third defendant, who participated in the auction through his father, who also is a defaulter, deposited the 1/4th amount on 17-5-1962, when it has to be deposited on 16-5-1962 itself, and failed to deposit the balance of 3/4th amount within a period of 30 days, and as the sale was held without obtaining permission of the Tahsildar u/s 47 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (the Hyderabad Tenancy Act). The writ petition was dismissed by the order dated 29-12-1967, holding that permission u/s 47 of the Hyderabad Tenancy Act is not necessary. Thereafter plaintiff preferred a revision to the first defendant, which was rejected on 15-12-1971, and so she filed W.P.No.6 of 1972 questioning the legality of the

order of the first defendant rejecting the revision, which was dismissed as infructuous on 16-7-1973. Thereafter plaintiff filed the suit contending that in view of the grounds mentioned by her in the writ petition and as the provisions of the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Ordinance, 1972 (Ordinance), which later became Act (the Act) prohibit sale of any land as mentioned therein, the sale held in favour of the third defendant in any event is null and void.

4. The case of the first defendant (Government of Andhra Pradesh) is that as Tirumala Reddy, father of the plaintiff, fell in arrears to a tune of Rs. 19,866-2 annas to the State of Hyderabad, the suit property, which was hypothecated by him to that government, was put to auction on 16-5-1962 as per law, in which the third defendant became the highest bidder and deposited the amount payable within 24 hours. After W.P.No.554 of 1962, filed by the father of the plaintiff, challenging the said sale, was dismissed on 13-2-1967 the sale in favour of third defendant was confirmed and was communicated to him on 26-6-1967. So he deposited the balance due on 28-6-1967 and subsequently a sale certificate was also issued to him. G.O.Ms.No.194 dated 2-2-1958 Revenue (T) Department, relied on by the plaintiff, has no application to the arrears due to the government from her father. As the sale in favour of the third defendant was confirmed long prior to the suit and as W.P. No. 1307 of 1967 filed by the plaintiff questioning the said sale was also dismissed, she cannot reagitate the same questions in a suit. Since the confirmation of the sale was before the coming into force of the Ordinance and Act, the provisions of the Ordinance or Act do not apply to the sale held and so the suit is liable to be dismissed as it is barred by limitation also.

5. Second defendant did not file any written statement.

6. The case, in brief, of the third defendant is that inasmuch as the contentions raised by the father of the plaintiff and plaintiff were rejected in W.P.Nos.554 of 1962, 1307 of 1967 and 6 of 1972 those decisions operate as res judicata and so she cannot question the validity of sale in his favour by way of a separate suit. After the sale was knocked down in his favour on 16-5-1962 he deposited 1/4th amount immediately. As the father of the plaintiff obtained an order of stay of all further proceedings in respect of the auction he was not called upon to pay the balance amount due and payable under the auction. After dismissal of W.P. No.554 of 1962, he was called upon to pay the balance amount within one week from the date of receipt of that notice. Immediately after the receipt of that notice he deposited the remaining amount due from him on 28-6-1967. The contention relating to non deposit of balance amount was also raised in W.P. No. 1307 of 1967 by the plaintiff and it was considered and rejected by the Court. After the sale certificate was issued in his favour plaintiff filed W.P. No. 6 of 1972 and obtained interim stay of all further proceedings, which was dismissed. In view thereof, and on the ground of limitation also, the suit is liable to be dismissed.

7. Defendants 5, 6 and 7 also filed written statements. It is not necessary to refer the contentions raised therein because they did not prefer any appeal questioning the judgment of the trial Court.

8. Basing on the pleadings, the trial Court framed as many as nine issues, two additional issues on 8-7-1981 and one additional issue on 1-12-1983 and two more additional issues during the course of arguments.

9. In support of her case, plaintiff examined 8 witnesses including herself as P.W. 1 and marked Exs. A-1 to A-4. On their behalf defendants examined five witnesses as D.Ws. 1 to 5 and marked Exs. B-1 to B-24.

10. On issue Nos.1 and 6, relating to the question whether plaintiff is the daughter and only the legal heir to the estate of K. Tirumala Reddy and the territorial jurisdiction, the trial Court held in favour of the plaintiff. On issue No. 4 relating to the judgments in the W.Ps. operating as res judicata, the trial Court held that the judgments in the three writ petitions do not operate as res judicata. On issue Nos. 7 and 8 relating to the question whether the suit is barred by limitation and the validity of notice u/s 80 CPC, it held in favour of the plaintiff. On issue No.2 relating to the confirmation of sale, it held that inasmuch as the sale is null and void its confirmation is irrelevant and so it can be challenged at any time. On issue No.3 relating to the question whether the State of Andhra Pradesh is entitled to recover the arrears, it held that as the penalty was due from Tirumala Reddy in respect of the contract entered into with Gulbarga District, and in view of the ratio in S. Ananthaiah v. Superintendent, Excise Department 1962 (2) ALT 259 the auction held is liable to be set aside. On issue No.5 relating to the question whether the sale is ineffective in view of the provisions of the Act, it held that the sale is null and void, on additional issue framed during arguments i.e. whether the sale held by second defendant in favour of third defendant in respect of the suit property is null and void and is not binding on the plaintiff, it held that the auction which is held by second defendant in favour of third defendant is null and void and not binding on the plaintiff. On additional issues 1 and 2 framed on 8-7-1981 relating to the question whether defendants 5 and 6 are entitled to half share and whether the auction proceedings in respect of half share of defendants 5 and 6 in respect of some of the properties is illegal and not binding on defendants 5 and 6, held that the claim of defendants 5 and 6 over the suit properties cannot be accepted and answered those issues against the defendants 5 and 6. On additional issue framed on 1-12-1983 relating to the question whether seventh defendant is the owner and possessor of one acre of land held against the seventh defendant. On additional issue No.2 framed during the course of argument relating to the question whether the plaintiff is entitled to the consequential injunction sought, held in her favour and decreed the suit in favour of the plaintiff with costs. Hence this appeal by the third defendant.

11. The contention of Sri CSKV Ramana Murthy learned Counsel for the third defendant is that since the plaintiff who filed three writ petitions earlier did not raise so many of the contentions raised in the suit in the earlier writ petitions, she

is debarred from raising the said contentions for seeking a relief, on the basis of the new grounds raised in the suit under the rule of constructive res judicata. By relying on *Hoshnak Singh v. Union of India and Ors.* : [1979]3SCR399 , *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another* , *Daryao and Others Vs. The State of U.P. and Others* , *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another* , *State of Punjab Vs. Bua Das Kaushal* , *Union of India (UOI) Vs. Nanak Singh* , *U.P. State Road Transport Corporation Vs. State of U.P. and Another* , *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.)* , *Andheri and Others* , *State of U.P. Vs. Nawab Hussain* , he contended that the finding of the trial Court that the suit is not barred by res judicata in view of the dismissal of the earlier writ petitions is erroneous. It is his contention that inasmuch as the suit is filed several years after the sale was confirmed and after the dismissal of the earlier writ petitions it is hopelessly barred by time, because as per Section 59 of the Revenue Recovery Act, which is made applicable to Telangana area by virtue of the Andhra Pradesh Rent and Revenue Sales and The Madras Revenue Recovery (Andhra Pradesh Extension and Amendment) Act, 1958, which came into force in Telangana area on 13-1-1959, the period of limitation is six months from the date of accrual of the cause of action and as the cause of action accrued to the plaintiff, as per the ratio in *Sapapathy Chetty v. Rengappa Naickan* ILR XXVI Mad 495, followed in *Chinnammal Achi and Ors v. Saminatha Malavaroyan* ILR XXX Mad 367, immediately on the confirmation of the sale on 26-6-1967, the suit filed on 22-1-1974 is clearly barred by time.

12. The contention of Sri K. Pratap Reddy, learned Senior Advocate, appearing for the plaintiff, is that since no issues were settled in any of the writ petitions, and as there is no decision on merits in any of the writ petitions on all the specific pleas raised in the plaint that the sale held is null and void, and since question of constructive res judicata arises only when there is a decision on merits on the points raised, no question of res-judicata or constructive res judicata, arises in this case, and relied on *Daryao and Others Vs. The State of U.P. and Others*, in support of his contention that question of res judicata does not arise if the earlier order is not passed on merits. It is his contention that inasmuch as W.P. No.554 of 1962 was not decided on merits, and as-the only question that was decided in the W.P. No. 1307 of 1967 related to the applicability of Section 47 of the Hyderabad Tenancy Act, which stood repealed, and as no other point was decided in that writ petition, and since the third W.P. No. 6 of 1972 was dismissed as withdrawn, there is no decision on merits on the points raised in the suit in any of the writ petitions and so the earlier proceedings do not operate as res judicata and in any event as the Revenue Recovery Act contemplates deposit of 1/4th of the amount of bid on the date of sale and since this Court in *Syed Burhanuddin Hussain v. State of A.P. and Ors.* 1973 (2) APLJ 102 (Short Note on Recent Case), held that if the amount payable on confirmation of the bid is not paid by the auction purchaser within time the sale gets wiped out, and since the amount payable immediately after knocking down

the sale in favour of the third defendant admittedly was not deposited on the date of sale, but was deposited on the next day, and since the balance amount of 3/4th was also not paid within the time stipulated, and as the sale was held within less than 30 days, when 30 days clear notice is mandatory as held by a division bench of this Court in W.A. No.74 of 1970 dated 30-8-1971. It is his contention that inasmuch as the third defendant was a minor at the time of the auction and as his guardian, who participated in the auction on his behalf in the auction, was a defaulter, and as the sale in favour of third defendant was a benami transaction, the sale in favour of third defendant should be treated as non est. It is his contention that inasmuch as the sale certificate was issued in favour of the third defendant on 22-1-1974 and since the suit is filed on 26-2-1974 the suit is well within time even as per the ratio in Sapapathy Chetty case ILR XXVI Mad 495 (supra) and Chinnammal Achi case ILR XXX Mad 367 (supra), and so the decree and judgment under appeal need no interference in this appeal.

13. As the two contentions raised by the learned Counsel for the third defendant relate to the suit being barred by limitation and res judicata, if those contentions are accepted it would not be necessary to go into the contentions raised by the learned Senior Advocate for plaintiff. If the above two contentions of the learned Counsel for the third defendant are to be negatived, the appeal is liable to be dismissed because no other contentions are raised by the learned Counsel for the plaintiff. So the other contentions raised by Sri K. Pratap Reddy relating to the validity of the sale in favour of the third defendant need not be considered. In view thereof the points for consideration are

(1) Whether the suit is barred by limitation?

(2) Whether the suit is barred by Res judicata?

14. Before taking up the points for consideration it has to be stated that the contention of the plaintiff that the sale in favour of the third defendant is hit by the provisions of the Ordinance and the Act cannot be accepted because the provisions of the Ordinance and the Act, which were promulgated and enacted in 1972 have no retrospective operation, and the provisions therein do not apply to the sales held prior to their coming into force in 1972. As the sale in this case was held in 1962, and as that sale on confirmation relates back to the date of sale, the sale held in favour of the third defendant is not covered by the provisions of the Ordinance or the Act.

POINT No. 1:

15. In view of the ratio in Sapapathy Chetty case ILR XXVI Mad 495 (supra) and Chinnammal Achi case ILR XXX Mad 367 (supra) the cause of action for filing a suit, to set aside sale knocked down in favour of the third defendant, arises only on confirmation of the sale but not before. The first defendant clearly alleged in its written statement that the sale in favour of the third defendant was confirmed on 26-6-1967. Though there is no document showing that the sale in favour of

the third defendant was confirmed on 26-6-1967, there is ample evidence on record in the shape of admission by the plaintiff to show that the sale in favour of the third defendant was confirmed on 26-6-1967. Significantly the specific plea taken by the plaintiff in para 8 of the plaint is that the sale in favour of the third defendant is not confirmed by virtue of the stay orders obtained by her from this Court. In para 15 of the plaint, which relates to cause of action, the plaintiff alleged that the cause of action for the suit arose in November 1973 when the defendants threatened to dispossess her from the plaint schedule property. Nothing is mentioned about the non confirmation or confirmation of sale in favour of third defendant in the cause of action para of the plaint.

16. In para 7(i) to (iii) of Ex.B-21 affidavit dated 3-7-1967, filed by the plaintiff in support of W.P. No.1307 of 1967 she stated:

(i) Auction is confirmed contrary to the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950,

(ii) That before confirmation of auction the government must get necessary sanction u/s 47 of the Hyderabad Tenancy Act,

(iii) That the confirmation of auction is illegal and void u/s 47 of the Act

(underlining mine)

and in para 8 thereof she stated

I submit that the respondent No. 4 after depositing the 3/4th amount is pressing hard on authorities to dispossess me from the lands in which event I will be put to serious loss and damage.

In para VIII of Ex. B-23 affidavit of the plaintiff dated 1-1-1972, filed in support of W.P. No. 6 of 1972, she alleged

After the above judgment in W.P. No. 1307 of 1967, the petitioner was informed that on 26-6-1967 the auction was concluded and confirmed.

(underlining mine)

The above extracted statements of the plaintiff in Ex.B-21 and Ex.B-23 affidavits, which are in the nature of admissions made by her, are substantive evidence and are binding on her without any further proof as per the ratio in Bishwanath Prasad and Others Vs. Dwarka Prasad and Others, . So it is clear that the plaintiff having known that the auction knocked down in favour of the third defendant was confirmed on 26-6-1967 itself, filed the suit in 1974 i.e. more than six years from the date of confirmation of the sale, falsely alleging that the sale in favour of the third defendant is not yet confirmed. Though D.W. 1 in his chief examination stated that after dismissal of W.P. No. 554 of 1962, the auction sale was confirmed on 26-6-1967 in favour of the third defendant, he was not cross examined on that aspect. As the evidence of D.W. 1 about the confirmation of sale on 26-6-1967 is corroborated by the admission of the plaintiff in para VIII of

Ex. B-23 affidavit extracted above, and as the plaintiff in para 7(i) & (iii) of her Ex. B-21 affidavit extracted above admitted the confirmation of sale in favour of the third defendant even by the date of her filing W.P. No. 1307 of 1967 on 3-7-1967, there can be no two opinions about the sale in favour of the third defendant being confirmed on 26-6-1967, even to the knowledge of the plaintiff. Since the period of limitation is only six months from the date of confirmation and since the suit is filed in 1974 in respect of the sale, which was confirmed in 1967, the suit is clearly barred by time.

17. The contention of Sri K. Pratap Reddy that inasmuch as Ex. B-18 certificate of sale is dated 22-1-1974, it has to be taken that the sale was confirmed only on 22-1-1974 and so the suit filed on 26-2-1974 is in time, cannot be accepted firstly because sale certificate would not be prepared immediately on the date of confirmation of the sale, and would be prepared some days, if not months or years after confirmation of the sale because of stay order etc. In this case plaintiff admitted about her obtaining stay of further proceedings in the auction by filing W.P. No. 554 of 1962 and W.P. No. 1307 of 1967. In para 8 of her Ex. B-21 affidavit plaintiff admitted about the third defendant depositing balance amount and pressing for possession, which can arise only after confirmation but not before. Since the stamps for Ex.B-18 sale certificate bear the date 11-1-1974, it is easy to see that third defendant, after being called upon to deposit the stamps for engrossing the sale certificate after dismissal of W.P. No.6 of 1972 on 16-7-1973, must have deposited the stamps on 11-1-1974. As stated earlier, even according to plaintiff the confirmation of sale took place on 26-6-1967 long prior to 22-1-1974. So the date of issue of sale certificate is not the date of confirmation of the sale. The second reason for the suit I being barred against the third defendant is the suit not being instituted against the third defendant on 26-2-1974. He was made a party to the suit subsequent to the filing of the suit only. I have looked into the original plaint. Though the name of the third defendant was also originally typed in the plaint in the array of defendants, his name was struck off with a pen, probably thinking that he is not a necessary party to the reliefs claimed in the suit. May be after coming to know that third defendant also is a necessary party to the suit, plaintiff filed I.A. No. 489 of 1974 to implead the third defendant also as a party i.e. as third defendant in the suit, which was allowed on 23-7-1974 and so third defendant became a party to the suit only on 23-7-1974. In view of Section 21(1) of Limitation Act, 1963, the suit against third defendant should be deemed to have been instituted only on 23-7-1974, because the trial Court did not pass any order deeming the third defendant to be a party to the suit from any earlier date, and as Plaintiff did not state the reasons for striking out the name of the third defendant before presentation of the plaint into Court. As contended by Sri Pratap Reddy even assuming that the cause of action accrued to the plaintiff on 22-1-1974 i.e. the date of the sale certificate in favour of the third defendant, since third defendant who is a necessary party to the suit, as any decision obtained without his being made a party would not bind on him, was made a party to the suit only on

23-7-1974, i.e. one day after the expiry of six months period from the date of the sale certificate in his favour, the suit against the third defendant cannot but be said to be barred by time and so I hold that the suit against the third defendant is hopelessly barred by time. The point is answered accordingly.

POINT No.2:

18. As no "issues" would be framed in writ petitions filed under Article 226 of the Constitution of India and as the Court only considers the question whether the writ petitioner is entitled to the relief sought by him in the writ petition or not, and since the apex Court in *Gulabchand Chhotalal Parikh Vs. State of Bombay* (Now Gujarat), , held that any previous decision on a matter in controversy, even in a writ petition, decided after full contest, or after affording fair opportunity to the parties to prove their case, will operate as *res-judicata* in a subsequent regular suit, I am not able to agree with the contention of Sri Pratap Reddy that decision in a writ petition does not operate as *res-judicata* in a subsequent suit filed on the same cause of action and for the same relief.

19. The first W.P. No. 554 of 1962 was filed by the father of the plaintiff on 21-5-1962 immediately after the sale was knocked down in favour of the third defendant on 16-5-1962. In para 8 of Ex. B-19 affidavit filed in support of W.P. No. 554 of 1962 the father of the plaintiff alleged

...3rd defendant (Tahasildar, Tandur) even without observing the preliminary requisites required to be followed in auctioning the properties auction on 16-5-1962 and the same is awaiting for confirmation....

In fact all the grounds alleged by the plaintiff in the plaint for setting aside the sale in favour of the third defendant, except the ground relating to deposit of the balance amount due, were available to her father, when he filed the said W.P. No. 554 of 1962. But he did not choose to press all the said pleas in that writ petition and sought for the setting aside of the sale only on the ground of Government of Andhra Pradesh lacking jurisdiction to hold the sale and on the ground that the Government of Andhra Pradesh i.e. first defendant had written off all penalties through a G.O. In Ex. B-15 order dated 13-0-1967 dismissing the said W.P. No. 554 of 1962, it is held that in the event of the petitioner therein obtaining the relief of getting the arrears written off by the Government of Mysore, State of Andhra Pradesh i.e. first defendant, has to refund the amount recovered from the writ petitioner without putting the writ petitioner to the necessity of filing a suit. It should be remembered that plaintiff who got herself impleaded as legal representative of her father in W.P. No. 554 of 1962 prior to Ex. B-15 order, did not raise any fresh or additional pleas, after she came on record as the legal representative of her father and allowed that order, though not passed on merits, to become final. Since the prayer in W.P. No. 554 of 1962 is to direct second respondent therein i.e. Collector, Hyderabad, to hold the auction afresh, and since that writ petition was dismissed by making the above referred observations, it should be deemed that in the event of the Government of Mysore

allowing the request of the plaintiff (or her father) for writing off the arrears, the entitlement of the plaintiff would be to recover the amount collected from her father through sale of the plaint schedule property and nothing more. If the Government of Mysore were to reject the request for writing off arrears, she can have no relief from defendants 1 and 2. Plaintiff as P.W. 1 clearly admitted that she did not make any request to the Government of Mysore for wiping out the arrears. What happened to the request made by the father of the plaintiff, if any, is not brought on record. So question of plaintiff, who is bound by the order in W.P. No. 554 of 1962 getting the relief setting aside the sale held, which was not granted in that writ petition, does not arise.

20. After allowing the Ex.B-15 order to become final, plaintiff again filed W.P. No. 1307 of 1967, which was admitted and dismissed on merits. Even assuming that Ex. B-15 order which is not an order passed on merits after considering the contentions raised does not operate as res judicata as Ex. B-16 order dismissing W.P. No. 1307 of 1967 filed by the plaintiff, was passed on merits, after considering the contentions raised by counsel for the plaintiff, it cannot be said that Ex. B-16 order in W.P. No. 1307 of 1967 does not operate as res judicata.

21. The trump card of the plaintiff in the plaint in this suit is the sale in favour of the third defendant being null and void for the reasons stated therein. Here it should be stated that the grounds mentioned for holding the sale in favour of the third defendant as null and void are (i) want of clear notice of 30 days, (ii) third defendant being a minor (iii) third defendant's guardian not depositing 1/4th bid amount immediately after the sale and (iv) not depositing the balance 3/4th amount in time. All the above four contentions are pure questions of fact, which have to be pleaded for giving an opportunity to other side to meet and answer them. Therefore, question whether the sale held, for the above reasons is null and void or not is a mixed question of fact and law, and is not a pure question of law. Though a decision on a pure question of law may not operate as res judicata, decision on a mixed question of fact and law does operate as res judicata in respect of pleas of fact not raised. Why she did not specifically raise all the above contentions in W.P. No. 1307 of 1967 filed by her for the very same relief is not explained by the plaintiff. As stated earlier, the father of the plaintiff also could have raised first three of the above four contentions, but for reasons only known to him he did not raise those contentions in W.P. No. 554 of 1962. So it is clear that the plaintiff is indulging in litigation against defendants 1 to 3 on instalment basis, reserving some pleas for future litigation, by taking a chance of instituting proceedings with some pleas, and thereafter instituting fresh proceedings for the same relief on another plea, which was available earlier. Rule of constructive res-judicata is the panacea for such type of litigation, as it laysdown that all the grounds of attack or defence have to be taken in the first proceeding itself, and question of reserving some pleas, that too important pleas, is not permitted and if all pleas, which might and ought to be taken are not taken, the rule of constructive res judicata, debars the party failing to take all the pleas available, taking those pleas in a subsequent proceeding on the same

cause of action, as grounds of attack or defence for seeking the same relief, which could not be obtained earlier by that party. Just like a doctor cannot breath life into corpse by administering a drug, which he ought to have administered when the patient was alive, a party to a proceeding cannot, after suffering an adverse order on merits, for his not raising all the pleas which he might and ought to have taken but not taken in that proceeding, cannot revive the litigation on those pleas kept in reserve by him earlier. Just like a plea of limitation, which is a mixed question of fact and law, if not taken in the earlier proceedings, would not be allowed to be taken in a subsequent proceeding on the ground of constructive res judicata as held in Sharadchandra Ganesh Muley Vs. State of Maharashtra and others, and State of Karnataka and Others Vs. B.S. Nanjundaiah, , the plea of the sale held in favour of the third defendant being null and void which is a mixed question of fact and law, having not been taken in the earlier writ petition, cannot be permitted to be taken in the suit filed after dismissal of the said writ petitions. Plaintiff who stated in Para 9 of her Ex. B-21 affidavit filed in support of W.P. No. 1307 of 1967

I have no other effective or alternative remedy except to invoke the extraordinary jurisdiction of this Hon"ble Court under Article 226 of the Constitution of India,

having not taken a plea that the sale is null and void for the reasons which were known and available to her, cannot set at naught Ex. B-16 order passed on merits, refusing her prayer to re-auction the plaint schedule property after setting aside the sale in favour of the third defendant, by filing a suit for the same relief on the ground that the sale in his favour is null and void.

22. The contentions relating to third defendant not depositing 3/4th balance in time in fact was raised in W.P. No. 1307 of 1967 and was not pressed as seen from Ex.B-16 order reading

It was not doubt mentioned in the affidavit in support of the writ petition that there should be a re-auction in view of the fact that the purchaser deposited the balance of purchase money nearly five years after the sale. This ground was not pressed for the obvious reason that the Collector could not call upon the purchaser to pay the balance in view of the stay order issued in the previous writ petition and that when the order of stay ceased to operate on the dismissal of the previous writ petition, the purchaser immediately deposited the amount on receipt of notice from the Collector.

23. Ex. B-16 order in W.P. No. 1307 of 1967 shows that the main contention raised relates to the sale being void for not observing the provisions in Section 47 of the Hyderabad Tenancy Act. In that order it is clearly mentioned

The learned Counsel for the petitioner (plaintiff) has not urged before us any other ground as vitiating the revenue sale.

So it is clear that some of the important pleas relating to the sale held in favour

of the third defendant not being valid, though raised in the affidavit filed in support of W.P. No. 1307 of 1967, were not pressed during the hearing of that writ petition.

24. As the intendment of the rule of res judicata is to prevent harassment of persons again and again on the same question in a different for a, after obtaining a decision on merits after full hearing in an earlier proceeding, and as no new decision can be obtained on different set of facts which are available even at the time of the earlier litigation, plaintiff cannot be permitted to harass the defendants in a different forum for the same relief which was refused to her in an earlier forum, because the apex Court in Rajendra Kumar Vs. Kalyan (D) by Lrs., observed.

The doctrine of res-judicata or constructive res-judicata predominantly is a principle of equity, good conscience and justice and it would neither be equitable nor fair not in accordance with the principles of justice that the issue concluded earlier ought to be permitted to be raised later in a different proceedings.

And in para 4 of State of Punjab Vs. Bua Das Kaushal, 4 it is observed

The questin whether the decision in a writ petition operates as res-judicata in a subsequent suit filed on the same cause of action has been settled by this Court in Union of India (UOI) Vs. Nanak Singh, . It has been observed that there is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res-judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality....

In para 11 of Daryao and Others Vs. The State of U.P. and Others, it is held:

...If a judgment has been pronounced by a Court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law....

In para 7 of Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, it is held

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res judicata, it shall not be adjudged again. Primarily it applies as between part litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceedings and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

and in para 20 of Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, it is held

So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11, C.P.C. provides that 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. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

(Underlying mine)

and in para 4 of *State of U.P. Vs. Nawab Hussain*, the apex Court held

But it may be that the same set of facts may give rise to two or more causes of action. If in such a case of person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and *Somervell L.J.*, has answered it as follows in *Greenhalgh v. Mallard*. (1947) 2 All ER 255

I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issue which the Court is actually asked to decide, but that it covers issues of facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding" to be started in respect of them.

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps" in raising the bar of *res judicata* by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive *res judicata* which in reality, is an aspect or amplification of the general principle.

So it cannot but be said that the suit is barred by *res judicata*:

25. All the above apart, plaintiff who came on record in W.P. No. 554 of 1962 as the legal representative of her father, can conduct the litigation on the grounds taken by her father. When the father of the plaintiff in W.P. No. 554 of 1962 failed

to take the plea that the sale is null and void for the reasons stated by the plaintiff in the plaint, and as plaintiff after she came on record as his legal representative also failed to take those pleas now taken, either in the W.P. No. 554 of 1962 or in W.P. No. 1307 of 1967 filed by her independently, and confined the grounds of attack only to one point and did not press all the other grounds raised, and suffered adverse finding on the plea specifically raised, cannot again invoke the jurisdiction of the civil Court to obtain the same relief which she could not get in the writ petitions, because in the "Shorter Constitution of India" by Durga Das Basu (13th Edition) at page 870 it is stated

Where there has been a decision on the merits, the rule of constructive res judicata will be applicable to bar a second application founded on the same cause of action *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, or as regards relief which were asked for but not granted in the previous proceeding under Article 226 *Mysore State Road Transport Corporation Vs. Babajan Conductor and Another*, ; or as regards a ground which ought to have been taken in the previous application, according to Explanation IV to Section 11, *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, .

and so I hold that the suit is clearly barred by the rule of res judicata and constructive res judicata also, though W.P. No. 6 of 1972 was not disposed of on merits. The point is answered accordingly.

26. In view of my finding on the points for consideration, the trial Court was in error in decreeing the suit and so the judgment and decree of the trial Court are liable to be and hence are set aside.

27. In the result, the appeal is allowed and the suit of the plaintiff is dismissed with costs throughout.