
(2012) 01 KAR CK 0346

In the Karnataka High Court

Case No : Regular Second Appeal No. 2189 of 2007

Jamia Masjid, Gubbi

APPELLANT

Vs

K.V. Rudrappa (Since Dead) by L.Rs and Others

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

Citation : (2012) 01 KAR CK 0346

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—This is plaintiffs second appeal questioning the correctness and legality of the judgment and decree passed by the III Additional District Judge, Tumkur in R.A. No. 125 of 2006, dated 2-7-2007, whereunder appeal filed by the plaintiff came to be dismissed and judgment and decree passed by the Principal Civil Judge (Senior Division) and CJM, Tumkur, in O.S. No. 149 of 1998, dated 3-2-2006 dismissing the suit came to be affirmed. This Court by order dated 6-9-2011 has admitted the above appeal to consider the following substantial questions of law:

(1) Whether the Trial Court was justified in dismissing the suit on the ground of res judicata by taking into consideration the earlier suits namely (1) O.S. No. 92 of 1950-51; (2) O.S. No. 748 of 1968 and (3) O.S. No. 100 of 1983?

(2) Whether the lower Appellate Court was correct in affirming the said judgment and decree?

2. Heard Sri C.S. Prasanna Kumar, Learned Counsel appearing for appellant, Sri P.D. Surana, Learned Counsel appearing for respondents 2 and 3, Sri Shanmugappa, Learned Counsel appearing for respondent 1/caveator, Sri A.V. Gangadharappa, Learned Counsel appearing for respondents 6, 8, 10 to 12. R4 and R5 were reported to be dead and their L.Rs have been brought on record as R6, R7, R8, R9, R10, R11 and R12 and R6(b) is also reported to be dead.

3. The suit in question namely O.S. No. 149 of 1998 (Old No. 96 of 1984 renumbered as O.S. No. 162 of 1989) was filed by appellant herein seeking relief of declaration to declare that State Wakf Board is the owner in possession of the suit property which is bearing Survey No. 2, Gubbi, Kasaba Hobli, measuring 2 acres and 4 guntas as described in the plaint schedule and for further relief of permanent injunction to restrain the defendants from interfering with plaintiff's possession and enjoyment of suit schedule property and said suit came to be filed by the Jamia Masjid, Gubbi represented by its President Sri Janab Hussain Khan. On service of suit summons defendants 2, 3 and 4 have appeared and filed the written statement denying the plaint averments as traversed in the said written statement. Defendant 9 has filed separate written statement. On the basis of the pleadings of the parties, Trial Court has framed in all 9 issues and by order dated 16-6-2005 which was based on a memo filed by the defendants, it was ordered that issue Nos. 5 and 6 would be treated as preliminary issues. Accordingly, Issue Nos. 5 and 6 was taken up for consideration by the Trial Court. The said two issues taken up by the Trial Court as preliminary issues are:

(5) Whether the defendants 1 to 4 prove that the suit is hit by principles of respondent?

(6) Whether the defendants 1 to 4 prove that the suit is barred by limitation?

4. Trial Court after considering the arguments advanced by respective learned Advocates and by order dated 3-2-2006 answered issue No. 5 in the affirmative and issue No. 6 in the negative and consequently dismissed the suit.

5. Aggrieved by order of dismissal of the suit by Trial Court, plaintiff preferred an appeal in R.A. No. 125 of 2006 before III Additional District Judge, Tumkur. After considering the arguments of learned Advocates lower Appellate Court by judgment dated 2-7-2007 dismissed the appeal and affirmed the order of Trial Court.

6. Aggrieved by the said order passed by the lower Appellate Court, plaintiff preferred appeal to this Court in RSA No. 2189 of 2007 (present appeal). After considering the arguments advanced by the learned Advocates appearing for the parties this Court by order dated 2-7-2008 allowed the appeal, set aside the judgment of the Court below and remanded the matter back to the Trial Court for disposal in accordance with law. Aggrieved by the said order of remand, made by this Court defendants 2, 3 and 4 as the legal heirs of deceased 1st defendant filed SLP in Cvl. No. 26047 of 2008 before the Hon''ble Apex Court. Leave came to be granted and it was converted into Civil Appeal No. 7240 of 2010. Defendants 3 and 4 had filed I.A. No. 1 of 2008 in this appeal (RSA No. 2189 of 2007) seeking recall of the judgment and decree passed on 2-7-2008 on the ground that they were not heard. This Court by order dated 25-9-2008 dismissed the said application. Aggrieved by the same, SLP was filed in SLP No. 29786 of 2008 and leave was granted and it was converted into C.A. No. 7241 of 2010. These two appeals came to be considered by the Hon''ble Apex Court and by

order dated 30-8-2010 both the civil appeals were allowed by setting aside the judgment and order passed by this Court on 2-7-2008 and 25-9-2008 respectively and remanded the matter back to this Court for rehearing. At the time of remanding the matter, Hon''ble Apex Court has observed that when two judgments of concurrent findings are set aside notice to all the respondents should have been issued and as such, Hon''ble Apex Court remanded the matter back to this Court for consideration. As such present appeal is before this Court for reconsideration/rehearing. Now, all the parties to this appeal are represented by respective learned Advocates who have addressed arguments in extenso and elaborately and it is also agreed by all the learned Advocates that all the parties are duly represented.

7. Sri Prasanna Kumar, Learned Counsel appearing for the plaintiff would contend that suit schedule property is the property of Jamia Masjid and declaration and possession was sought for by the plaintiff is not hit by principles of res judicata. Assailing the order of Trial Court as affirmed by the lower Appellate Court, he would contend that O.S. No. 92 of 1950-51 was filed under Section 92 of the Civil Procedure Code, 1908 by devotees of plaintiff-Jamia Masjid, Gubbi in a representative capacity and in the said suit what has been adjudicated and decided is as envisaged under clauses (a) to (h) of Section 92(1) and the said suit was filed for framing a scheme and even otherwise a liberty has been given in the said suit itself to the trustees to file a suit for appropriate relief after new trustees are appointed and none of the observations made therein would constitute res judicata and as such present suit filed by Jamia Masjid seeking declaration of title cannot be held to be barred by res judicata. He would contend that what is to be examined is as to whether the findings in O.S. No. 92 of 1950-51 which came to be affirmed in R.A. No. 510 of 1954 and compromise recorded in O.S. No. 768 of 1998 and the withdrawal thereof and judgment and decree passed in O.S. No. 199 of 1983 is the same relief now claimed in the present suit and if so, whether it would operate as res judicata or not? He would contend that O.S. No. 92 of 1950-51 was filed for settling a scheme for the management of Jamia Masjid as Khazi Abdul Khuddus was not managing the property of Masjid effectively. He would contend that in the said suit right of the parties are not adjudicated; Parties in the said suit and the parties in the present suit are different; cause of action in the said suit and the present suit are different; Courts adjudicating the dispute in two suits are different namely the suit which came to be adjudicated in O.S. No. 92 of 1950-51 was by the District Judge exercising power under Section 92 and the present suit is adjudicated by the Court of original jurisdiction viz., Principal Civil Judge (Senior Division) and CJM, and they are two different Courts and as such principles of res judicata is not applicable.

7.1. He would elaborate his submissions by contending that prayer in earlier three suits were not for declaration at all; Section 92 of CPC does not empower the said Court to adjudicate regarding title and ownership since it is a Court of limited jurisdiction. He would draw the attention of the commentary by Mulla on

CPC in 14th Edition, para 28 at page 547 which reads as under:

28. Suits to enforce private rights.--The suit contemplated by this section is a representative suit (See note above "Representative suit and res judicata"). Suits brought not to vindicate or establish the right of the public in respect of a public trust, but to remedy an infringement of an individual right or to vindicate a private right, do not fall within this Section (m). The mere fact that a suit claims relief specified in the section does not bring the suit under it. It must be brought by individuals as representatives of the public for vindication of public rights. In deciding whether a suit falls within this section, the Courts must have regard to the capacity in which the plaintiffs are suing and the purpose for which it is brought. Where the right to the office of a trustee is asserted or denied the suit is outside the section (n). Such suits are instituted in the ordinary manner and not under this section. 7.2. He would further submit that Jamia Masjid is not a party in O.S. No. 92 of 1950-51 and there is no conclusive finding given that it is the property of Khazi Abdul Khuddus and what has been decided in the said suit is regarding settling a scheme in respect of Masjid properties and as such he would contend that it is not a conclusive decision on merits of the claim over the title to suit schedule property. He would submit that in order to invoke the doctrine of res judicata the ingredients referred to therein are required to be satisfied in full, namely, the issue in both the suits should have been same and adjudicated between the same parties and both the Courts should be competent to adjudicate the same and admittedly the Court which tried the suit O.S. No. 92 of 1950-51 did not have the competence to adjudicate the title relating to the property in question since it was a scheme suit. He would also contend that parties in these two suits namely O.S. No. 92 of 1950-51 and the present suit O.S. No. 149 of 1998 are not same. In the earlier suit i.e., O.S. No. 92 of 1950-51 it was filed by the general public and present suit is filed by the Jamia Masjid itself. The scope and power of suits to be tried under Section 92 of CPC and the power of the Court to try suits of ordinary original jurisdiction under Section 92 of CPC are different and operate in different spheres, and as such, he contends that only when subsequent suit is also a scheme suit then it would operate as res judicata and not otherwise.

7.3. He would contend that defendants are likely to take protection under Explanation VIII of Section 11 of CPC and contend that suit is barred by res judicata and said provision would not come to the aid of defendants since the issue framed in the present suit namely O.S. No. 149 of 1998 is not the same issue which was under consideration and adjudication in O.S. No. 92 of 1950-51. He would further elaborate his submissions by contending that even otherwise the present suit is not hit by res judicata since cause of action pleaded in both the suits are different. He would contend that after the adjudication of the suit in O.S. No. 92 of 1950-51 Mr. Khazi Abdul Khuddus has given the suit schedule property to the Board in Wakf by way of declaration in the year 1963 and properties managed by him has been published in Gazette Notification dated 10-7-1965 and same is not challenged would go to show the title has vested with

the Wakf Board.

7.4. He would submit that O.S. No. 748 of 1968 which was filed by the present plaintiff came to be compromised and accordingly it was reported by filing a petition under Order 23, Rule 1 and even if it operates as a bar under Order 23, Rule 1(4)(b) said plea cannot be construed as res judicata since issue has to be framed, adjudicated and answered separately and same cannot be a ground to dismiss the suit on the ground of res judicata at the threshold. He would submit that there is a marked difference between Section 11 and Order 2, Rule 2 of the Code of Civil Procedure. If Order 2, Rule 2 is attracted as contended then an issue has to be framed, adjudicated and answered independently and there cannot be overlapping of these two provisions. He would contend abandonment, relinquishment or withdrawal are all acts of the parties which can be explained during trial and only after a full fledged trial a decision can be arrived at and not otherwise. He contends decisions rendered in O.S. No. 92 of 50-51 or O.S. No. 748 of 1968 would not disclose that there is adjudication with regard to the right of Khazi Abdul Khuddus as the owner of the property is question or his relinquishment of the claim and as such principles of res judicata is not applicable. He would submit that O.S. No. 100 of 1983 even if it were to be held that provision under Order 2, Rule 2 of the Civil Procedure Code is attracted suit in question cannot be dismissed by extending the said principle to res judicata. He would summarise his contentions as under:

(1) Suit O.S. No. 92 of 1950-51 is a suit filed, adjudicated and decided under Section 92 of the CPC by a Court of limited jurisdiction wherein declaration of the property belonging to Abdul Kuddus was not adjudicated.

(2) Parties in O.S. No. 92 of 1950-51 and parties in present suit i.e., O.S. No. 149 of 1998 are different.

(3) Cause of action in O.S. No. 92 of 1950-51 and the cause of action in the present suit i.e., O.S. No. 149 of 1998 are different and distinct.

(4) The Court which has adjudicated and decided O.S. No. 92 of 1950-51 has no jurisdiction to grant declaration and its power to grant the prayer is circumscribed by the provisions of clauses (a) to (h) of CPC.

(5) Any finding given in O.S. No. 92 of 1950-51 would not operate as res judicata in O.S. No. 149 of 1998.

7.5. In support of his submission, he has relied upon the following judgments:

(1) Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, ;

(2) Rambaran Prosad Vs. Ram Mohit Hazra and Others, ;

(3) Swami Paramatmanand Saraswati and Another Vs. Ramji Tripathi and Another, ;

(4) *Abdur Rahim and Others v Syed Abu Mahomed Barkat Ali Shah and Others* AIR 1928 PC 16;

(5) *Alka Gupta Vs. Narender Kumar Gupta*, ;

(6) *Haldhar Prasad Singh Vs. Giridih Municipality and Others*, ;

(7) *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, ;

(8) *Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Others Vs. Vithu Hira Mahar (Dead) by LRs. and Others*, ;

(9) *Gram Panchayat of Village Naulakha Vs. Ujagar Singh and Others*, ;

(10) *N. Anandan Vs. Ayyanna Gounder and others*, ;

(11) *Smt. P. Vasanthi Vs. Smt. Vimala Martin and Another*, .

8. Per contra, Sri P.D. Surana, Learned Counsel appearing on behalf of respondents 2 and 3 would support the orders of the Court below and has brought to the notice of this Court all the earlier proceedings and contends that there is no infirmity in the orders of the Courts below and as such, he prays for answering the substantial questions of law formulated herein above against the appellants and seeks for dismissal of the appeal. He would submit that Jamia Masjid which is the plaintiff in the instant suit was virtually the plaintiff in all other earlier suits and request the Court to consider the prayer sought for in the earlier suit which was for declaring the suit schedule property as the property of Jamia Masjid and being in its possession as also paragraphs 2 and 3 of the plaint (O.S. No. 96 of 1984 renumbered as 149 of 1998 and later renumbered as 162 of 1989).

8.1. He would submit that Jamia Masjid by itself is not a legal entity and as such the declaration that has been sought for to declare the suit schedule property to be the property of the Wakf Board. He would further contend that under Section 92(1)(c) and 92(1)(cc) of Code of Civil Procedure, power is available to the Court to order for vesting a property in a trust or directing it to be delivered to any other person who is entitled for such possession and Court can go into the question of title to deliver or vest the property to his possession. As such, he contends that District Judge has all the trappings of the Civil Court while adjudicating a scheme suit.

8.2. He would draw the attention of the Court to paragraphs 7 and 10 of the judgment in O.S. No. 92 of 1950-51 to contend that alleged liberty given to the "trustees to take such steps as they may deem fit" would relate to the terms of the grant order and not otherwise and contends that said inam was a khazi inam, even according to the Trial Court liberty that has been granted would not mean and include to file a fresh suit and if at all the plaintiff is aggrieved by said judgment, it has to seek review of said judgment since said judgment and decree has been accepted by it without being challenged.

8.3. He would further elaborate his submission to contend that in the plaint nowhere it is stated that Kazi Abdul Khuddus dedicated the property to Jamia Masjid as Mosque property. He would submit that defendants have purchased the suit schedule property from the legal representatives of Kazi Abdul Khuddus under three sale deeds dated 20-4-1983 and at this point of time, neither the plaintiff nor the legal heirs of Kazi Abdul Khuddus can turn around and contend that judgment and decree passed in O.S. No. 92 of 1950-51 is not binding on them. He would further submit that the suit O.S. No. 92 of 1950-51 was filed by two persons who claimed to be interested in the affairs of the Mosque representing the community at large wherein the present plaintiff was defendant and the present suit is filed by the very same Jamia Masjid through its President and as such, plaintiff cannot reopen the issue which has been adjudicated and decided which was relating to the ownership/title and said issue having been settled, it cannot be reopened as it would be barred by res judicata.

8.4. He would further contend that one more suit O.S. No. 748 of 1968 was filed by the Mysore State Board of Wakfs predecessor in title of present plaintiff seeking declaration to declare that suit property constitute Wakf, for possession and for past and future mesne profits and contends that said plaint had been presented by its Secretary and Kazi Abdul Khuddus had been arrayed as 1st defendant in the said suit, which ended in a compromise whereunder prayer for declaration has been abandoned and as such said compromise also operates as res judicata and Wakf Board cannot be now permitted to once again seek declaration that it is the owner of the suit schedule property by filing the present suit through the present plaintiff. He would contend that having regard to the provision of law contained in Order 23, Rule 1(4)(b), appellant is precluded from filing a fresh suit. He would also contend that under Order 23, Rule 3-A of Code of Civil Procedure no suit will lie to set aside a decree on the ground that compromise on which decree is passed is not lawful.

8.5. He would contend that subsequently, Karnataka Board of Wakfs filed one more suit O.S. No. 100 of 1983 against Abdul Masoob S/o. Abdul Khuddus and defendants 1 to 4 herein seeking relief of perpetual injunction which was withdrawn on 22-11-1984 and as such, two suits cannot be maintained for same cause of action and it is hit by Order 2, Rule 2 of Civil Procedure Code. As such, he contends that conclusion arrived at by the Courts below that suit of the plaintiff is barred by res judicata be sustained and appeal be dismissed.

8.6. He would also contend that plaintiff in the present suit seeks for declaration not in itself but in favour of Wakf Board. He would draw the attention of this Court to the records of the Trial Court to contend that notice was issued on Wakf Board also and there was a representation through their Advocate and later on, an application for impleading I.A. No. VII was also filed before the Trial Court on 26-8-2003, which came to be dismissed by order dated 15-9-2003 and same was not challenged and as such, Jamia Masjid cannot now seek for any relief in favour of Wakf Board in the present suit. He would contend that foundation for

all the subsequent suits is based on 1990 suit and at no point of time, Wakf Board has sought to get itself impleaded. He would submit that whatever the reliefs that parties wanted has been granted and it has been accepted in O.S. No. 92 of 1950-51 and also in O.S. No. 748 of 1968. He would submit that a consent decree remains valid unless set aside and would be binding on all the parties and as such, consent decree drawn in O.S. No. 100 of 1993 would also operate as res judicata. He would submit that filing of the suit O.S. No. 100 of 1983 itself was suppressed in the present suit.

8.7. Replying to the arguments advanced by Learned Counsel appearing for plaintiff he would submit that judgment in Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others, is by a larger Bench and as such, this will hold the field and the judgments relied upon by the appellant/plaintiff has to be ignored. He would submit in Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, , which is relied upon by the Learned Counsel appearing for appellant, the issue of res judicata was not under consideration and matter went to the High Court on the issue of cross-examination of witness and there is only a passing reference made regarding res judicata and as such said judgment is inapplicable to the facts of the case.

8.8. In support of his submission, he has relied upon the following judgments:

- (1) R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others, ;
- (2) Singhai Lal Chand Jain (dead) Vs. Rashtriya Swayam Sewak Sangh, Panna and Others, ;
- (3) Mohammad Ghouse Sahib and Others Vs. Muhammad Kuthubudin Sahib and Others, ;
- (4) Shankar Sitaram Sontakke's case;
- (5) Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa, ;
- (6) Byram Pestonji Gariwala Vs. Union Bank of India and others, ;
- (7) Sulochana Amma Vs. Narayanan Nair, ;
- (8) Tulsan Vs. Pyare Lal and Others, ;
- (9) Gokul Chand Vs. Jagdish Chandra and Another, ;
- (10) Gurdev Kaur and Another Vs. Mehar Singh and Others, ;
- (11) Sri Narain Singh and Others Vs. Baleshwar Singh and Others, ;
- (12) Indira Bai Patel Vs. B.A. Patel, ;
- (13) Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, ;

9. Sri Shanmugappa, Learned Counsel appearing for respondent 1 brings to the

notice of this Court the order passed by the Hon'ble Apex Court whereunder the judgment dated 27-9-2008 and order dated 25-9-2008 of this Court came to be set aside and matter came to be remanded for rehearing and brings to the notice of this Court that prayer made in the present appeal is only seeking a remand. He would submit that legal heirs of 1st respondent's vendor i.e., respondent 4 (since deceased), 5th defendant (5th respondent herein since deceased), and defendants 7 to 9 (i.e., respondents 10 to 12) had filed the written statement before the Trial Court at the first instance on 17-10-1985 raising the issue of res judicata vide paras 11 and 14 of the said written statement and as such, respondents 4, 5, 7-A to 7-D, 8 to 12 who are legal heirs of Kazi Abdul Khuddus cannot now contend that present suit is not barred by res judicata. He would submit that against judgment and decree passed in O.S. No. 92 of 1950-51, no appeal or cross-objection was filed by the legal heirs of Kazi Abdul Khuddus and as such Explanations IV, V and VI of Section 11 is attracted and contends that when a decree is passed refusing the prayer sought for than Explanation V is attracted. He would elaborate his contentions to state that in O.S. No. 92 of 1950-51, the Board has accepted the ownership of Kazi Abdul Khuddus and as such, it could not have filed a subsequent suit and even otherwise the subsequent suit O.S. No. 100 of 1983 was got dismissed on 22-11-1984 and as such present suit is barred by res judicata. He would submit that in the suit O.S. No. 100 of 1983 written statement had been filed by defendants 2 to 5 contending the said suit was barred by res judicata and the deceased Kazi Abdul Khuddus had also filed the written statement contending that the plaintiff-Board cannot set up title once again in itself which goes to show that plea of res judicata had already been raised and as such defendants in the present suit cannot be permitted to raise the plea that principles of res judicata is inapplicable. He would also contend that records of the Trial Court would clearly go to show that suit schedule property was in the ownership of Abdul Khuddus and it is shown as "Pitrarjitha" (Ancestors). He would also submit that present suit is barred by constructive res judicata. In support of his submissions he relies upon the following judgments:

- (1) Rajendra Kumar Vs. Kalyan (D) by Lrs.,
- (2) Bhima Rama Jadhav v Abdul Rahid 1967(2) Mys. L.J. 509 (DB): AIR 1968 Mys. 184 (DB);
- (3) State of U.P. Vs. Nawab Hussain, ;
- (4) Byram Pestonji Gariwala's case;
- (5) R. Murali and Others Vs. Kanyaka P. Devasthanam and Charities and Others, ;
- (6) Commissioner of Endowments and Others Vs. Vittal Rao and Others, ;
- (7) Aanaimuthu Thevar (Dead) by LRs. Vs. Alagammal and Others, ;
- (8) Kaluta (Deceased) through his son and Others Vs. Greater Ashoka Land and

Development Company Pvt. Ltd., ;

(9) Smt. Marembi v Jiyauddin Safisdab Khatib and Others ILR 1999 Kar. 1264;

(10) Dhananjay Sharma Vs. State of Haryana and Others, .

10. In reply Sri C.S. Prasanna Kumar, Learned Counsel for plaintiff would contend that while considering the issue of res judicata, no other issue either Order 23, Rule 1(4)(b) or Order 2, Rule 2 can be gone into since same is alien to Section 11 of the Code of Civil Procedure. He would submit that three suits referred to by the defendants has not culminated in final adjudication vis-a-vis, the right, title and interest of the Wakf Board with regard to suit schedule property and a suit which has been withdrawn would not constitute res judicata. Only in the event of an issue is framed, adjudicated and decided then only it would constitute as res judicata and not otherwise. Compromise recorded can be termed as a compromise in part and it does not declare anyone to be the owner and in the said decree there is no express refusal of a decree in favour of Kazi Abdul Khuddus and as such Explanation V is not all applicable. On these grounds he seeks for answering the substantial questions of law in favour of the appellant.

11. Having heard the learned Advocates appearing for the parties and on perusal of the lower Court records, and judgments cited at the bar I proceed to answer the substantial question of law formulated in the following manner.

Brief Background of the Case:

12. The suit in question i.e., O.S. No. 149 of 1998 has been filed by "The Jamia Masjid" initially on the file of the Civil Judge, Tumkur, which came to be numbered as O.S. No. 96 of 1984. Thereafter, it was transferred to the Court of Munsiff and JMFC, Gubbi and it was numbered as O.S. No. 162 of 1989. Subsequently, it was transferred to the Court of Civil Judge (Senior Division), Tumkur and was renumbered as O.S. No. 149 of 1998 i.e., present number. In the suit, prayer that has been sought for is as under:

(a) The State Wakf Board is the owner with possession of the suit item as stated in the body of the plaint and thus the plaintiff is the owner with possession as representative of the wakf Board;

(aa) Direct the defendants to deliver vacant possession of the plaint schedule property to the plaintiff;

(aaa) For the future mesne profits by directing an enquiry as to such mesne profits under Order 20, Rule 12 of CPC;

(b) Restrain the defendants from interfering with the plaintiffs peaceful possession and enjoyment of the suit item by means of permanent injunction; and

(c) For costs and such other relief as the Hon''ble Court deems fit to grant to the plaintiff under the circumstances of the case.

The suit Schedule property as described in the plaint is as follows.-

SCHEDULE

Sy. No. 2 of Gubbi Taluk, Kasaba Hobli, measuring 2 acres and 4 guntas now converted for non-agricultural purposes with a cinema building in the suit land bounded on:

East by

the land of late Papanna and sons

West by

the land of B.K. Abdul Aziz

North by

B.H. Road and

South by

Madanakatte Waste-Weir Halla, masonry drain.

13. In the said suit i.e., O.S. No. 149 of 1998 defendants 1 to 4 filed the written statement on 19-11-1984 and defendants 5 to 9 i.e., wife and children of late Khaji Abdul Khuddus had filed their written statement on 17-10-1985. These defendants have specifically contended that present suit is barred by principles of res judicata in view of the judgment and decree passed in O.S. No. 92 of 1950-51 confirmed in RA No. 510 of 1954 and judgment and decree passed in O.S. No. 748 of 1968, and sought for dismissal of the present suit on the said ground. Defendants 1 to 3 in their additional written statement filed on 26-6-1995 reiterated their earlier contention and sought for dismissal of suit on the ground of res judicata.

14. Defendants 2, 3 and 4 filed written statement on the suit being transferred to Civil Judge (Senior Division), whereunder the plea with regard to res judicata was raised in paragraphs 6 and 22 of their written statement. It reads as under:

6. It is submitted that the suit schedule property was the subject-matter of the O.S. No. 92 of 1950-51 filed by the members of the mosque known as "Jamayat Masjid" in which the vendor of these defendants was also a party. In the said suit, it was declared that the suit schedule property is the personal property of Kazi Abdul Khuddus and since some of the other properties were also included in the said suit, late Kazi Abdul Khuddus had filed an appeal before the Hon"ble High Court of Karnataka in R.A. No. 510 of 1954 challenging the portion of the order passed by the District Judge, in O.S. No. 92 of 1950-51. The Hon"ble High Court after hearing the arguments, passed an order on 14th August, 1959, declaring that the suit schedule property is the personal property of Sri Kazi Abdul Khuddus. Since the subject-matter of the suit and the parties are one and the same and the same is already decided by the Hon"ble High Court, the suit of

the plaintiff is hit by the principles of respondent judicata and hence, the above suit is not maintainable and it is liable to be dismissed with exemplary costs as required under Section 35A of the CPC.

22. It is true that the Mysore Board of Wakf has filed a suit in O.S. No. 748 of 1968 against Kazi Abdul Khuddus and H.S. Gururaj Rao, for a declaration and possession and also for mesne profits. The said suit was ended in a compromise between Kazi Abdul Khuddus and H.S. Gururaj Rao and hence, the Board of Wakfs gave up its claim in respect of the suit schedule property and as such, the suit now filed is hit by the principles of res judicata and liable to be dismissed. The further averments x x x are all hereby denied as false and the plaintiff is put to strict proof thereof.

(Emphasis supplied)

15. However, defendant 9 i.e., Sri Khazi Abu Nayeem, who had filed the written statement along with other defendants on 17-10-1985, earlier and which has been referred to supra filed one more written statement on 3-11-2003 by completely taking a different defence from the one earlier taken and supported the claim of the plaintiff and also sought for possession of the suit schedule property from the plaintiff on his behalf and also on behalf of defendants 5 to 8.

16. On the basis of the pleadings of the parties, Trial Court has framed nine issues as extracted herein below:

- (1) Whether the plaintiff proves that suit property is wakf property?
- (2) Whether the defendants 1 to 4 prove that suit property was the personal property of khazi Abdul Khuddus?
- (3) Whether the plaintiff proves his lawful possession over the suit property?
- (4) Whether the plaintiff proves that interference by the defendants?
- (5) Whether the defendants 1 to 4 prove that the suit is hit by the principles of res judicata?
- (6) Whether the defendants 1 to 4 prove that suit is barred by limitation?
- (7) Whether the defendants 1 to 4 prove that Court fee paid is not proper?
- (8) Whether the plaintiff is entitled to declaration and injunction?
- (9) Alternatively whether the plaintiff is entitled for possession?

Issue Nos. 5 and 6 was ordered to be treated as preliminary issues and accordingly same was taken up for consideration by the Trial Court. After considering the arguments advanced by the respective learned Advocates appearing for parties and also considering the pleadings available on record as also the provision of law namely Section 11 of Civil Procedure Code Trial Court has held that ownership and title regarding suit schedule property was the

subject-matter of consideration in O.S. No. 92 of 1950-51 as also the subject-matter of adjudication in R.A. No. 510 of 1954 and it was held that a finding has already been given in these judgments by holding that suit schedule property does not belong to the Masjid and it belongs to Sri Khazi Abdul Khuddus and as such, issue regarding ownership of suit schedule property has been finally settled by this Court in R.A. No. 510 of 1954 and consequently answered issue No. 5 in the affirmative and dismissed the suit. The Trial Court also considered as to whether the judgment passed in O.S. No. 92 of 1950-51 as affirmed in R.A. No. 510 of 1954 which was a scheme suit where the present defendants were not a party (legal heirs of Khazi Abdul Khuddus) would be binding on the plaintiff or not and held the same would be binding on the present plaintiff in view of Explanation IV to Section 11 to Code of Civil Procedure. Trial Court also noticed that suit O.S. No. 748 of 1968 had been filed against Khazi Abdul Khuddus by Wakf Board in whose favour plaintiff is seeking declaration and in the said suit plaintiff had relinquished its title over the suit schedule property. It also found that one more suit O.S. No. 100 of 1983 had been filed by the present plaintiff seeking perpetual injunction against Khazi Abdul Khuddus and said suit also came to be dismissed on the basis of a memo filed by the plaintiffs Counsel and as such, it held that present suit was barred by res judicata.

17. The Lower Appellate Court on re-appreciation of the pleadings and after considering the rival contentions held that even in a representative suit filed under Section 92 of the Code of Civil Procedure it would be binding on all those who are interested in the suit and accordingly held that earlier judgment rendered by the District Court in O.S. No. 92 of 1950-51 would be binding on the present plaintiff and it would operate as res judicata. Contention raised by the plaintiffs that ownership was not directly and substantially in issue in the earlier suit between the same parties was also negated by the lower Appellate Court and findings recorded by the Trial Court came to be affirmed and appeal came to be dismissed.

18. In order to adjudicate and answer the substantial questions of law formulated hereinabove, it would be necessary to extract Section 11 of Code of Civil Procedure which reads as under:

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

Explanation I.--The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.--For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the

decision of such Court.

Explanation III.--The matter 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 a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

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

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

19. In the book "Res judicata" (Second Edition) by Spencer-Bower and Turner it has been held as under:

1. In English Jurisprudence as res judicata, that is to say a final judicial decision pronounced by a judicial Tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies. The effect of such a decision is two-fold.

Parties estopped from averring to the contrary:

2. In the first place, the judicial decision estops or precludes any party to the litigation from disputing, against any other party thereto, in any later litigation, the correctness of the earlier decision in law and fact. The same issue cannot be raised again between them, and this principle extends to all matters of law and fact which the judgment, decree, or order necessarily established as the legal foundation or justification of the conclusion reached by the Court.

Transit in rem judicatam:

3. In the second place, by virtue of the decision the right or cause of action set up in the suit is extinguished, merging in the judgment which is pronounced. Transit in rem judicatam. The result is that no further claim may be made upon the same cause of action in any subsequent proceedings between the same parties or their privies.

20. Any party who is desirous of setting up plea of res judicata by way of estoppel, whether he is relying on such plea of res judicata as a bar to his opponent's claim, or as the foundation of his own, and who has taken the preliminary steps required in order to qualify him for that purpose, must establish all the constituent elements of an estoppel of this description, as already indicated in the general proposition that is to say, the burden is on him of establishing (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;
- (iii) that the judicial Tribunal pronouncing 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 estoppel is raised, or their privies, or that the decision was conclusive in rem.

21. The principle of res judicata is founded on public policy to prevent multifariousness of legal proceedings between the same parties. This doctrine is based on two factors namely:-

- (i) Judicial decisions has to reach finality and end in conclusiveness resulting in termination of disputes; and
- (ii) A citizen, an individual or a litigant should not be driven to undergo multiplication of litigation.

22. Thus, it would not only sub-serve the cause of the justice but would also prevent a litigant from reopening the matters which has reached finality. Keeping in mind the above definition, let me now refer to some of the judgments of Hon''ble Apex Court on this issue:

1. Shankar Sitaram Sontakke''s case:

9. The obvious effect of this finding is that the plaintiff is barred by the principle of "res judicata" from reagitating the question in the present suit. It is well-settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of "res judicata. 2. Sulochana Amma's case:

The Law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like insolvency Court, probate Court, land acquisition Court, Rent Controller, Revenue Tribunal, etc. No doubt main body of Section 11 was not amended, yet the expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a Competent Court or Tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a Competent Court to try the subsequent suit. 3. Gulam Abbas case:

"Now the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance, the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation". Reference in this connection was made by the Court to the famous decision in the leading *Duchess of Kingston's case* 1776 (2 Smith's Lead Cas, 13th Edition, 644-645). Halsbury's Laws of England (3rd Edition, Volume 15, para 357 at p. 185) and Corpus juris (Volume 34, p. 743). In *Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat)*, , the question was whether after the dismissal of a writ petition on merits after full contest by the High Court under Article 226 of the Constitution a subsequent suit raising the same plea claiming discharge from the liability on the same ground was entertainable or not and this Court held that on general principles of res judicata the decision of the High Court on the writ petition operated as res judicata barring the subsequent suit between the same parties with respect to the same matter. On a review of entire case-law on the subject, including Privy Council decisions, this Court (at page 574 of SCR): *Gulabchand Chhotalal's case*, observed thus:

As a result of the above discussion, we are of opinion that the provisions of Section 11, CPC are not exhaustive with respect to an earlier decision operating

as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial". 4. Commissioner of Endowments case:

"28. In support of his submission, the Learned Counsel for respondent 1 contended that as long as an issue arises substantially in a litigation irrespective of the fact whether or not a formal issue has been framed or a formal relief has been claimed, a finding on the said issue would operate as res judicata, strongly relied on the decision of this Court in Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, . Paras 18 and 19 of the said judgment read:

"18. In India, Mulla has referred to similar tests (Mulla, 15th Edition, p. 104). The learned Author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue Isher Singh Vs. Sarwan Singh and Others, and Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, . We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105):

It is not to be, assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision". 5. Alka Gupta"s case:

"9. This Court in *Gurbux Singh Vs. Bhooralal*, , held:

In order that a plea of bar under Order 2, Rule 2(3) of Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. Unless the defendant pleads the bar under Order 2, Rule 2 of the Code and an issue is framed focussing the parties on that bar to the suit, obviously the Court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2, Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2, Rule 2 of the Code. But the High Court (both the Trial Bench and Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2, Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2, Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2, Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under Order 2, Rule 2 of the Code was not attracted.

14. Res judicata means "a thing adjudicated" that is an issue that is finally settled by judicial decision. The Code deals with res judicata in Section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

11. Res judicata.--No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they are any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

- (i) The matter must be directly and substantially in issue in the former suit and in the latter suit.
- (ii) The prior suit should be between the same parties or persons claiming under them.
- (iii) Parties should have litigated under the same title in the earlier suit.
- (iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.
- (v) The Court trying the former suit must have been competent to try particular issue in question.

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression "former suit" refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a Court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such Court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a 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. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2, Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from *Greenhalgh v Mallard*, 1947(2) All ER 257, thus:

".... it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it cover issues or facts which are so clearly part of the subject-matter of the litigation and so

clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

(Emphasis supplied)

In *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, thus:

an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata.

IV. A suit cannot be dismissed without trial merely because the Court feels dissatisfied with the conduct of the plaintiff.

16. Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration with reference to a proceeding in a Court of law. The entire object of the Code is to ensure that an adjudication is conducted by a Court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the Court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

23. The prayer sought for in three suits namely O.S. Nos. 92 of 1950-51, 748 of 1968 and 100 of 1983 are as under:

O.S. No. 92 of 1950-51

O.S. No. 748 of 1968

O.S. No. 100 of 1983

(a) Settling a scheme for the proper management of the Jamia Masjid, Gubbi Town and management of its properties;

(a) For declaring that the suit property constitute Wakf;

(b) For possession of the suit property;

(a) For a permanent injunction restraining the defendants, their agents, servants or anybody on their behalf from interfering with the plaintiffs peaceful possession and enjoyment of the schedule land and from alienating the scheduled land to any person either by sale, mortgage etc., and;

(b) Directing the defendant to render proper accounts in respect of income and other funds that he has received for the institution and from its properties; and

(c) For past and future mesne profits to be enquired under Order 20, Rule 12 of the Code of Civil Procedure;

(d) Granting costs of the suit; and

(c) Granting such further or other reliefs as the Court may deem fit to grant.

(e) For such other reliefs as the Hon"ble Court deems fit in the circumstances of the case.

(b) For costs and such other reliefs as the Hon"ble Court deems fit to grant in the interest of justice.

It is to be noted that in two suits above referred to i.e., O.S. Nos. 92 of 1950-51 and 748 of 1968 Khazi Abdul Khuddus has been arrayed as the first defendant and in O.S. No. 100 of 1983 his son has been arrayed as 1st defendant. O.S. No. 92 of 1950-51 has been filed for settling scheme by the general public in respect of Jamia Masjid and its properties. O.S. No. 748 of 1968 has been filed by the Mysore State Board of Wakf through its Secretary and also through the Chairman of the District Wakf Committee for relief of permanent injunction in respect of same property. O.S. No. 100 of 1983 has been filed by the Karnataka Board of Wakfs. The property involved in all the three suits is same i.e., Survey No. 2 of Gubbi, Kasaba measuring 2 acres 4 guntas which is also the property described as plaint schedule in O.S. No. 149 of 1998. It is to be noticed that in O.S. No. 92 of 1950-51 and O.S. No. 748 of 1968, Khazi Abdul Khuddus has filed the written statement contending that it is his individual property and Masjid has no right, title or interest over the same. In O.S. No. 92 of 1950-51 for settling the scheme in respect of Masjid this issue has also come up for consideration and it has been adjudicated holding that suit property is not the property belonging to Masjid and it is the individual property belonging to Khazi Abdul Khuddus.

24. One of the prime contentions raised in this appeal is that O.S. No. 92 of 1950-51 was a representative suit and any decision rendered in the said suit would not be binding on the present plaintiffs since the said suit was not one for a declaration of title but only for settlement of a scheme of management and in the said suit only prima facie title was examined for settling a scheme and as such the judgment rendered therein cannot be regarded as a judgment passed by the Competent Court. In support of this proposition Learned Counsel for plaintiff has relied upon the judgments in the cases of Bishwanath and Another Vs. Shri Thakur Radhaballabhji and Others, and Swami Parmatmanand Saraswati. Thus what is required to be examined is as to whether issue regarding

ownership and title was directly and substantially in issue in the earlier proceedings which came to be considered and had reached finality. If the answer is in affirmative then, subsequent suit on the same issue would be barred by res judicata and if the answer is in the negative there cannot be any bar to proceed in the subsequent suit. Now let me examine the applicability of judgments relied upon by Learned Counsel for plaintiff:

1. Pragdasji Guru Bhagwandasji's case:

10. A suit under Section 92 of CPC is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the Court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the section. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of Section 92 of CPC. As was observed by the Privy Council in *Abdur Rahim and Others v Syed Abu Mohamed Barkat Ali Shah and Others*, AIR 1928 PC 16, a suit for a declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of Section 92 of CPC. In the case before us, the prayers made in the plaint are undoubtedly appropriate to the terms of Section 92 and the suit proceeded on the footing that the defendant, who was alleged to be the trustee in respect of a public trust was guilty of breach of trust. The defendant denied the existence of the trust and denied further that he was guilty of misconduct or breach of trust. The denial could not certainly oust the jurisdiction of the Court, but when the Courts found concurrently on the evidence adduced by the parties, that the allegations of breach of trust were not made out, and as it was not the case of the plaintiffs, that any direction of the Court was necessary for proper administration of the trust, the very foundation of a suit under Section 92 of CPC became wanting and the plaintiffs had absolutely no cause of action for the suit they instituted. In these circumstances, the finding of the High Court about the existence of a public trust was wholly inconsequential and as it was unconnected with the grounds upon which the case was actually disposed of, it could not be made a part of the decree or the final order in the shape of a declaratory relief in favour of the plaintiffs. It has been argued by the Learned Counsel for the respondents that even if the plaintiffs failed to prove the other allegations made in the plaint, they did succeed in proving that the properties were public and charitable trust properties.... a fact which the defendant denied. In these circumstances, there was nothing wrong for the Court to give the plaintiffs a lesser relief than what they actually claimed. The reply to this is, that in a suit framed under Section 92 of CPC, the only reliefs which the plaintiff can claim and the Court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held

entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of Section 92 of CPC. The finding as to the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit. The result is that in our opinion the decision of the High Court should stand, but the decree and the concluding portion of the judgment passed by the Trial Court and affirmed by the High Court on appeal shall direct a dismissal of the plaintiffs' suit merely without its being made subject to any declaration as to the character of the properties. To this extent the appeal is allowed and the final decree modified. The order for costs made by the Courts below will stand. Each party will bear his own costs in this appeal". In this judgment which arose out of a suit filed by nine plaintiffs invoking Section 92 of CPC and claiming a relief that the properties described in the schedule to the plaint as well as other properties under the management of the defendant to be declared to be religious and charitable trust properties and for other consequential reliefs including a scheme to be framed for proper management, suit came to be dismissed by the Trial Court and it was reversed by the High Court and remanded back to the Trial Court. Thereafter the Trial Court dismissed the suit subject to the declaration already given by High Court that temple and properties in possession of defendants were public, religious and charitable properties. Appeal filed against said judgment was dismissed by High Court. In this background, the Hon'ble Apex Court held that relief praying for a declaration that properties in suit are trust properties does not come under any of the clauses (a) to (h) enumerated under Section 92(1) of CPC and accordingly modified the decree of the Trial Court as affirmed by the High Court. Admittedly in the said suit, a declaration of title was sought for which is impermissible under clauses (a) to (h) of Section 92(1) of CPC. However in the suit O.S. No. 92 of 1950-51 no such relief of declaration was sought and in the defence set up by Khazi Abdul Khuddus that it is his individual property it was declared by the jurisdictional Court that suit schedule property does not belong to Masjid and it belongs to Khazi Abdul Khuddus. In that view of the matter, said judgment would not come to the aid of plaintiff.

2. Bishwanath's case:

7. It is settled law that to invoke Section 92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature; (ii) there was a breach of trust or a direction of Court is necessary in the administration of such a trust; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section. A suit by an idol for a declaration of its title to property and for possession of the same from the defendant, who is in possession thereof under a void alienation, is not one of the reliefs found in Section 92 of the Code of Civil Procedure. That a suit for declaration that a property belongs to a trust is held to fall outside the scope of Section 92 of the Code of Civil Procedure by the Privy Council in Abdur

Rahim and Others v Syed Abu Mahomed Barket Ali Shah and Others, 55 Ind. App. 96 : AIR 1928 PC 16, and by this Court in Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others, , on the ground that a relief for declaration is not one of the reliefs enumerated in Section 92 of the Code of Civil Procedure. So too, for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of Section 92 of the Code of Civil Procedure: See Mukaremdas Mannudas and Others Vs. Chhagan Kisan Bhawasar and Others, . Other decisions have reached the same result on a different ground, namely, that such a suit is one for the enforcement of a private right. It was held that a suit by an idol as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private right and was, therefore not a suit to which Section 92 of the Code of Civil Procedure applied: See Darshan Lal and Others Vs. Shibji Maharaj Birajman, and Madhavrao Anandrao Raste v Shri Omkareshvar Ghat, AIR 1929 Bom. 153 : 31 Bom. LR 192. The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and, therefore, it is a suit by the idol to enforce its private right. The suit also is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in Section 92 of the Code of Civil Procedure. In either view, this is a suit outside the purview of Section 92 of the said Code and, therefore, the said section is not a bar to its maintainability.

25. In this matter suit by an idol for a declaration of its title to property and for possession of the same from the defendant who was in possession under a void alienation was sought for and as such it was held that such prayer is alien to Section 92 of the CPC and as such it was held that there is no bar with regard to subsequent suit for declaration. In the instant case, the previous suit namely O.S. No. 92 of 1950-51 was instituted by residents of Gubbi on behalf of the plaintiff, Jamia Masjid in a representative capacity against Khazi Abdul Khuddus as the sole defendant. The said suit was filed for settling the scheme and for proper management of Jamia Masjid, and its properties. The sole defendant therein i.e., Khazi Abdul Khuddus raised a plea that suit properties are his self-acquired properties and as such the Trial Court based on the rival contentions framed as many as eight issues and for purposes of considering and answering the substantial question of law formulated in this appeal, issue No. 1 framed therein would be sufficient and same reads as under:

1. Do the schedule properties belong to Jamia Mosque at Gubbi as alleged in the plaint? and said issue came to be adjudicated and answered by the said Court as under:

7. The suit schedule first item is a wet land bearing Survey No. 419 measuring 5 acres, 3 guntas situate in Gubbi Amanikere. In cross-examination the defendant says: "I have not produced the Government grant of suit item No. 1. The suit first item, I do not claim. It belongs to the mosque". Incidentally this admission also proves that the defendant does not claim the mosque as his. The defendant

swears that the Government gave him Survey Nos. 2 and 30 (Schedule items 2 and 3) to him as Khazi and that the mosque has nothing to do with these lands. He then says that the suit fourth item was purchased by him from Government but that he has sold this land to one Gubbi Chandrappa about eight years ago. He says that the site of the shops (suit fifth item) belongs to him and that his father got the shops construct Exht. IV is the original inam title deed granted in favour of Gulam Mohammad, is the grandfather of the defendant. This shows that a dry land measuring 3 acres and 26 guntas was granted as inam to the Khazi. Ext. VII is the certified copy of the Inam Register. This confirms the grant of the inam under Ext. IV. The plaintiffs have not produced anything to show that the suit items 2 and 3 were granted or acquired for the mosque. It must therefore be held that these two items are Khazi inam granted personally to the ancestors of the defendant and that they do not form part of properties of the mosque. With regard to the suit fourth item the evidence of the defendant is that he purchased it from Government and that he has sold that land to Gubbi Chandrappa about 8 years ago. In cross-examination he says that the Government have taken over the suit first time their possession and that the suit fourth item was not given to him in lieu of acquired land. The suit fifth item consists of 5 or 6 shops are also claimed by the defendant. His contention is that the site of the shop belongs to him and that his father built the shops. Admittedly the site of the shops belongs to the mosque. No satisfactory evidence is produced by the defendant to show that the shops were built by his father. In cross-examination he states that his father built these shops out of the borrowed money. There is no tangible evidence as to the persons from whom the money was borrowed or that the debt was discharged. The evidence on the side of the plaintiffs that the shops were built out of public funds is more reliable. The defendant admits that he has mortgaged three of the shops to one Gubbi Chandrappa. But the main question in the present case is whether these shops belonged to the mosque or to the defendant personally. Inasmuch as the defendant has failed to establish that his father built the shops out of his private funds and since admittedly the site belongs to the mosque, it must be held that these shops are the property of the mosque.

8 and 9 x x x x

10. In his written statement the defendant claimed all the suit schedule immoveable as his own. But as observed before the evidence discloses his prima facie right to only suit schedule items 2 and 3. These two items cannot therefore be considered as belonging to the mosque. It shall however be open for the trustees to be appointed to take such steps as they may deem fit if they consider that in respect of those two items (items 2 and 3) the defendant has not satisfied the terms of the grant. In the Code of 1877, Section 539 the words used were "a direct interest". In the present Code it is sufficient if the suit is filed by at least two persons having an interest in the trust. In 24 Calcutta 418 persons entitled to worship in a temple were found to possess such an interest. In 50 Madras 721 it is observed that if the persons suing have an interest in the trust, it is not

necessary that they should have been personally effected by an act done by the person sues. It must therefore be held that plaintiffs have an interest in bringing the suit.

(Emphasis supplied)

26. Thus, issue regarding the ownership of the property has been heard by a Competent Court and after adjudication thereof it has been held that Abdul Khuddus is the absolute owner of the said property as extracted hereinabove. In fact this judgment and decree which was pursued in appeal before this Court in R.A. No. 510 of 1954 also came to be affirmed and it was held as follows.-

The result is that this appeal is allowed in part. In substitution of the decree made by the Court below, we direct that the learned District Judge will now settle a scheme for the due administration of the mosque and of its properties which are items 1 and 5. The suit in regard to items 2, 3 and 4 stands dismissed.

(Emphasis supplied)

27. The Hon'ble Supreme Court in the following judgment has held that plaintiff's being representative of the public at large which is interested in the trust would be considered in the eye of law as an interested persons to the suit and judgment binds not only the parties namely in the suit but all those who are interested in the trust:

(a) R. Venugopala Naidu's case:

9. The legal position which emerges is that a suit under Section 92 of the Code is a suit of a special nature for the protection of public rights in the public trusts and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 of the Code and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are on the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under Section 92 of the Code is thus a representative suit and as such binds not only the parties named in the suit-title but all those who are interested in the trust. It is for that reason that Explanation VI to Section 11 of the Code constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 of the Code. (b) Singhai Lal Chand Jain (dead) case:

10. Therefore, the respondents now claim under the same title in the previous suit and thereby they are bound by the decree. The doctrine of res judicata evolved the public policy to prevent trial of an issue twice over. It clearly applies

to the facts of the case. Accordingly, they are precluded to raise objections on behalf of the Sangh by filing the objections.

.....

13. Thus it could be held that the Sangh having been duly represented in the previous proceedings and conducted the litigation on behalf of the Sangh bona fide and were unsuccessful in the suit, no one on behalf of the Sangh can lay any objection in the execution nor plead nullity of the decree. The doctrine of res judicata prohibited the members of the Sangh to obstruct the execution of the decree. The decree of ejectment binds every member of the Sangh and, therefore, the appellant is entitled to have the decree executed and possession taken.

(c) Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh C. (Dead), M.N. Singh and Others, :

19. As observed by this Court in R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others, , a suit under Section 92 of CPC is a suit of special nature for the protection of public rights in the public trust and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of public at large, may choose two or more persons amongst themselves, for the purpose of filing a suit under Section 92 of CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under Section 92 of CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 of CPC constructively bars by res judicata the entire body of interested persons from re-agitating the matter directly and substantially in issue in an earlier suit under Section 92 of CPC. 28. Thus, it cannot be held that neither District Judge in O.S. No. 92 of 1950-51 or this Court in Appeal R.A. No. 510 of 1954 was not competent to decide the prayer sought for in the said plaint namely for settling a scheme to vest the property either in Mosque or declare that said property belonged to Khazi Abdul Khuddus and vested with him. In the instant case, question of title having been in issue in earlier suit as discussed hereinabove it has to be answered in the affirmative and as such it has to be held that present suit in question is barred by res judicata.

29. Learned Counsel appearing for plaintiff Sri Prasanna Kumar would contend that in the judgment of the Trial Court which decided the suit O.S. No. 92 of 1950-51 at paragraph 10, it was held that prima facie defendant's right was established over items 2 and 3 properties and it is only a passing observation

made and as such, Section 11 of Code of Civil Procedure does not apply. He contends that question of title could not have been decided in the said suit. When a scheme suit is filed for the maintenance of the property of the trust, the Court before ordering for the scheme being settled arrives at a satisfaction or conclusion as to whether the property referred to therein belongs to the trust or anyone else is having a claim over the said property. Under clauses (c) and (cc) of Section 92(1) of Code of Civil Procedure, power is available to Court to order for vesting any property in a trustee or directing a trustee or a person who has been removed as a trustee to deliver possession of any property in his possession to the person entitled to the possession of such property and as such the Court adjudicating the said issue would delve upon the title set up by either of parties. While adjudicating such a claim in O.S. No. 92 of 1950-51 the Court of competent jurisdiction has come to a conclusion that Khazi Abdul Khuddus is the owner of suit schedule property and title vests with him as already observed supra. This judgment and decree of the Trial Court came to be affirmed by this Court in R.A. No. 510 of 1954 on 14-8-1959 whereunder the judgment of the Trial Court came to be modified and held that item No. 4 of the suit schedule property is also not established to be the property of the Mosque. Thus, the claim of the Jamia Masjid over items 2, 3 and 4 stood dismissed and the District Judge was directed by this Court to settle the scheme for due administration of the Mosque and of its properties which are Items 1 and 5 only. It is this Item No. 2 which came to be adjudicated and decided by the District Judge and by this Court and which is the suit schedule property in the present suit in question.

30. The judgment and decree passed in R.A. No. 510 of 1954 by this Court on 14-8-1959 has reached finality. Thus, as rightly observed by the lower Appellate Court, that decision would also bind the plaintiff even if it were to be erroneous judgment *G. Viswanathan Vs. The Hon'ble Speaker, Tamil Nadu Legislative Assembly, Madras* and another, . The judgment in *Swami Parmatmanand Saraswati's* case relied upon by the Learned Counsel appearing for plaintiff to contend that suit filed under Section 92 is a suit of special nature and any judgment rendered in the said suit would not act as a bar to file the present suit is liable to be rejected for the simple reason since in the said suit, it has been held - a suit filed under Section 92 of Code of Civil Procedure to remedy infringement of individual right or to vindicate private right is out side the scope of Section 92 of Code of Civil Procedure. In the instant case the proposition is in converse namely; the residents of Gubbi have filed a scheme suit for settling a scheme in favour of the Masjid and its properties and not claiming any right unto themselves and as such, the said judgment would not come to the rescue of appellants.

31. It was next contended by Sri Prasanna Kumar that in the year 1965 Khazi Abdul Khuddus has dedicated the disputed land in the year 1965 and same having been notified as Wakf property by the Wakf Board, the present suit was not barred by *res judicata*, since there is no contest by the defendants about the dedication. When this contention is examined with regard to the pleadings

available on record, it would emerge that if the dedication was in the year 1965 there is no explanation forthcoming as to why plaintiff was silent till the year 1983. This clearly goes to show that the Wakf Board being fully aware of the fact about the earlier litigation and decree for settlement of the Trust property being confined to items 1 and 5 only, Wakf Board did not pursue its claim over remaining property which includes suit schedule property, obviously being aware of earlier judgment in O.S. No. 92 of 1950-51 affirmed in R.A. No. 510 of 1954 and its binding effect on the Board. No where in the plaint it is stated that Abdul Khuddus dedicated the property to Jamia Masjid as Mosque property. In fact, the legal heirs of Abdul Khuddus have sold the suit schedule property to the defendants under three sale deeds dated 20-4-1983 and after contending in the written statement filed on 17-10-1985 that suit in question is barred by res judicata they cannot now withdraw the said plea.

32. The Hon''ble Supreme Court in the case of Mohammad Ghouse Sahib have held that decree passed in the suit under Section 92 of Code of Civil Procedure in 1961 having not been questioned by the Board all these years defendants cannot object to the execution of the decree, whereunder objection raised by defendants had been overruled in execution proceedings. It would be also of benefit to note the judgment of the Hon''ble Apex Court in the case of Sulochana Amma, whereunder the applicability of Explanation VIII to Section 11 of the Civil Procedure Code came to be considered and answered and held as follows.-

Para 6. The words x x x x Explanation VIII to cull out its scope and ambit it must be read along with Section 11, to find the purpose it seeks to serve. The Law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like insolvency Court, probate Court, land acquisition Court, rent Controller, Revenue Tribunal, etc. No doubt main body of Section 11 was not amended, yet the expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a Competent Court or Tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a Competent Court to try the subsequent suit".

(Emphasis supplied)

In conclusion, it has been held that if the scope of Explanation VIII is confined to the order and decree of the Court of limited jurisdiction, the scope of enlarging Explanation VIII would be defeated and the decree of Civil Courts of limited pecuniary jurisdiction shall stand excluded and such anomalous situation must be

avoided. Thus, to keep the litigation unending successive suits can be filed in the Court of limited jurisdiction and later on in a Court of higher jurisdiction, litigating over the same issue which is not the purpose of Section 11 of Code of Civil Procedure. Thus Explanation VIII is to be read harmoniously and to clear any ambiguity surrounding it. In the instant case, it cannot be held or construed that the suit O.S. No. 92 of 1950-51 which was adjudicated and decided was not by a Court of competent jurisdiction.

33. One another factor which requires to be noticed by this Court is that the Wakf Board itself had filed a suit in O.S. No. 748 of 1968 for declaring that the suit property constitute Wakf and for possession of the same. The said suit ended in a compromise or settlement between the parties which compromise petition was filed under Order 23, Rule 1 of Code of Civil Procedure. Learned Advocates appearing for the respondents Sriyuths P.D. Surana and Shanmughappa in chorus would contend a consent decree passed would act as res judicata and relies upon the judgment of the Apex Court in Byram Pestonji Gariwala's case, Paragraph 44. Order 23, Rule 1 of Civil Procedure Code refers to withdrawal of suit or abandonment of part of claim. Under sub-rule (4)(b) of Code of Civil Procedure, if the plaintiff withdraws from a suit or part of claim without permission referred to under sub-rule (3), he would be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The learned Advocates for the respondents would contend that in view of compromise petition filed under Order 23, Rule 1 of Code of Civil Procedure and withdrawing the claim without seeking leave to institute fresh suit it would amount to abandonment of the claim and as such the present suit is barred by res judicata. Mr. Prasanna Kumar has contended that waiver, relinquishment, abandonment or withdrawal or all acts of the parties which can be explained only after full fledged trial and in support of this proposition, he has relied upon the judgment of the Hon''ble Apex Court in Alka Gupta's case, wherein it has been held as under:

9. This Court in Gurbux Singh's case x x x x by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2, Rule 2 of the Code. But the High Court (both the Trial Bench and Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2, Rule 2 of the Code, res judicata relates to the plaintiffs duty to put forth all the grounds of attack in support of his claim, whereas Order 2, Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2, Rule 2 of the Code in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable. In the above judgment it was noticed by the Hon''ble Apex Court that two suits had been filed and first suit was for recovery of balance price agreed under an agreement of sale and the second suit was for rendition of accounts in pursuance of the dissolution of the firm and it was noticed that dismissal of the suit under

Order 2, Rule 2 of the Code in the absence of any plea by the defendant and in the absence of an issue in that behalf order would be unsustainable and it has been held that plaintiff should have an opportunity to explain or demonstrate that second suit was based on a different cause of action. Applying the principles laid in the said judgment to the facts on hand when the written statement filed in the present suit (O.S. No. 149 of 1998) is examined, it is noticed that defendants 2, 3 and 4 have taken up a specific plea in paragraphs 6 and 22 that suit is hit by principles of res judicata as observed hereinabove. It is also to be noticed that defendants 5 to 9 filed written statement on 17-10-1985 and have specifically raised a plea with regard to res judicata at paragraph 14 which reads as under:

14. The suit is barred by the principles of res judicata in view of the decisions in O.S. No. 748 of 1968 on the file of Additional Munsiff, O.S. No. 92 of 1950-51 on the file of District Judge, Tumkur and R.A. No. 510 of 1954 on the file of the then High Court of Mysore, Bangalore. In fact, the plaintiff filed a suit on the file of Munsiff, Gubbi for injunction and the said suit was dismissed. This would go to show that a specific plea had been raised with regard to res judicata and plea of bar of subsequent suit under Order 2, Rule 2 was not pleaded and as such, the question of plaintiff explaining or demonstrating that second suit was maintainable does not arise in the instant case. It is to be noticed that plaintiff in the instant suit is seeking declaration and decree that State Wakf Board is the owner with possession of the suit schedule property and in O.S. No. 748 of 1968 filed by the "The Mysore State Board of Wakf it has sought for declaration that suit property constitute Wakf, and for possession of the suit property. Said suit O.S. No. 748 of 1968 came to be compromised and relief of declaration and possession sought for has been abandoned and/or not pursued. The said decree has remained unchallenged and it is not the case of the plaintiff that said decree was obtained by fraud, coercion, misrepresentation and etc. In fact, the Hon''ble Supreme Court under similar circumstances in the case of Byram Pestonji Gariwala''s case has held as under:

The consent decree made on 18-6-1984 remained unchallenged. None questioned it. The appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his Counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccessful challenge by reason of delay, estoppel or res judicata and was rightly so held by the High Court. Thus, it would clearly go to show a judgment obtained by consent is intended to end the litigation between the parties just as it would end by way of judgment resulting from the decision of the Court which would be a valid decree and constitute as res judicata. In conclusion it has to be held that on comparison of the pleadings in the three suits it would go to show that issue raised in the present suit was directly and substantially in issue in those suits though the reliefs sought for may vary in degree. One of the tests to ascertain is to find out as to whether the principal issue regarding title was decided and if so it has to be treated as

"directly and substantially" in issue. When such exercise is done by examining the plaints, written statements, issues framed and adjudicated and prayers sought for and granted or rejected or abandoned from the earlier suits with the present suit, it would emerge that the issue in the present suit as also the prayer sought for in the present suit was "directly and substantially" considered in the earlier suits and not collaterally or incidentally. Technical aspect like pecuniary jurisdiction or subject wise competence of the earlier forum to adjudicate the subject-matter and grant appropriate reliefs in the suits filed subsequently would recede to background and it has to make way for the application of general principles of res judicata. No individual can be vexed twice over the same kind of litigation and the general doctrine of res judicata has to be applied and the earlier decisions rendered will operate as a res judicata not necessarily the Court deciding the matter formerly be competent to decide the subsequent suits or that the former proceeding in subsequent suits delving the same subject-matter. The nature of former proceeding would be immaterial. Thus, taking into consideration the cumulative effect of all the pleadings produced before the Trial Court which has also been perused and scrutinised by me, I am of the considered view that the resultant opinion is that Section 11 of the Code of Civil Procedure is squarely applicable to the facts and circumstances of the case and the Courts below were right in holding that earlier suits filed by the plaintiff operates as res judicata. There is no error or infirmity in the orders passed by the Courts below and for the foregoing reasons and discussion made hereinabove, the substantial questions of law formulated hereinabove is answered in the affirmative i.e., against the plaintiff/appellant and in favour of respondents 1 to 3. Hence, I pass the following.-

ORDER

- (i) Appeal is dismissed by answering the substantial questions of law against the appellant.
- (ii) Judgment and decree passed by the III Additional District Judge. Tumkur dated 2-7-2007 in R.A. No. 125 of 2006 is hereby affirmed.
- (iii) No costs.
- (iv) Registry to draw the decree accordingly.