
(2013) 04 AHC CK 0033
In the Allahabad High Court
Case No : Second Appeal No. 2276 of 1977

Maharaji Kunwar	Vs	APPELLANT
Sheo Shanker		RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Citation : (2013) 7 ADJ 593 : (2014) 1 ALJ 465

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : K.D. Pandey, R.K. Singh, R.N. Singh, V.K.S. Chandel and Virendra Singh, for the Appellant; R.M. Singh, Suresh Chandra Varma and Arvind Kumar Singh, for the Respondent

Judgement

Sudhir Agarwal, J.—Heard Sri Ram Niwas Singh, Advocate assisted by Sri V.K.S. Chandel, Advocate for the appellant and Sri Arvind Kumar Singh for the respondents. This is plaintiff's second appeal u/s 100 of Code of Civil Procedure, 1908 (hereinafter referred to as "C.P.C.").

2. Smt. Maharaji Kunwar, claimed herself to be the daughter of Smt. Kamta Singh and Smt. Ramdei, wife of Kamta Singh, instituted original suit No. 227 of 1969 for cancellation of sale-deed dated 12.10.1966 executed by Smt. Ramdei in favour of Ram Saran Singh, son of Sant Bux Singh, defendant No. 1. Kamta Singh and Sarjoo Singh were real brothers and Smt. Ramdei and Dulari Devi are the names of their wives, respectively. The defendants 1 and 2, Shiv Shankar and Uma Shankar Singh, are the two sons of late Sarjoo Singh while defendant-respondent No. 3 Smt. Dulari Devi is the widow of late Sarjoo Singh.

3. The plaint case, set up by appellant, is, that Kamta Singh died in April, 1966 leaving his widow Smt. Ramdei, and appellant, sole daughter, as heirs of property of deceased. Smt. Ramdei also died in October, 1966 whereafter appellant remained as the only successor to the property of late Kamta Singh. The defendant Nos. 1 and 3 in collusion, got prepared a sale-deed dated 12th October, 1966, in respect to bhumidhari land of late Kamta Singh, transferred in

favour of defendant No. 4 and vide registered deed dated 27.10.1966. The aforesaid instrument is forged and fictitious for the reason that neither Smt. Ramdei executed the said document, nor she appeared before Sub-Registrar, nor put in her signature/thumb impression on the document, nor any consideration passed on to her, nor document could have been executed by her since she was not alive on 12th October, 1966. One more reason assigned therein is that defendant No. 4 had no reason to purchase land of his maternal grand father or mother, inasmuch as, defendant No. 4 is said to be the son of appellant Smt. Maharaji Kunwar.

4. Defendant Nos. 1 and 2 filed written statement contesting suit. They admitted that Sri Kamta Singh and Sarjoo Singh were real brothers and Smt. Ramdei and Smt. Dulari Devi, their wives, respectively. They, however, disputed plaintiff-appellant as the daughter of Kamta Singh and Smt. Ramdei and also the factum that Smt. Ramdei died in October, 1966 i.e. before execution of sale-deed in question. It is said that Smt. Ramdei, widow of Kamta Singh is still alive, yet she had not been impleaded a party in the suit. They further said that Dulari Devi, defendant No. 3, in fact, is not alive and a dead person has been impleaded as defendant No. 3.

5. In all, the Trial Court formulated five issues as under:

1. Whether the impugned sale-deed dated 12.10.1966 is liable to be cancelled for the reasons alleged in para Nos. 5 and 6 of plaint?
2. Whether the plaintiff is the daughter of Ram Dei? If not, its effect?
3. Whether Smt. Ram Dei is alive or died? If she is died, when did she die?
4. Whether suit is bad for misjoinder of parties?
5. To what relief, if any, is the plaintiff entitled?

6. It appears that before Naib Tehsildar, Azamgarh appellant Smt. Maharaji Kunwar made an application for mutation of her name and this was registered as case No. 812/9 of 1966 (Smt. Maharaji Kunwar v. Ramdei). He recorded statement of Mangal Singh, Lekhpal that Smt. Ramdei, widow of Kamta Singh had died three months back and Smt. Maharaji Kunwar resident of Jiyapur is her daughter and thereafter an order was passed on 29.12.1966 permitting mutation by entering name of Smt. Maharaji Kunwar in place of Ramdei. After recording of statement of Lekhpal on 13.12.1966 order passed by Naib Tehsildar on 29.12.1966, an application was filed before Tehsildar, who passed an order on 14.10.1969 cancelling order dated 29.12.1966 and directed Naib-Tehsildar to proceed afresh. This order appeared to have been challenged before Collector, Azamgarh, who rejected appeal vide order dated 11.5.1970 where-against revision No. 486BC of 69-70/Azamgarh u/s 219 of Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901") was filed before Board of Revenue and learned Member, Board of Revenue, vide order dated 15.11.1971, set aside order dated 14.10.1969 and Collector's order dated 11.5.1970. In the meantime, it

also appears that village was under consolidation proceedings and there was an order of Consolidation Officer passed on 6.12.1965 in respect to land comprise of Khata Nos. 94, 46, 35 and 22 where-against appeal No. 67 of 1970 was filed by Smt. Ramdei u/s 1(1) of Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953") before Settlement Officer (Consolidation), Azamgarh claiming that she should be recorded as co-bhumidhar alongwith respondent i.e. Shiv Shankar, Uma Shankar, Girija Shankar and Rama Shankar. A substitution application filed by Smt. Maharaji Kunwar on the plea that Smt. Ramdei is already dead. Therein the matter was enquired into and a finding was recorded that Smt. Ramdei is alive and Smt. Maharaji Kunwar could not adduce any evidence about death of Smt. Ramdei.

7. The substitution application of appellant was rejected. Thereafter order was passed by Settlement Officer (Consolidation) on 10th June, 1968 holding that there is a compromise entered on 6.12.1965 between the parties, which contains signatures/thumb impression of all the parties including Kamta Singh. In absence of anything to show that said compromise was a forged document, the same has to be given effect to.

8. The matter was thereafter taken in revisions No. 538, 539, 540 and 543 before Deputy Director of Consolidation, U.P. Azamgarh, who dismissed all the revisions by order dated 7th January, 1969. In respect to a question whether Smt. Ramdei is dead or alive, in paras 4 and 6 of order, he said as under:

4. The facts of the case appear that Sri Makta Singh the recorded co-tenure-holder compromised in khata Nos. 94, 46, 35 and 22 before the C.O. and C.O. Passed orders on the basis of compromise on 6-12-65 expunging the name of Sri Kamta Singh out of those khata. Then after Sri Kamta Singh died and his wife Smt. Ram Devi filed an appeal before the S.O.C. Pointing out that the order of C.O. Is incorrect and illegal as her husband was sickly and confined to bed, that his mind was not working properly that he did not enter into any compromise and that she has filed the appeal as his heir. This was not decided that Smt. Maharaji applied for substitution as heir of Smt. Ram Devi being daughter of Smt. Ram Devi and Kamta alleging that Smt. Ram Dei was dead. The O.Ps. Contended this, saying that Smt. Ram Devi was living. On the basis of enquiry report of A.C.O. Which was so directed by the Dy. Director of Consolidation vide his order dated 20-5-67 that Smt. Ram Devi was living and after holding such enquiry as the S.O.C. deemed fit, the contention of Smt. Maharaji was rejected and she was not substituted as heir to Smt. Ram Devi and the appeal was disposed of and dismissed. The 4 appeals were connected and thus all the appeals in respect of the Khata were dismissed.

6. It is now a matter of fact whether Smt. Ram Devi is dead or alive, I am inclined to agree with the S.O.C.'s proper finding that Smt. Ram Devi is alive and as such Smt. Maharaji cannot be substituted as heir in appeals preferred by Smt. Ram Devi. I do not consider any further enquiry necessary.

(emphasis added)

9. The Board of Revenue also dismissed the revisions and also the review application.

10. In the meantime, Smt. Maharaji Kunwar came to this Court in writ petition Nos. 1085 of 1969, 1329 of 1969, 1328 of 1969 and 1330 of 1969 assailing the orders of Settlement Officer (Consolidation) dated 7th January, 1969 and Deputy Director of Consolidation dated 10th June, 1968 whereby her application for impleadment was rejected on the ground that Smt. Ramdei has died. It was urged before this Court that authorities under Act, 1953 cannot look into the question whether Smt. Ramdei was alive or dead, by admitting evidence etc. This Court dismissed all the above writ petitions vide a detailed judgment dated 10th March, 1971. It is in these facts and circumstances, Trial Court dismissed the suit by holding that aforesaid proceeding, which ended upto this Court against Smt. Maharaji Kunwar operated as "constructive res judicata" on the question, "whether Smt. Ramdei is dead, as alleged in October, 1966 or not". The findings having been recorded by Consolidation Authorities, which stood sustained upto this Court, the issue is answered against plaintiff.

11. Besides, Trial Court also held that plaintiff failed to adduce any evidence to show that she is the daughter of Smt. Ramdei. The suit was accordingly dismissed by Trial Court and judgment has been confirmed by lower Appellate Court by dismissing plaintiff-appellant's Civil Appeal No. 401 of 1973.

12. The sole substantial question of law, which has been formulated in this case is:

Whether decision of Consolidation Authority regarding issue whether Smt. Ramdei was alive or dead in October, 1966 would operate as res judicata in a Civil Suit pending before a Civil Court?

13. Sri Ram Niwas Singh, learned counsel appearing for the appellant contended that Consolidation Authorities had no jurisdiction to admit evidence or to appoint Commissioner to collect evidence. The trapping of regular Court being absent, findings in consolidation matters shall not operate as res judicata in the suit in question. The Courts below, recording finding against plaintiff-appellant only on the ground that issue, whether Smt. Ramdei had died or was alive in October, 1966, has already been decided finally and that decision would operate as constructive res judicata, have committed patent error and judgments, therefore, are liable to be set aside by setting aside findings of both the Courts below on this issue. He drew my attention to Sections 9A and 11 of Act, 1953 and Rule 25A and 26 thereof.

14. Besides above, he also endeavoured to persuade this Court to formulate another substantial question of law to the effect and consequences of non filing of written statement by a defendant in the suit i.e. defendant No. 4. Sri Singh contended that defendant No. 4 is the main party where against plaintiff had

sought relief. Since defendant No. 4 did not contest the suit and chose not to file any written statement or led evidence, claim set up by plaintiff-appellant was liable to be accepted by Trial Court unless it records reasons that it is not satisfied as provided in Order VIII, Rule 10 C.P.C. read with Section 58 of Evidence Act. He drew my attention to a decision of Apex Court in Balraj Taneja and Another Vs. Sunil Madan and Another, .

15. After hearing counsel for the parties, I find that sale-deed was executed by Smt. Ramdei in favour of defendant No. 4 and if that be so, defendant No. 4, if, has chosen not to file written statement and not to contest the suit, whether it would have any serious legal consequence in the matter. This is an important issue which has directly arisen in this case. Therefore, another substantial question of law, in my view, need be considered in this case is:

Whether non-filing of written statement by defendant No. 4 against whom relief was sought by plaintiff-appellant would entitle plaintiff to get a judgment and decree in his favour without any onus upon him to prove his/her case further.

16. Sri Arvind Kumar Singh, learned counsel appearing for defendants-respondent Nos. 1 and 2 submitted that sale-deed was executed by Smt. Ramdei. At the time when suit was filed, Smt. Ramdei was alive. This was already adjudicated by Consolidation Officer, Settlement Officer (Consolidation) and Deputy Director of Consolidation and ultimately by this Court, by a well discussed reasoned judgment. All the arguments being advanced now by Sri R.N. Singh with reference to Sections 9A and 11 of Act, 1953, were also advanced in earlier writ petitions which were dismissed on 10th March, 1971. The aforesaid decisions therefore, would operate res judicata. Smt. Ramdei was alive in October, 1966 and also even thereafter when the aforesaid orders were passed by Consolidation Authorities as well as when judgment was pronounced by this Court. It is in these circumstances, suit for cancellation of sale-deed executed by Smt. Ramdei, was not maintainable. The plaintiff had no cause of action or locus standi to seek cancellation of sale-deed executed by another person, who himself/herself had no objection or complaint or grudge against such execution of sale-deed. He submitted that this is also another substantial question of law which goes to the root of the matter which deserve to be framed. I find substance. Hence third substantial question of law is:

Whether plaintiff appellant can maintain original suit No. 227 of 1969 and she is not a party to the sale-deed dated 12th October, 1966 and the vendor/executant of the aforesaid sale-deed has not chosen to challenge the same and sought its cancellation and therefore suit itself was liable to be dismissed for want of cause of action.

Findings

17. I first propose to consider the question of res judicata. Before coming to the legal aspect it would be appropriate to recapitulate as to what had actually been held by consolidation authorities in proceedings which had arisen before them.

18. Sri Kamta Singh and Sarjoo Singh both were sons of Hari Singh. Hari Singh was recorded tenure-holder of the land comprising Khata No. 22, 33, 46 and 94 of Village Dharaura, Tehsil Lalganj, District Azamgarh. After the death of Hari Singh; Sarjoo Singh and Kamta Singh succeeded property of Hari Singh including the aforesaid land. In the basic year, khata No. 22, 46 and 94 were recorded in the name of Kamta Singh, Shiv Shankar and Uma Shankar, the two sons of Sarjoo Singh while khata No. 33 was recorded in the name of Kamta Singh and Shiv Shankar and Uma Shankar the two sons of Sarjoo and Rama Shankar and Girja Shankar the two sons of Satya Deo. The village when came under consolidation, Shiv Shankar and Uma Shankar filed objection u/s 9A(2) of Act, 1953 claiming conclusive bhumidhari rights over all the four khatas.

19. Before Consolidation Officer, a compromise was entered into between Kamta Singh on the one hand, and respondent Nos. 3 and 4 on the other hand. The Consolidation Officer disposed of objection on the basis of aforesaid compromise vide order dated 6th December, 1965 holding respondent Nos. 3 and 4 to be exclusive bhumidhar of said khatas. Kamta Singh died in April, 1966 and immediately thereafter his widow, Smt. Ramdei went in appeal against the order dated 6th December, 1965.

20. When appeal was pending before Settlement Officer (Consolidation), Smt. Maharaji Kunwar claiming herself to be daughter of Smt. Ramdei and Kamta Singh, filed an application on 25th October, 1966 for substitution in place of appellant Smt. Ramdei alleging that she has already died. This application was disposed of vide order dated 29th November, 1966 by Assistant Settlement Officer (Consolidation) treating Smt. Ramdei dead and substituting name of Smt. Maharaji Kunwar in place of Smt. Ramdei. Against aforesaid order, a revision was filed before Deputy Director of Consolidation, who found that there was no valid order of transfer of case to Assistant Settlement Officer (Consolidation) and therefore, order of substitution passed by him was without jurisdiction. He set aside order of Assistant Settlement Officer and remanded the case to Settlement Officer Consolidation with a direction to decide application of Smt. Maharaji Kunwar, after holding enquiry.

21. In turn, Settlement Officer (Consolidation) directed Assistant Officer Settlement to make an enquiry and submit report, whether Smt. Ramdei was alive or dead. Consequently, Assistant Consolidation Officer made an spot enquiry, obtained evidence of parties and submitted report to the effect that Smt. Ramdei was alive. This report of Assistant Consolidation Officer was accepted by Settlement Officer (Consolidation) and on 1.6.1968 he dismissed application of Smt. Maharaji Kunwar seeking substitution, on the ground that Smt. Ramdei was alive. There-against Smt. Maharaji Kunwar preferred revision which was dismissed by Deputy Director Consolidation on 7th January, 1969. This order came to be challenged before this Court in four writ petitions i.e. 1085, 1329, 1328 and 1330 of 1969.

22. Hon''ble R.B. Mishra, J. (as His Lordship then was) considered all the

aforesaid writ petitions and decided the same vide judgment dated 10th March, 1971. This judgment is on record as paper No. 70/2C. Referring to Sections 9A and 40 of Act, 1953, it was argued that contested matter of civil nature could not have been decided by Assistant Consolidation Officer and he had no jurisdiction. Therefore his report could not have been made basis for deciding whether Smt. Ramdei was alive or dead. On behalf of appellant-petitioner in the aforesaid writ petitions, reliance was also placed on Apex Court's decision in Padam Sen and Another Vs. The State of Uttar Pradesh, .

23. The Court (Hon"ble R.B. Mishra, J.) held that proceedings before Consolidation Authorities are judicial proceedings only for limited purpose, as provided u/s 9A(3) and 40 of Act, 1953. Referring to Section 38, the Court observed, if Settlement Officer (Consolidation) has been given power to issue a Commission, certainly he can call for report from Assistant Consolidation Officer. The Court further said:

The Assistant Consolidation Officer can also be taken to be a Court of first instance with a limited jurisdiction, and can decide undisputed matters on conciliation; but where conciliation is not possible, he will have to refer the matter to the Consolidation Officer who will have to decide it after hearing the parties and taking their evidence. All these authorities perform judicial functions. Learned counsel for the petitioner conceded that he had no complaint about the Settlement Officer calling for a report from the Assistant Consolidation Officer. In view of Section 38 of the Act, the Assistant Consolidation Officer had also been vested with the power of a Civil Court and I feel no difficulty if he made an inquiry in pursuance of the order of the Settlement Officer (Consolidation). As a subordinate authority he could not defy the orders of a superior authority, and it was open to the Settlement Officer (Consolidation) in view of Section 38, which is widely worded, to call for a report from the Assistant Consolidation Officer. The Assistant Consolidation Officer took evidence of the parties, went to the spot and made a report thereafter. It was open to the petitioner to have produced evidence before the Assistant Consolidation Officer, but she did not choose to do so. The contesting respondents produced a lady who called herself to be Smt. Ramdei widow of Kamta Singh and they also produced certain other witnesses who affirmed that the lady produced as Smt. Ramdei was the widow of Kamta Singh. The Settlement Officer (Consolidation) accepted, the report of the Assistant Consolidation Officer that Smt. Ramdei was alive. If Smt. Ramdei was alive, there was no question of substitution and the application for substitution filed by the petitioner could not be granted. He accordingly dismissed the application for substitution and decided the appeal on merits, holding that the compromise entered into between Kamta Singh on the one hand and respondent Nos. 3 and 4 on the other was a valid compromise and not vitiated by fraud. The Deputy Director of Consolidation also agreed with the view taken by the Settlement Officer and dismissed the four revisions filed before him in respect of the four Khatas in question.

24. Having said so, Court further said that on consideration of relevant provision of the Act, it cannot be said that Settlement Officer (Consolidation) or the Deputy Director of Consolidation committed any manifest error in relying on the report submitted by Assistant Consolidation Officer. The Court also rejected the argument advanced on behalf of present appellant, who was petitioner therein, that Smt. Ramdei was not produced before Settlement Officer (Consolidation) and held that petitioner herself did not produce any evidence to the contrary. The decision taken by Settlement Officer (Consolidation) and Deputy Director of Consolidation held neither bad nor unjustified.

25. Therefore, it is very clear that whatever arguments have been advanced before this Court now, the same were raised in earlier writ petitions also and have been negated. This is an attempt to reargue the same issue.

26. It cannot be disputed that in the proceedings before Consolidation Authorities, present appellant as well as defendants 1 and 2 were also party. Therefore, issue having already been decided apparently would operate as constructive res judicata.

27. At this stage, argument was advanced that Consolidation Authorities are not Civil Courts and CPC is not applicable as such. Therefore principle of res judicata applicable to Civil Court, would not apply in the present case.

28. In my view, submission is thoroughly misconceived. It appears to have been advanced by misconstruing basic policy behind principle of res judicata @ constructive res judicata which now has been extended to Tribunals and authorities, having trapping of Court or decide the matter in quasi-judicial manner.

29. The plea of res judicata is an inhibition against the Court. A finding in favour of a party on the plea of res judicata would oust jurisdiction of the Court to try subsequent suit or the suit in which such issue has been raised, which has been heard and finally decided in a former suit (see: Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, .

30. The application of principle of res judicata is based on public policy and in the interest of the State as well. The principle of res judicata is not confined to Section 11 of C.P.C.

31. The principle of res judicata was well recognised in the ancient legal systems also. It has consistently been held as not limited to the specific words of the Code for its application.

32. One of the oldest case which considered the doctrine of res judicata vide Section 11, CPC, 1908 is 20 CWN 738 (Privy Council) , wherein their Lordships reminded the dictum in the words of Lord Coke in Priddle v. Napper, 6 Coke IA 1777, which said "Interest reipublicae ut sit finis litium", otherwise great oppression might be done under colour and pretence of law. (See also Commissioner of Central Excise, Nagpur Vs. Shree Baidyanath Ayurved Bhawan

Ltd.,). The statement of law as propounded in Sheoparsan Singh (supra) has been approved in Iftikhar Ahmed and Others Vs. Syed Meharban Ali and Others, .

33. In (1921) ILR 48 499 (Privy Council) , it was said that Section 11 of Code is not exhaustive of the circumstances in which an issue is res judicata. Even though Section may not apply, the plea of res judicata still would remain operative, apart from the limited provisions of the Code, and would bar a subsequent suit on the same issue, unless is shown to be inapplicable by the defendants, referring to pleading, parties and cause of action etc. It was reaffirmed by Lord Buckmaster, in 26 CWN 713 (Privy Council) , wherein the remarks were "that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect."

34. In AIR 1930 22 (Privy Council) , Privy Council held "the question as to what is considered to be res judicata is dealt with by Section 11 of CPC 1908. In that section many examples and circumstances in which the rule concerning res judicata applies are given; but it has often been explained by this Board that the terms of Section 11 are not to be regarded as exhaustive".

35. In Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, , it was held that Section 11 is not exhaustive of the general doctrine of res judicata. Though the rule of res judicata as enacted in Section 11 has some technical aspects, the general doctrine is founded on consideration of high public policy to achieve two objectives, namely that, there must be a finality to litigation, and, that, individuals should not be harassed twice over the same kind of litigation.

36. It is thus clear that principle of res judicata is based on sound policy and not an arbitrary one. Henry Campell Black in his "Treatise for law of judgments" 2nd Edition Vol. I, para 242 has said, "Where the Court has jurisdiction of the parties and the subject-matter in the particular case, its judgment unless reversed or annulled or impeachment by parties or privies, in any collateral action or proceeding whatever, the Doctrine of this Court, and of all the Courts of this country, is formerly established, that, if the Court in which the proceedings took place, had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such errors be considered when the judgment is brought collaterally into question one. This principle is not merely an arbitrary rule or law but it is a doctrine which is founded upon reason and the soundest principle of public policy."

37. In Jenkins v. Robertson, (1867) LRIHL 117, Lord Romily observed "res judicata by its very words means a matter upon which the Court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly. In my opinion res judicata signifies that the Court has after argument and considerations come to a decision on a contested matter."

38. In *Corpus Juris*, Vol. 34, it is said that it is a rule of universal law providing every regulated system of jurisprudence and is put upon two grounds embodied in various maxims of common law, the one of public policy and necessity which makes it to the interest of the state that there should be an end of litigation, and, the other, hardship on the individual that he should not be vexed twice for the same cause.

39. The Court, in *Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others*, , remarked "When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of *res judicata* on general principle can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue Courts, land acquisition Courts, administration Courts, etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute."

40. In *Lal Chand (Dead) by Lrs. and Others Vs. Radha Krishan*, , the Court reiterated, "the principle of *res judicata* is conceived in the larger public interest which requires that all the litigation must sooner than later come to an end. The principle is also founded on equity, justice and good conscious which require that a party which has once succeeded on a issue should not be permitted to be harassed by a multiplicity of proceedings involving the same issue".

41. In *K. Ethirajan (Dead) by Lrs. Vs. Lakshmi and Others*, , the Court referring to para 26 of its earlier judgment in *Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another*, , held, that, rule of *res judicata* prevents the parties to a judicial determination from litigating the same question over again. Where the proceedings have attained finality, parties are bound by the judgment and cannot litigate again on the same cause of action.

42. In *Sulochana Amma Vs. Narayanan Nair*, , the scope of Section 11 CPC was considered and it was said that Section 11 does not create any right or interest in the property but merely operates as a bar to try the same issue once over. It aims to prevent multiplicity of proceedings and accords finality to an issue which directly and substantially has arisen in the former suit between the same parties or their privies, decided and became final so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the Court is saved. The above judgment also clarify Explanation VIII that the decree of a Court of limited jurisdiction would also operates as *res judicata* in the subsequent suit though the subsequent suit was not triable by that Court.

43. In *Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others*, , it was said, that principle of *res judicata* is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the

matter which was the subject-matter of lis stood determined by a competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment. Recently the above view is reiterated in *Brij Narain Singh Vs. Adya Prasad (dead) and Others*, .

44. In *Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Others Vs. Vithu Hira Mahar (Dead) by LRs. and Others*, , the Court observed that well known doctrine of res judicata is codified in Section 11 of C.P.C. It generally comes into play in relation to civil suits.

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

46. The doctrine of res judicata has been extended to public interest litigation also in *State of Karnataka and Another Vs. All India Manufacturers Organization and Others*, and the Court has said:

As a matter of fact, in a public interest litigation, the petitioner is not agitating his individual rights but represents the public at large. Hence the litigation is bona fide, a judgment in previous public interest litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue, which had been raised should have been raised on an earlier occasion by way of public interest litigation.

47. In *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, , the Court clarified that the doctrine of res judicata is in the domain of procedure and cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to interpretation of enactment affecting jurisdiction of the Court finally between them even though no question of fact or mixed question of law and fact and relating to the right in issue between the

parties once determined thereby. It also said that a decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties; the "matter in issue" may be an issue of fact, an issue of law or one of mixed law and fact. However, the Court said that the previous decision on a matter in issue alone is res judicata; the reasons for the decision are not res judicata, and said as under:

The previous decision on a matter in issue alone is res judicata; the reasons for the decision are not res judicata.

48. Another aspect as to when the rule of res judicata would not be attracted has been dealt with in detail in para 10 of the judgment in Mathura Prasad Serjoo Jaiswal (supra) which reads as under:

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

49. In other words, what I discern from the above authorities, is that the res judicata is a fundamental principle in a legal system to set at rest a dispute once settled so as not to trouble the parties again and again on the same matter. It operates on the principle that a question must be once fairly and finally tried by a competent Court and, thereafter, further litigation about it between the same parties must be deemed to have concluded and should not be allowed to be re-agitated. The maxim to be attracted is "no one shall be vexed twice over the same matter". [See Commissioner of Central Excise v. Shree Baidyanath Ayurved Bhawan Ltd. (supra)].

50. It is not that every matter decided in a former suit can be pleaded as res judicata in a subsequent suit. To attract the plea of res judicata, the conditions precedent, which need be proved, are:

1. The matter directly and substantially in issue in the subsequent suit must be the same matter, which was directly and substantially in issue, either actually or constructively, in the former suit.
2. The former suit must have the same parties or the parties under whom they or any of them claims.

3. The parties must have litigated under the same title in the former suit.
4. The Court, which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue has been subsequently raised.
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

51. In *Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others*, , the Court said, to attract plea of *res judicata*, following conditions must be proved:

1. that the litigating parties must be the same;
2. that the subject-matter of the suit also must be identical;
3. that the matter must be finally decided between the parties; and
4. that the suit must be decided by a Court of competent jurisdiction.

52. In certain cases, applicability of *res judicata* qua the aforementioned conditions precedent came to be considered with certain different angles, which may be useful to be referred here at.

53. One such aspect came to be considered by Privy Council in AIR 1924 144 (Privy Council) . The plaintiff excluded certain question by the statement of his pleader and, therefore, the trial Court did not decide the issue. In the first appeal the defendant urged that the Trial Judge was wrong in not deciding this question even though his action was based on the plaintiff's advisor's statement and the defendant asked the first appellate Court expressly to decide the question. The Court did so. The question was whether it can be argued that the point decided was not raised and, therefore, the Court did not consider it to be a necessary issue. On the contrary when the first appellate Court decided the issue and the same became final, it would operate as *res judicata* to the subsequent suit involving the same issue.

54. Another angle of the above aspect came to be considered by the Privy Council in AIR 1932 51 (Privy Council) , where though the point was not properly raised in the plaint but both parties without protest chose to join issue upon that point and it was held that the decision on the point would operate as *res judicata* between the parties.

55. In *Jagdeo Misir and Others Vs. Mahabir Tewari*, , a Division Bench of this Court held:

We think that those two cases are authorities for the proposition that if a party raised an issue, however improperly, in a case which is accepted by the other side and if the Court itself accepts the issue to be one relevant to the enquiry and necessary for the determination of the case, and that issue is argued out by both parties and a judicial decision come to, it is not open subsequently for either

of the parties or their successors-in-interest or the person claiming through them, to say that the issue does not constitute res judicata.

56. This has been followed in Lalji Saheb through Bankey Behari Lal Vs. Munshi Lal Babu and Others, and Dhan Singh Vs. Jt. Director of Consolidation, U.P., Lucknow and Others, .

57. In Dhan Singh (supra) this Court also held that res judicata may apply even though the parties against whom it is sought to enforce did not enter appearance and contest question in the previous suit. But in such a case it has to be shown that such a party had notice that the relevant question was in issue and would have to be decided for which the burden lie on the person who pleaded bar of res judicata. For these propositions this Court followed and relied on AIR 1950 17 (Privy Council) .

58. Even if a judgment in a previous case is erroneous, it would be binding on the parties thereto and would operate as res judicata in subsequent case as held in Gorie Gouri Naidu (Minor) and another Vs. Thandrothu Bodemma and others, , is well-settled.

59. In short, I can say that in order to have the defence of res judicata accepted, it is necessary to show not only that the cause of action was same, but also that the plaintiff had an opportunity of getting the relief in the former proceedings, which he is now seeking.

60. In Jaswant Singh and Another Vs. Custodian of Evacuee Property, New Delhi, , it was pointed out that the test is whether the claim in the subsequent suit or proceeding is in fact founded upon the same cause of action, which was the foundation of the former suit or the proceeding. The cause of action for a proceeding has no relation, whatsoever, to the defence, which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application, as the case may be, as the cause of action or in other words, to the media upon which the plaintiff or the applicant ask the Court to arrive at a conclusion in his favour.

61. AIR 1937 1 (Privy Council) , was a case where five temples, subject-matter of suit, were built in 19th Century by one Thadikonda Seshayya a native of Vellatur and the grandfather of Kotiswara Rao adoptive father who is said to have earn wealth in Hyderabad and return to his native place. The temples were built for the deities of Siddhi Ganapati Swami, Rajeswara Swami, Bhimeswara Swami, Adi Seshachala Swami and Kameswara Maharani. Sri Thadikonda Seshayya conducted the festivals and other affairs of the deities during his life time. He left a will dated 26.8.1826 shortly before his death directing his widow, Adilakshmamma to make a permanent endowment for the temples to the extent of Rs. 70,000/- out of his self acquired properties. The widow purchased two sets of properties in the villages of Kowtharam and Peddapulivarru for the temples, conducted the affairs of temples out of the land so purchased, and afterwards

made a formal gift of the lands to the idols. Another set of properties in the village of Vellatur was endowed to the same temples by the Zamindar of Narasaraopet. Seshayya's two sons, Siddi Ganapati Doss and Nagabhushana Gajanana Doss conducted festivals and other affairs until the death of Ganapati in 1857. The latter's widow claimed the Dharmakartaship but the Collector decided in favour of Gajanana. In 1859 the Inam Commissioner granted an Inam title deed in respect of the Devadayam Inam situated in the village of Kowtharam. In 1867 Gajanana started borrowing money on the security of Devadayam lands, which culminated in a usufructuary mortgage for Rs. 8000/- dated 15.1.1887 under which the lands of Kowtharam were handed over to the mortgagee. To discharge this mortgage Gajanana and his adopted sons Seshayya granted permanent lease of Kowtharam lands dated 6.12.1888 and on the same date the mortgagee, Gopalakrishnamma executed the counterpart of the lease. Two persons interested in the temples and in the performance of the service and worship thereof who had obtained the leave of the Court u/s 18, Religious Endowments Act, 20 of 1863, on 18.1.1891 filed suit O.S. No. 4 of 1891 in the District Court, Kistna against Gajanana, his adopted son Seshayya and Gopalakrishna claiming that the five suit temples at Vellatur were public temples, therefore, the first two defendants be removed from the office of the Dharmakarta. The main defence taken by the defendants in the said suit was that the temples and lands were private property hence Act, 20 of 1863 did not apply. Gajanana died during the pendency of suit, vide judgment dated 5.2.1892 the District Judge Kistna dismissed suit holding that the temples were private, lands were a private foundation and Act, 20 of 1863 did not apply. The judgment was confirmed by Madras High Court in appeal vide judgment dated 3.8.1893. One suit was filed by Venkata Seshayya and others on 21.8.1923 as representing the interested public under Order 1 Rule 8 CPC with the requisite permission of the Subordinate Judge of Masaulipatam seeking a declaration that five temples of the village of Vellatur, Guntur District are public temples and that certain Ina lands situated in Kowthavaram village form the endowment of these temples and, therefore, the plaintiff seeking setting aside of a permanent lease in respect of these lands executed on 6.12.1888 by the then Managers of the temples, the mortgage deed on the security of these lands dated 3.11.1900 and the Court sale effected in execution of the decree obtained on the basis of the said mortgage in O.S. No. 29 of 1911. They further seek restoration of possession of these lands to Kotiswara Rao, defendant No. 1 who is the person hereditary Dharmakartha of the temples. Before the Privy Council it was contended on behalf of the appellants conceding that the appellants must be deemed to be claiming under plaintiffs in 1891 suit within the meaning of Explanation VI, Section 11 CPC as they were both claiming as representing the public interest in the temples of Kowthavaram lands and the issue in the two suits was substantially same but it was submitted that 1891 suit was not a bona fide litigation, there was gross negligence in the conduct of the suit by the plaintiff in 1891 suit, and, therefore, the principle of res judicata would not bar the present suit. Rejecting the submission, it was held that the provision of Section 11 CPC is

mandatory and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of Section 44, Evidence Act which defines with precision the grounds of such avoidance as fraud or collusion.

62. When in a matter a issue is directly and substantially involved and decided then obviously it operate as res judicata. The word "issue" has not been defined in CPC. Whartons "Law Lexicon" says that "issue" means "the point in question at the conclusion of the pleading between the contending parties in an action, when one side affirms and the other side denies". Order XIV of the CPC deals with the settlement of "issues" and determination of suit on issues of law or on issues agreed upon. Rule 1 deals with the framing of issues as follows:

1. Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

2. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

3. Every material proposition affirmed by one party and denied by the other, shall form the subject of a distinct issue.

4. Issues are of two kinds.

(a) Issues of fact

(b) Issues of law

Meaning of "a matter directly and substantially in issue"

63. Then comes as to what constitute "a matter directly and substantially in issue". One of the test recognised is, if the issue was necessary to be decided for adjudicating on the principle issue, and, was decided.

64. A collateral or incidental issue is one i.e. ancillary to a direct and substantive issue; the former is an auxiliary issue and the later the principal issue. The expression collateral or incidental in issue implies that there is another matter which is directly and substantially in issue. (Mulla's C.P.C. 16th Edition, Vol. I, page 179).

65. Difficulty, however, in distinguishing whether a matter was directly in issue or collaterally in issue confronted various Courts in different Countries and certain test were laid down therein. Halsbury's Laws of England (Vol. 16, para 1538, 4th Edn.) says "difficulty arises in the application of the rule, in determining in each case what was the point decided and what was the matter incidentally cognizable, and the opinion of Judges seems to have undergone some fluctuations."

66. In "The Doctrine of Res judicata" (2nd Edn., 1969, p. 181), "Spencer Bower and Turner", quoted Dixon, J. of the Australian High Court in Blair v. Churran,

(1939) 62 CLR 464 at 553; "The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation of a groundwork of the judgment."

67. The aforesaid authorities opined, in order to understand this essential distinction, one has always to inquire with unrelenting severity-is the determination upon which it is sought to find an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do. It is suggested by Dixon, J. that even where this inquiry is answered satisfactorily, there is still another test to pass: viz. whether the determination is the "immediate foundation" of the decision as opposed to merely "a proposition collateral or subsidiary only, i.e. not more than part of the reasoning supporting the conclusion." It is well-settled, say the above authors, "that a mere step in reasoning is insufficient. What is required is no less than the determination of law, or fact or both, fundamental to the substantive decision."

68. Corpus Juris Secundum (Vol. 50, para 725) noticed the above aspects and conceded, it is sometimes difficult to determine when particular issue determined is of sufficient dignity to be covered by the rule of estoppel. It is said that estoppel by judgment does not extend to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on.

69. However, this rule did not prevent a judgment from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining ultimate vital point.

70. American Jurisprudence (Vol. 46, Judgments, para 422) says; "Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

71. The words "substantially" means "of importance and value". When a matter is substantially in issue, when it is of importance and value for the decision of main proceeding. When parties go to a trial on a particular issue treating it as material and invites the Court to give a decision thereon, that will be an issue substantially and directly involved and would operate as res judicata. However, a mere expression of opinion on a question not in issue cannot operate as res judicata as held in Ragho Prasad Gupta Vs. Shri Krishna Poddar, .

72. In Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, , the term "directly and substantially in issue" qua the words "incidental and collateral" came up for consideration. The Edroos family in Gujarat claimed to be descendants of Hazarat Imam Ali, the son-in-law and cousin of Prophet Muhamed. One of the descendants of the said Hazarat came

down to India in 1542 A.D. and founded his Gadi at Ahmedabad, Broach and Surat. The members of the Edroos family were Sajjadanishins or Mutavallis of the wakf throughout. The three Rozas at the three places as well as the villages which were granted - not only for the maintenance of these Rozas but also for the benefit of the Waquif's family, constituted the wakf. The holder was buried in the house and his Dargah is situated in this place. There is also a place for reciting prayers. In an earlier litigation in ILR 1889 13 555 (Bom.) , a Division Bench of the Bombay High Court, traced the history of the wakf and held that the custom of primogeniture did not apply to the office of Sajjadanishin or Mutavalli of this wakf. In a later dispute in Saiyad Jaffar El Edroos Vs. Saiyad Mahomed El Edroos, , another Division Bench held after construing the royal grants relating to the villages Umrao and Orma that the grants were primarily for the Rozas and Dargas and they clearly constituted "wakf but that the Sajjadanashin or Mutavalli had, however, a right to the surplus income left over after discharge of the legal obligations regarding the wakf. It was thus held that the Sajjadanishin could provide for the needs of the indigent members of the family and this was a pious obligation which was only a moral obligation and not a legal obligation and hence the indigent members of the Edroos family, as a right, could not claim maintenance out of the surplus income. Thereafter, Regular Suit No. 201 of 1928 was filed by three plaintiffs u/s 92 C.P.C. impleading father of Sayed Mohamed Baquir-El-Edroos in 1928 after obtaining permission on 22.2.1928 from the Collector u/s 92 C.P.C. for filing the suit. The suit was dismissed on 6.10.1931, the first appeal was dismissed but cross objections were allowed on 21.11.1938 and the second appeal to the High Court was withdrawn. In the aforesaid suit, there were eight points whereof points No. 1 to 7 related to the validity of appointment of the defendant and the nature of the office and the right to the surplus etc. It was held that the appointment of defendant as Sajjadanashin was valid and that the grant of the property was both for the Rozas and for the maintenance, presumably of the Sajjadanashin and his family members. It was also held that the Sajjadanashin had complete power of disposal over the surplus as he was not in the position of an ordinary trustee. It was held that the Sajjadanashin had complete power of disposal over the surplus, hence the plea of plaintiff's complaint about mis-utilization of the income by Sajjadanashin was rejected. Another issue was framed whether the waqf was a private or a public and it was held that it was a private waqf. The District Court held that from 1746 A.D. onwards, the Sajjadanashin were using the revenue of these villages for their own maintenance and that of the members of their family and other dependents. This finding was consistent with the judgment of the Bombay High Court in Saiyad Jaffar El Edroos (supra) wherein this was held permissible. The District Court in view of the fact that Sajjadanashin was from the family and not a stranger or outside held it a private waqf. Thereafter another matter came before the Gujrat High Court in relation to Ahmedabad Rozas wherein also a Single Judge of Bombay High Court in Alimiya Mahmadiya and Another Vs. Sayed Mohomed Baquir Eledroos Valde Saueed Jaffer El-Edroos and Another, , rejected a similar plea. This judgment was confirmed by the Division Bench in

Sayed Mohd. v. Alimiya, (1972) 13 Guj. LR 285. In the case before the Apex Court in respect to Rozas at all the three places, the Assistant Commissioner in enquiry No. 142 of 1967 passed an order dated 26.7.1968 accepting the preliminary objection of res judicata but the Joint Charity Commissioner, Gujrat in its order dated 17.12.1973, in appeal, did not accept the said plea which was pressed before him only in respect to the Rozas at Broach and Surat. He set aside the order of Assistant Commissioner and remanded the matter for enquiry. The Assistant Judge in Misc. Civil Application No. 32 of 1974 affirmed the order of Joint Commissioner on 3.9.1976 and it was further affirmed by a Division Bench of Gujrat High Court in First Appeal No. 985 of 1976 on 27.7.1985. Aggrieved by the aforesaid order, the appellant, Sajjadanashin Sayed took the matter to the Apex Court and raised the plea of res judicata in respect to Rozas at Broach and Surat. It is in the light of the above facts, the Apex Court considered the matter. In order to see whether the principle of res judicata is attracted, the Apex Court framed an issue as to what is the meaning of "collaterally and incidentally in issue" as distinguished from "directly and substantially in issue". In para 11, the Apex Court found that the matter collaterally and incidentally in issue are not ordinarily res judicata and this principle has been well accepted but certain exceptions to this principle have also been accepted. The Court also traced out the law on the subject in England, America, Australia and India. Referring to Halsbury's Laws of England (Vol. 16, para 1538, 4th Edn.), the Court observed that the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question or if any matter is incidentally cognizable. The said judgment attained finality since the second appeal filed in the High Court was withdrawn.

73. In the light of the above facts and in this context the Apex Court in Sajjadanashin (supra), in respect to India, affirmed the view of the learned Author Mulla in "C.P.C." as under:

..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 principle 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 later case. 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,).

74. It also referred to two judgments of the Privy Council in (1884) ILR 11 301 (Privy Council) and *Asrar Ahmed vs. Durgah Committee, Ajmer*, as well as its earlier decision in *Mahant Pragdasji Guru Bhagwandasji Vs. Patel Ishwarlalbhai Narsibhai and Others*, and found that inspite of a specific issue and adverse finding in the earlier suit, the Finding was not treated as *res judicata* as it was purely incidental or auxiliary or collateral to the main issue in each of the three cases and was not necessary for the earlier case nor formed foundation. It also considered *Sulochana Amma (supra)* and a Madras High Court decision in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple and Another Vs. Rajanga Asari and Others*, , in respect where to it was pointed out that there was a direct conflict. The Court however found that the said decisions are not contrary to each other but should be understood in the context of the tests referred to above. It held that in *Sulochana Amma (supra)* it is to be assumed that the tests above referred to were satisfied for holding that the finding as to position was substantially rested on title upon which a finding was felt necessary but in the case before the Madras High Court, it must be assumed that the tests were not satisfied. The Apex Court confirmed the observations of the learned author Mulla in "*C.P.C. (Supra)*" and said that it all depend on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in an earlier suit and was also substantive basis for grant of injunction or not.

75. Further, the Court in *Sajjadanashin (supra)* quoted the following from the "*Corpus Juris Secundum*" (Vol. 50, para 735, p. 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with and held, "Where title to property is the basis of the right of possession, a decision on the question of possession is *res judicata* on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessary involved, the judgment is not conclusive on the question of ownership or title." The Court observed that in the case before it there were certain changes in the statutory law with respect to definition of "public waqf" and in view thereof since now the "private waqf was also included within the definition of "public waqf" in the Act, due to change in subject it held that the earlier decision would not operate as *res Judicata*.

76. In *Sharadchandra Ganesh Muley Vs. State of Maharashtra and others*, , Explanation IV Section 11A containing doctrine of "might and ought" and application of doctrine of constructive *res judicata* came to be considered. The Court held, that, where in respect to land acquisition proceedings an earlier writ petition was filed without raising a plea which was available at that time, in the second writ petition such plea could not have been taken as the doctrine of "might and ought" engrafted in Explanation IV to Section 11 of the C.P.C. would come into play and the incumbent would be precluded from raising the controversy once over. The Court held that the doctrine of constructive *res judicata* shall put an embargo on his right to raise a plea as barred by limitation

u/s 11A.

"Explanation IV"

77. However, the concept of "constructive res judicata" is necessary to be dealt with in view of Explanation-IV Section 11 C.P.C. A Matter, which might and ought to have been made a ground of attack or defence is a, matter which is constructively in issue. The principle underlying Explanation-IV is res judicata not confined to issues which the Courts are actually asked to decide but 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. (State of U.P. Vs. Nawab Hussain,). The proposition of law expounded, as referred to above, in para 20 is also unexceptional. However, it would apply only where a plea was available at the time of the suit but not availed of. But there is no question of constructive res judicata where there is no adjudication in the earlier proceedings [Kewal Singh Vs. Smt. Lajwanti,]. The effect of Explanation-IV is where a matter has been constructively in issue, it could not from the very nature of the case be heard and decided but will be deemed to have been heard and decided against the parties omitting to allege it except when an admission by the defendant obviates a decision (6 CWN 889 (Privy Council); AIR 1949 143 (Privy Council)).

78. There is an exception to this plea, i.e., where the evidence in support of one ground is such as might be destructive for the other ground, the two grounds need not be set up in the same suit. In Kanhiya Lal v. Ashraf Khan, AIR 1924 All 355, it was observed that a person claiming property on the allegation that it is wakf property and that he is the Manager thereof is not bound to claim the same property in the same suit alternatively in his own rights in the event of its being held that the property was not wakf property. In Cheria Veetil Madhavan Variar (died) and Others Vs. Chathu Nambiar of Memenda Amsom Kizhal Desam and Others, , a suit to recover possession of properties on a claim that they belong personally to the plaintiff was held not barred by reason of a decision in a previous suit, in which they were claimed as belonging to a Tarwad of which he was a member. Similarly, where the right claimed in the subsequent suit is different from that in the former suit; it is claimed under a different form that in the former suit; it is claimed under a different title, the subsequent suit would not be barred by res judicata/constructive res judicata.

79. Next is the question about the "same parties" or "between parties under whom they or any of them claim". In order to find a person by res judicata it must be shown that he was in some way party to the earlier suit as the judgment binds only parties and privies. A person claiming under a party is known as privy. The ground of privity is property and not personal relations. If the plaintiff in subsequent suit claims independent right over the suit property the principle of res judicata would not apply. If the predecessor in interest was party to the suit/proceeding involving the same property then the decision binds his successor in

interest. From the record it must be evident that the party sought to be bound was in some way a party to the suit. A person merely interested in the litigation cannot be said to be a party to the suit. Such a person is neither to make himself a party nor can be bound by the result of the litigation as held in Jujjuvarapu Kotamma Vs. Pappala Simhachalam and Others, .

80. Where a person in the subsequent suit claims independent right over the suit property the principle of res judicata would not apply. (Byathaiah (Kum) and others v. Pentaiah (Kum) and others, 2000 (9) SCC 191).

81. Similarly the party must be litigating under the same title. The test is the identity of title in two litigations and not the identity of the actual property involved in two cases as held in Rajalaxmi Dasi v. Banamali Sen (supra); Ram Gobinda Dawan and Others Vs. Smt. Bhaktabala, .

82. Same title means same capacity; the test being whether the party litigating is in law the same or a different person. If the same person is a party in different character, the decision in the former suit does not operate as res judicata. Similarly, if the rights claimed are different, the subsequent suit will not be res judicata simply because the property is identical. Title refers not to cause of action but to the interest or capacity of the party suing or being sued.

83. Coming back to the facts of present case in the light of above discussion, appeal was filed by Smt. Ramdei challenging order dated 6.12.1965 and thereafter present appellant came up with an application for substitution alleging that Smt. Ramdei has died. This fact was disputed by respondents therein which included defendants 1 and 2 in the present appeal. Therefore, question whether Smt. Ramdei had died in 1966 and would entitle Smt. Maharaji Kunwar to be substituted in her place was an issue directly and substantially came up for consideration before Consolidation Authorities. On the basis of evidence, the issue was decided holding that Sri Ramdei has not died and is alive. The question of substitution does not arise. This matter attained finality upto this Court, vide judgment dated 10th March, 1971. Therefore, upto 10th March, 1971, there is/ was nothing which may demonstrate that Sri Ramdei had died justifying substitution of Smt. Maharaji Kunwar in consolidation proceedings. This issue having attained finality upto this Court, I am not inclined to agree that aforesaid issue can be allowed to be reagitated before Courts below in the suit instituted in 1969 by the plaintiff-appellant for cancellation of sale-deed which was executed by Smt. Ramdei herself on 12th October, 1966 on the ground that at that time she was already dead. The earlier decision of Court shall operate as constrictive res judicata.

84. In my view, Courts below have rightly held and followed earlier decision that Smt. Ramdei was alive and earlier decision on this aspect has rightly been held, to operate as res judicata. The question No. 1 is, therefore, answered against plaintiff-appellant and in affirmance.

85. Now I come to the second question. The plaintiff has sought a decree of

cancellation of sale-deed executed by Sri Ramdei on the ground that vendor executant of the document was dead on the date of alleged execution. There is no provision which obliges Trial Court to treat the plaint case correct and proved and plaintiff entitled for relief sought in case the defendant (s) has not filed written statement. Even if a suit is not contested by defendant, the plaintiff has to prove its case and has to stand on its own legs.

86. Order VIII, Rule 10 CPC enables Court that in a given circumstance, it may proceed to deliver the judgment but it is not obligatory or necessary in every case. Moreover, when there are several defendants and one or some of them have chosen not to contest the suit by filing written statement but other defendants have contested the issue by filing written statement, the Court, on its own, will not choose as to which defendant is the main contesting party and which is ancillary or useless or unnecessary and it is his/their presence should be ignored.

87. The submission, in my view, is nothing but a desperate attempt when appellant has failed to sustain her claim set up in the suit. The very issue going to the root of the matter has gone against her. The plaintiff's foundation of challenge is the death of vendor on the date when the sale-deed dated 12th October, 1966 is said to have been executed. This very fact having been found to be false, entire edifies of the suit falls and nothing thereafter would come to rescue the plaintiff-appellant. Moreover, order VIII, Rule 10 has undergone various amendments but at the time of decision by Trial Court, the provision, as it stood then, read as under:

Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

(emphasis added)

88. The procedure has left discretion to the Court. In the present case, Court proceeded to frame issues and permitted parties to lead evidence. This procedure cannot be said illegal or impermissible in law. I find that on this aspect this matter is squarely covered by decision of Apex Court in Balraj Taneja and another (supra), wherein Court said:

30. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of

Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in Sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

89. The above quote in Balraj Taneja and another (supra), has been followed recently in C.N. Ramappa Gowda Vs. C.C. Chandregowda (Dead) by L.Rs. and Another, , wherein also it has been held that Court is duty bound to adjudicate even in the absence of complete pleadings or in absence of pleadings of only one party. In para 14 of the judgment, the Court said that effect of non-filing of written statement and proceeding to try the suit is clearly to expedite disposal of the suit. It is not penal in nature wherein the defendant has to be penalised for non filing of written statement by trying the suit in a mechanical manner by passing a decree. Apex Court reiterated its earlier observations in following words:

....We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the Plaintiff in view of the deemed admission by the Defendant, the Court can conveniently pass a judgment and decree against the Defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex parte judgment without directing the Plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the Plaintiff's case even without any evidence is prima facie unimpeachable and the Defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial Court who is seized of the trial of the suit.

90. Applying the aforesaid facts in the present case, where cancellation of sale-deed has been sought on the ground of fraud and misrepresentation including the fact that vendor had already died and was not alive on the date of execution of sale-deed, it was necessary for Trial Court to have credible evidence to find out whether those facts are correct or not. This is further to be seen in the light of the fact that sale-deed was duly registered and Section 60 of Registration Act, 1908 raises a presumption that endorsement thereon by Registrar/Sub-Registrar are correct and all those transactions have actually taken place. This is a statutory presumption and to rebut the same the appellant-applicant could not have been successful without leading evidence, even if one of defendants had not filed written statement.

91. In the present case there is an additional reason that since defendant Nos. 1 and 2 had contested the suit by filing written statement, in my view, Order VIII, Rule 10 has no application at all. The issue No. 2, therefore, is answered in negative i.e. against the plaintiff-appellant.

92. Now coming to the last question, I am inclined to answer it also against plaintiff-appellant and in favour of defendants. Once plaintiff failed to prove death of vendor of sale-deed dated 12.10.1966 i.e. the fact that at the time of filing suit the said vendee was dead, she (plaintiff) had no cause of action to challenge the sale-deed in which she was not a party at all. Smt. Ramdei, being alive, neither, any right over property of Smt. Ramdei could have been claimed by plaintiff-appellant nor she had any right to challenge an action of Smt. Ramdei i.e. by execution of a sale-deed when Smt. Ramdei herself has no concern. The question, therefore, is answered accordingly. I hold that plaintiff-appellant having failed to prove death of Smt. Ramdei either on the date of execution of sale-deed or on the date of even filing of suit, had no cause of action to maintain the suit in question and therefore it was liable to be dismissed for this very reason. In the result, this appeal fails and dismissed with cost throughout.