
(2013) 02 AHC CK 0283
In the Allahabad High Court
Case No : Second Appeal No. 266 of 1976

Ram Naresh Singh and Another	Vs	APPELLANT
Ram Pal Singh and Others		RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 26 Rule 10(2), Order 26 Rule 9, 11, 2
Evidence Act, 1872 — Section 44
Religious Endowments Act, 1863 — Section 18

Citation : (2013) 8 ADJ 324 : (2013) 4 ALJ 351

Hon'ble Judges : Sudhir Agrawal, J

Bench : Single Bench

Advocate : Dhruv Narayan, A.K. Yadav and R.C. Singh, for the Appellant; Radha Krishnan, G.S.D. Mishra and Samimul Husnain, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agrawal, J.—Heard Sri R.C. Singh, learned counsel for the appellant and Dr. G.S.D. Mishra, learned counsel appearing for respondents. The plaintiff-appellant instituted Original Suit No. 216 of 1967 seeking injunction in respect to property in dispute that defendants-respondents should not interfere in the peaceful possession of plaintiff appellant and should also remove the illegal construction raised thereon. It was pleaded that plaintiff appellant is cultivator Sirdar on plot No. 1492/2, measuring 1 Bigha, situate in Village Paigamberpur, Pargana Jhunsi, District Allahabad. The property in dispute has nothing to do with defendants respondents still they are raising construction thereon and interfering with possession of plaintiff-appellant.

2. The Trial Court dismissed suit vide judgment dated 11.09.1969 by deciding issue Nos. 1 and 2 against plaintiff-appellant holding that he could not demonstrate that he owned or was in possession of disputed plot or that the same formed part of plot No. 1492/2 of which he claimed to be the cultivator Sirdar. Moreover from the pleadings of plaintiff-appellant it was also evident that

disputed land was being utilised by defendants-respondents after raising their construction etc. and in absence of any evidence or proof shown by plaintiff appellant to demonstrate that said construction was in respect to land which formed part of plot No. 1492/2, the injunction, as sought, by plaintiff-appellant cannot be granted.

3. The aforesaid findings in respect to issues No. 1 and 2 has been confirmed by Lower Appellate Court by dismissing plaintiff appellant's Civil Appeal No. 43 of 1970 vide judgment dated 31.10.1975.

4. It appears that during pendency of matter before Lower Appellate Court, a Survey Commissioner was appointed who submitted report on 25.04.1972. Another Commissioner's report was also obtained by Lower Appellate Court on 20.04.1973. However, the aforesaid reports could not demonstrate either possession of plaintiff appellant on property in dispute or that the land in question formed part of plot No. 1492/2, of which only, the plaintiff-appellant, claimed to be cultivator-Sirdar and, hence, aforesaid reports could not render any help in deciding issue in favour of plaintiff appellant. The Lower Appellate Court, therefore, confirmed findings recorded by Trial Court.

5. The following substantial questions of law were framed by this Court vide order dated 28.07.2010:

(I) Whether the report of Survey Commissioner having been called for by the Lower Appellate Court, accepted and confirmed, it was beyond the jurisdiction of the (successor) Lower Appellate Court to have held that the acceptance thereof was improper?

(II) Whether in the facts and circumstances of the case the provision contained under Sections 189 and 190 of U.P.Z.A. and L.R. Act, 1951 (hereinafter referred to as the "Act, 1951") could have been pressed into service especially in view of the fact that there was no pleading by the defendant?

6. Subsequently, this Court, vide order of date, added the following more substantial questions of law:

(III) Whether objections having been filed against the report of the Survey Commissioner, having been rejected and the report having been confirmed, the correctness thereof could be challenged at any subsequent stage of the appeal in view of the law laid down in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, ?

(IV) Whether it was not incumbent upon the plaintiff-appellant to examine the Lekhpal under any provision of law and the demarcation of plot No. 1492/2 must be presumed at law to correct unless proved to contrary?

(V) Whether there is a presumption of legality about the demarcation under Chapter V of U.P. Land Records Manual and it was for the respondents to have proved to the contrary?

(VI) Whether demarcation of plot No. 1492/2 could have been discarded by the Lower Appellate Court on mere speculation and reasons not germane to the controversy?

(VII) Whether Survey Commissioner's report which was confirmed after objection could have been discarded?

(VIII) Whether Survey Commissioner's report or oral evidence adduced by plaintiff appellant per se can be construed as proof to support the claim of plaintiff-appellant that plot in dispute forms part of plot No. 1492/2 of which the plaintiff-appellant is Sirdar.

(IX) Whether the principle of res judicata at all has any application in the matter merely because Commissioner's report was accepted by courts below?

7. The question Nos. I, III, VII, VIII and IX can be considered together having common input of facts and law.

8. The Commissioner's reports obtained in this matter are basically about location, construction position and possession. It does not appear that any attempt was made by Commissioner in two reports to find out whether disputed property formed part of plot No. 1492/2 in any manner. Both the reports do not throw any light on this aspect.

9. Order XXVI, Rule 9 empowers the Court to direct for local investigation by issuing a Commission and to submit report. Rule 10 talks of procedure of report of Commissioner and if accepted by Court, the status conferred thereupon. The same read as under:

9. Commissions to make local investigations.--In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issue, the Court shall be bound by such rules.

10. Procedure of Commissioner (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit -- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the

manner in which he has made the investigation.

(3) Commissioner may be examined in person -- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

(Emphasis added)

10. Order XXVI, Rule 9 thus enables the Court to issue a Commission, in such cases, where, it deems a local investigation to be requisite or proper for the purposes of elucidating any matter in dispute or ascertaining the market value of any property or amount of any mesne profits or damages or annual net profits. The report submitted by Commissioner together with evidence, if any, collected by Commissioner shall be examined by Court, and, if taken on record, shall form evidence in suit. The party, if any, having grievance against report of Commissioner has two remedies. Firstly, it can file an objection to the report and secondly, may lead evidence to show what has been said in report is not correct.

11. In *Vemba Gounder Vs. Poonchulai Gounder*, , the Court took the view that before asking parties to lead evidence on merit, if an objection has been raised to the report of Commissioner, it ought to be considered and decided.

12. In *Amena Bibi and others Vs. Sk. Abdul Haque*, , the Court said that acceptance of Commission's report as an evidence does not mean that parties are precluded from challenging the report. The report of the commissioner is not binding on the Court. It may accept the facts arrived at by the commissioner or may not accept his conclusion or vice-versa as held in *Bibhuti Bhushan Bank and Another Vs. Sadhan Chandra Sheet and Others*, and *Sankar Kumar and Another Vs. Mohanlal Sharma*, .

13. In *Harihar Misra Vs. Narhari Setti Sitaramiah and Another*, in para 4 the Court said:

Rule 10 of O. 26 does not make the report of the Commissioner as concluding the question of valuation. On the contrary, the rule gives clear indication that the report of the Commissioner is only one of the pieces of evidence amongst other evidence to be led by the parties for determination of the issue on valuation of the suit. When the parties file no objection to the Commissioner's report, the court rightly accepts the report. Its acceptance by itself does not, however, mean that parties are precluded from challenging the evidence of the Commissioner and the witnesses examined by him or by giving any other evidence to countermand the effect of the Commissioner's report.

(Emphasis added)

14. Following the above decision, Calcutta High Court in *Amena Bibi and others Vs. Sk. Abdul Haque*, said:

Thus, from the underlying principle emerging from the above cases, it is manifest that the party objecting to the Commissioner's report can lead best possible

evidence at the time of hearing to countermand the report even if the same was accepted earlier. The Court on taking the comprehensive view decide the point at issue and arrive at right conclusion. I do not find at this stage any justification to interfere with the findings of the learned trial court order accepting the Commissioner's report.

15. In *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, in para 14 it was held:

It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the Commissioner and to what extent to act upon such facts and data. But it would not be correct to say that the report of the Commissioner has no evidentiary value at all, since the statements made in it are not tested by cross-examination.

16. In para 81 of the said judgment the court said: "Interference with the result of a detailed and careful report so submitted should be made only for cogent and compelling reasons. In a case where an elaborate report is filed by the Commissioner, whose integrity, credibility and carefulness are not questioned, whose careful and laborious execution of his task is proved by the report itself, interference will be made only in exceptional circumstances, in cases where convincing evidence contra is available before Court."

17. In *Sharda Vs. Dharmpal*, the Court held that the primary duty of the Court is to see that truth is arrived at. It also held that in certain cases scientific investigation by the experts in the field is not only to be found leading to the truth of the matter, but may also lead to the removal of misunderstanding between the parties.

18. From the above it is thus clear that a Commissioner's report constituted only an evidence and has to be considered by Court like any other evidence while deciding the suit. It cannot be said that the view expressed by Commissioner in his report will be deemed to be a finding on the concerned issue as soon as the Commissioner's report is accepted by Court to form a part of record as evidence and the Court, if takes any other view, than what has been stated by Commissioner in his report, that would amount to be recording a contradictory finding over a finding of judicial nature already recorded so as to attract the principle of *res judicata*.

19. From the above the well established principles of law which can be extracted is that Commissioner's reports under Order 26, Rule 10(2) is only a piece of evidence and it is always open to Trial Court to believe it or not. The mere fact that Commissioner's report was admitted as part of evidence does not deprive a Court of Fact to reject or disbelieve the report while assessing the evidence and deciding issues in suit.

20. The submission and proposition exposed lack of understanding on the part of learned counsel about the very concept of principle of *res judicata*. It is really

surprising that principle of res judicata holding the field of law for last several centuries, yet often argued in the courts of law, in matters, where, apparently application thereof is totally misplaced.

21. Looking to the argument advanced and that too at length, I find it necessary to elaborate the principle of res judicata here at for better understanding not only for the purpose of this case but also in general.

22. The principle of res judicata, as it stands today, I find, has its origin and existence long back, besides, any boundation of system of jurisprudence, whether Hindu law, Muslim law, English law etc. The Court do not find any substantial change in the principle and the very basis of the concept which if applicable would have to be followed by a Court of law unless it can be shown that the principle of res judicata, as is known, not at all attracted in a given case.

23. This Court find that availability of the principle of res judicata existing in different systems of law. It has been very painstakingly traced by Lahore High Court's Full Bench decision in AIR 1927 289 (Lahore) . It would be useful to have the benefit of such in depth study by reproducing the same as under:

In the mitakshara (Book II, Chap. I, Section V, verse 5) one of the four kinds of effective answers to a suit is "a plea by former judgment" and in verse 10, Katyayana is quoted as laying down that "one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of Purva Nyaya or former judgment" (Macnaughten and Colebrooke's translation page 22). The doctrine, however, seems to have been recognized much earlier in Hindu Jurisprudence, judging from the fact that both the Smriti Chandrika (Mysore Edition, pages 97-98) and the Virmitrodaya (Vidya Sagar Edition, page 77) base the defence of Prang Nyaya (=former decision) on the following text of the ancient law-giver Harita, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments:

The plaintiff should be non-suited if the defendants avers; "In this very affair, there was litigation between him and myself previously," and it is found that the plaintiff had lost his case

There are texts of Parsara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition, page 15) to the same effect.

Among Muhammadan law-givers similar effect was given to the plea of "Niza-I-munfasla" or "Amar Mania Taqirir Mukhalif." Under Roman Law, as administered by the Proetors' Courts, a defendant could repel the plaintiff's claim by means of "exceptio rei judicata" or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and as stated in Roby's Roman Private Law (Vol. II, page 338) the general principle recognized was that "one suit and one decision was enough for any single dispute" and that "a matter once brought to trial should not be tried except, of course, by way of appeal".

The spirit of the doctrine is succinctly expressed in the well known maxim "Nemo debet bis vexari pro eadem causa" (no one shall be twice vexed for the same cause). At times the rule worked harshly on individuals (e.g., when the former decision was obviously erroneous) but its working was justified on the great principle of public policy "Interest rei publicae sit finis litium" (it is for the public good that there be an end of litigation).

In some of these ancient systems, however, the operation of the rule was confined to cases in which the plaintiff put forward his claim to "the same subject-matter with regard to which his request had already been determined by a competent Court and had passed into judgment". In other words, it was what is described as the plea of "estoppel by judgment" or "estoppel by record", which was recognized and given effect to. In several European continental countries even now the rule is still subject to these qualifications, e.g., in the Civil Code of France, it is said "The authority of the thing adjudged (chose jugée) has place only in regard to that which has constituted the object of a judgment. It is necessary that the thing demanded be the same; that the demand be founded upon the same cause; that it be between the same parties and found by and against them in the same capacity."

In other countries, and notably in England, the doctrine has developed and expanded, and the bar is applied in a subsequent action not only to cases where claim is laid to the same property but also to the same matter (or issue) as was directly and substantially in dispute in the former litigation. In other words, it is the identity of the issue, which has already been "necessarily tried" between the parties and on which a finding has been given before, and not the identity of the subject-matter which attracts the operation of the rule. Put briefly the plea is not limited to "estoppel by judgment" (or record), but is also extended to what is described as "estoppel by verdict". The earliest authoritative exposition of the law on the subject in England is by Chief Justice DeGrey in the *Duchess of Kingston Case* (1), which has formed the basis of all subsequent judicial pronouncements in England, America and other countries, the jural systems of which are based on or inspired by British Jurisprudence. In that case a number of propositions on the subject were laid down, the first of them being that "the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties upon the same matter, directly in question in another Court."

In British India the rule of *res judicata* seems to have been first introduced by section 16 of the Bengal Regulation III of 1793, which prohibited the Zilla and City Courts "from entertaining any cause, which forms the production of a former decree of the record of the Court, shall appear to have been heard and determined by any judge or any superintendent of a Court having competent jurisdiction". The earliest legislative attempt at codification of the law on the subject was, however, made in 1859, when the first CPC was passed. Section 2 of the Code barred the cognizance by Courts of suits based on the same cause of

action, which had been heard and determined before by Courts of competent jurisdiction. It will be seen that this was only a partial recognition of the English rule insofar as it embodied the principles relating to estoppel by judgment (or record) only and did not extend to estoppel by verdict. In 1877 when the Code was revised, the operation of the rule was extended in section 13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action but the prohibition equally applied against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent Court. The section has been amended and amplified twice again and has assumed its present form in section 11 of the Code of 1908, the principal amendments which have a bearing on the question before us, being (a) that the expression "former suit" was defined as meaning a suit which has been first decided and not one which was first instituted, and (b) that the competence of a Court is not regulated by the course of appeal of the former suit but by its capacity to try the subsequent suit as an original Court.

But although the Indian Legislature has from 1859 onwards made several attempts to codify the law on the subject and the present section 11 is a largely modified and improved form of the original section 2 of Act VIII of 1859, it must be borne in mind that the section as even now enacted, is not exhaustive of the law on the subject, and the general principles of *res judicata* apply to matters on which the section is silent and also govern proceedings to which the section does not in terms apply.

24. It is, thus, evident that *res judicata* is a principle or doctrine or concept which is well recognized since ancient times. It is a principle of universal application treated to be a fundamental and basic idea in every developed jural society. The very objective of adjudication of a dispute by an adjudicatory forum, whatever name it is called, is to bring to an end dispute or lis between the parties. The seed of justice, thus, aims to have every matter fairly tried once and, thereafter, further litigation should be barred treating to be concluded for all times to come between the parties. So far as the dispute which has already been adjudicated, it is a rule common to all, well defined in a civilized system of jurisprudence, that, the solemn and deliberate sentence of law upon a disputed fact pronounced, after a proper trial, by its appointed organ should be regarded as final and conclusive determination of the question litigated and should set at rest, forever, the controversy. This rule which treats the final decision of a competent Tribunal as "irrefragable truth" was well known to Hindu and Mohammadan lawyers and jurists since long as the system is recognized in Hindu as well as Muslim laws also.

25. So far as Europe is concerned, it is mainly influenced with the legal system of Roman jurisprudence. This principle is one of the great gains of Roman jurisprudence carried to modern jural system of Europe. In the Anglo saxon jurisprudence, this principle is formerly based on a maxim of Roman jurisprudence "*interest reipublicae ut sit finis litium*" (it concerns the state that

there should be an end to law suits) and partly on the maxim "nemo debet bis vexari pro una at eadem cause (no man should be vexed twice over for the same cause). The Act 8 of 1859 provided the principle of the res judicata in Section 2 which read as under:

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

26. The principle of res judicata vide Section 2 of C.P.C., i.e., Act 8 of 1859 came to be considered before Privy Council in (1873) L.R.I.A. Supp. 212 (Privy Council) . The Judicial Committee said "We are of the opinion that Section 2 of the Code of 1859 would by no means prevent operation of the general law relating to res judicata founded on the principle "nemo debet bis vexari pro eadem causa".

27. In Krishna Behary Ray v. Bunwari Lal Ray, (1875) 1 Cal 144 (146) , Privy Council while construing the expression "cause of action" held that it cannot be interpreted in its literal and restricted sense. If a material issue had been tried and determined between the same parties by a competent court, the same cannot be re-agitated again by the parties in a later suit who were also parties in the former suit.

28. When this view was expressed in some other judgments also, the legislature introduced the words "matter directly and substantially in issue" in Section 13 in Act No. 10 of 1877 and 14 of 1882.

29. In (1882) ILR 5 304 an interesting question with respect to res judicata and estoppel by verdict and/or estoppel by judgment was considered. An original suit No. 12 of 1850 was instituted by certain persons of Tenkalai sect in the Court of Sadar Amin against the members of Vadakalai sect. A Vadakalai temple was erected in the village of Mathura Mangalam in the honour of a devotee Embar in which the member of Tenkalai sect were interested in maintaining worship and in defending the privileges of the temple. The other sect, namely, Vadakalai, also erected a Vaishnava temple on a private site in the Sanadi (temple) street in honour of a devotee, Vedhanta Desikar, which was later on thrown open for regular public worship. In 1849 the above mentioned suit was filed praying that the Vadakalais be compelled to remove their idols and be prohibited from celebrating festivals and erecting any temple in the village for the worship of their idols. The Vadakalais, defended the suit contending that the general right of owners of land to erect on their own property, places of public worship and to set up therein such idols as they thought fit. Earlier to that suit, it appears that there was some other suit between the same sects wherein the pundit had delivered an opinion that the public worship of idols of devotees such as the spiritual teachers of the respective sects was not recognized by Hindu law, and that law did not permit persons to assemble together to celebrate to such idols. But

where it was customary to do so, such idols might be used in private worship. Relying on the said opinion of the pundit, the Sadar Amin granted the order of injunction prayed for. In the appeal preferred before the Judge, he held that supposing the worship of which the Tenkalais complained was prejudicial to the interests of the institution they supported, the question being one of conscience, no cause of action accrued to the Tenkalais, and that it was competent to the Vadakalais to adopt the worship of what idols they pleased in pagodas erected on their own lands. It reversed the decree in so much it ordered the removal of idols and prohibited the Vadakalais from erecting pagodas and celebrating public worship therein. But it found that conduct of procession in honour of Vadakalai idols was an innovation, did not form an essential part of the worship, and might be productive of public disturbance, and, accordingly, passed an order restraining it. Noticing that this part of the order was beyond the relief sought in the plaint, an appeal was preferred before Sadar Court. The Sadar Court sought for opinion of pundits of the Court with respect to Hindu law on the subject who opined that it would be contrary to custom to allow a pagoda to be erected by the Vadakalai Vaishnavas even on their own ground if such an erection was against feelings generally of the people of the village. He referred to a passage in the preamble of the Mitakshara which declared that "no cases prejudicial to the feelings of the inhabitants of a town or village shall be entertained by a King". The Sadar Court accordingly decreed that the defendants (the Vadakalais) should be prohibited from erecting temple or instituting public worship on the spot of ground objected to by the plaintiffs and which lay within the range of their temple, that is to say, within the usual range of the processions conducted in connection with the temple worship. In another appeal No. 141 of 1856, Sadar Court declared that the right to pass in procession through the public streets of a town in such a way as the Magistrate might not object to as dangerous to the public safety, was a right inherent in every subject of the State and the Vadakalais' action which continued was in disobedience as was restrained by the earlier decree and injunction prohibiting decree was again passed in 1862. Thereafter, Vadakalais removed their idols and erected a building for the purpose of worship on another site. No arrangement of celebration of the public worship was made till 1879 except of occasional processions. However, in 1879 again provision was made for continuous conduct of such worship throughout the year. This led to another suit which ultimately reached the appellate Court. It was held that the decree in earlier suit cannot preclude Vadakalais from building a temple or conduct public worship at any other spot and plea of estoppel based on the earlier decisions was held to be inapplicable. The Court held that the matter in issue which was raised and decided in the former suit was not a question of fact but a question of law based on the opinion of pundit which was found opposed to the law declared to be the law of India under British administration. The Court held that the law of India under British administration as declared is that the person of whatever sect are at liberty to erect building and conduct public worship on their own land provided they neither invade the rights of property enjoyed by their neighbours nor cause a public nuisance, and that they are also entitled to conduct religious

processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace. The Court held that the principle of *res judicata* also would not come in way. The Courts are bound to ascertain and apply the law and not to make law. It observed, what was argued was estoppel by verdict, and, estoppel by judgment. Explaining the "estoppel by verdict", it held that it indicates that such estoppels are confined to questions of facts and no authority was cited before the Court to warrant application of rule to determination of an issue of law. Explaining the principle of *res judicata*, the Court observed, "Although considerations of convenience have established the rule that the final decree of a competent Court is decisive of the rights it declares or refuses notwithstanding it may have proceeded on an erroneous view of the law, and although the same considerations have established the rule that the determination by a competent Court of questions of fact directly and substantially in issue are binding on the parties, these considerations do not suggest the expediency of compelling the Courts to refuse to give effect to what they have ascertained to be the law." However, the Court also said that all earlier decisions were in respect to a different place and would not bar the subsequent suit which was in respect to another spot.

30. In *Ram Kirpal v. Rup Kuari*, (1883) ILR 6 (All.) 269 (PC) it was held that Section 13 of 1877 Act would not apply to execution proceedings but upon general principles of law the decision of a matter once decided in those proceedings was a bar to the same matter being re-agitated at a subsequent stage thereof.

31. Act 5 of 1908 contains the provision of *res judicata* u/s 11 which substantially is same as it was in Act 14 of 1882, but includes certain explanations clarifying some aspects of the matter considered to be necessary in the light of some judgments of different High Courts. It has undergone some amendments in 1976, but has withstood the test of the time more than a decade. Section 11 of Act 5 of 1908, as it stands today, 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 or 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 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 reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings 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.

32. Explanations VII and VIII have been added by Amendment Act of 1976 and admittedly have no application to the dispute in hand.

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

34. The application of principle of res judicata is based on public policy and in the interest of the State as well. However, I would like to clarify here itself that I may not be understood as observing that the principle of res judicata is confined to Section 11 of the Act 5 of 1908. As I have already held, the principle of res judicata was well recognized in the ancient legal systems also and it has consistently been held as not limited to the specific words of the Code for its application.

35. One of the oldest case which considered the doctrine of res judicata vide Section 11, CPC, 1908 is 20 CWN 738 (Privy Council) : 20 CWN 738 21 (PC) 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., .

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

37. Then comes (1921) ILR 48 499 (Privy Council) wherein it was said that Section 11 of the Code is not exhaustive of the circumstances in which an issue is res judicata. Even though the 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 T.B.Ramachandra Rao and another v. A.N.S. Ramachandra Rao and others, 26 CWN 713 , 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."

38. In AIR 1930 22 (Privy Council) , the 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".

39. 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.

40. 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 observed, "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."

41. 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."

42. 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.

43. 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.

44. 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 conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving the same issue".

45. 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.

46. 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 clarifies Explanation VIII that the decree of a Court of limited jurisdiction would also operate as res judicata in the

subsequent suit though the subsequent suit was not triable by that Court.

47. 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.

48. Recently the above view is reiterated in *Brij Narain Singh Vs. Adya Prasad (dead) and Others*, .

49. In *Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Others Vs. Vithu Hira Mahar (Dead) by LRs. and Others*, : AIR 2010 SC 818), 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.

50. 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.

51. 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*, : (AIR 2006 SC 1846) 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.

52. 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 the enactment affecting the 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."

53. 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 Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, 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 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 S. 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.

54. 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, Nagpur Vs. Shree Baidyanath Ayurved Bhawan Ltd.,].

55. 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.

56. 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*, the 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.

57. In certain cases, the 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.

58. 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.

59. 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.

60. 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*."

61. 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, .

62. In Dhan Singh Vs. Jt. Director of Consolidation, U.P., Lucknow and Others, 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 he on the person who pleaded bar of *res judicata*. For these propositions this Court followed and relied on AIR 1950 17 (Privy Council) .

63. 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.

64. In short, I can say that though 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.

65. 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.

66. 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 earned 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 26.08.1826 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 15.01.1887 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 06.12.1888 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 18.01.1891 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 05.02.1892 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 03.08.1893. One suit was filed by Venkata Seshayya and others on 21.08.1923 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 06.12.1888 by the then Managers of the temples, the mortgage deed on the security of these lands dated 03.11.1900 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 Dharmakarta 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.

67. Sri R.C. Singh also tried to urge that there is no basic distinction between issue estoppel and doctrine of estoppel and res judicata and whatever terminology may be used but that would bar the Court below from treating Commissioner's report to be a final decision on the issue.

68. First I propose to consider the question, whether res judicata and estoppel are the same thing and can be used interchangeably or not. I have no hesitation in observing that the two are essentially different. Though it is true that sometimes res judicata has been treated as part of doctrine of estoppel but in law and in fact and in principle both have been held to have different connotation and that refers to the essential ingredients thereof.

69. Both these principles are based on public policy and justice. Often they are treated as a branch of law having same traits but both differ in several aspects. Doctrine of res judicata some times is construed as a branch of doctrine of estoppel but as I said earlier both have different connotation. In Hope Plantations Ltd. (supra) in para 26 of the judgment the Apex Court said:

It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars.....

70. The estoppel is part of the law of evidence and prevents a person from saying one thing at one time and opposite thing at another time while res judicata precludes a man from avowing the same thing in successive litigations. (Cassomally v. Carrimbhoy (1911) 36 Bom 214; Smt. Radharani Dassi Vs. Smt. Binodamoyee Dassi and Others, ; Sri Raja V. Sarvagnaya Kumara Krishna Yachendra Bahadur Varu, Rajah of Venkatagiri Vs. The Province of Madras, . I find it useful to refer the distinction elucidated by Hon'ble Mahmood J. in Sita Ram Vs. Amir Begam and Others, "Perhaps shortest way to describe difference between the plea of res judicata and estoppel is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon from proving any thing which would contradict his own previous declaration or acts to the prejudice of another party who, relying upon those

declaration or acts to the prejudice of another party, has altered his position. In other words, res judicata prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence".

71. Res judicata has been held to be a branch or specie of the rule of estoppel called "estoppel by record". In Guda Vijayalakshmi Vs. Guda Ramachandra Sekhara Sastry, in para 3 the Apex Court observed:

Res judicata, after all, is a branch or specie of rule of estoppel called estoppel by record and though estoppel is often described as a rule of evidence, whole concept is more correctly viewed as a substantive rule of law.

72. A judgment operates as estoppel on all points considered and decided therein. It is the decision and not decree that creates bar of res judicata. Res judicata, therefore, is estoppel by judgment or record and not by decree. The judgment operates as estoppel in respect to all the findings which are essential to sustain the judgments. What has taken place, recorded and declared final, cannot be questioned subsequently by anyone which has already an opportunity to adjudicate and this is what I call as estoppel on record. The distinction between the doctrine of res judicata and estoppel would lie with the estoppel results from the acts and conduct of the parties while the res judicata prohibits the Court from entering into an inquiry as to a matter already adjudicated upon. While in the case of estoppel it prohibits a party after the inquiry has already been entered upon from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declaration or acts has altered his position. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over and again even though the determination may even be demonstrably wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". It is held that these two terms are of common law origin.

73. One cannot correctly find whether res judicata will apply or not unless understand the import of words "suit"; "issue"; and, "directly and substantially in issue".

74. To apply the doctrine of res judicata one needs to understand meaning of the word "suit" or "issue". When a matter can be said to be "directly and substantially in issue"? Can it be said that the parties are same or parties in the earlier suit were the parties under whom the present one are claiming their rights i.e. litigating under the same title?

75. It is not disputed that the term "suit" has not been defined in CPC. Section 26 says that every suit shall be instituted by presentation of a plaint or in such other manner as may be prescribed. The term "suit" was considered by the Privy Council in Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 and it was

held that word "suit" ordinarily, apart from some context, must be taken to mean a civil proceeding instituted by presentation of a plaint. To the same effect is the view expressed by the Madras High Court in Venkata Chandrayya v. Venkata Rama Reddy, ILR (1899) 22 Mad 256, Raja Gopa Chettiar v. Hindu Religion Endowment Board, Madras, AIR 1934 Mad 103 and by Punjab and Haryana High Court in Union Territory of Chandigarh Vs. Sardara Singh and Others, .

76. However, if a suit is filed by a pauper under Order XXXIII CPC the same would commence from the moment the application to sue in form a pauperis is presented, (see Matuki Mistry Vs. Kamakhya Prasad and Others, , Narayana Dutt and another v. Smt. Molini Devi, AIR 1964 Raj 269, Smt. Shripati Kuer and Another Vs. Smt. Malti Devi and Others, : This illustration is only for the purpose to show "any other manner as may be prescribed", contained in Section 26 CPC.

77. Similarly, the "issue" has also 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 deemed 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"

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

79. 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).

80. 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."

81. 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 page 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."

82. 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."

83. *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.

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

85. *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."

86. 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, .

87. 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 Muhammed. One of the descendants of the said Hazrat came down to India in 1542 A.D. and founded his Gadi at Ahmedabad, Broach and Sural. The members of the Edroos family were Sajjadanashin 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 Sajjadanashin 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 Sajjadanashin 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 point Nos. 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 misutilization 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 Vs. Saiyad Mahomed El Edroos, 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.

88. In the light of the above facts and in this context the Apex Court in Sajjadanashin: Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, 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 pleadings, 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*, .

89. 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 Ishwarlalbhair Narsibhai and Others*, and found that in spite 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 Vs. Narayanan Nair*, 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.

90. Further, the Court in *Sajjadanashin, Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others*, 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 necessarily 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*.

91. 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

92. 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)).

93. 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 *Babu Kanhiya Lal Vs. Ashraf Khan and Others*, , 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.

94. 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, .

95. 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 : (2001 AIR SCW 4668).

96. 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, .

97. 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.

98. In Sri Ramjee and others v. Bishwanath Pd. Sah and others, AIR 1978 Patna 129, former suit was filed by plaintiff alone and in his own rights while the subsequent suit was filed in the name of the deity and it was held not barred as res judicata.

Explanation VI

99. Lastly, but not the least, is the concern with respect to Explanation-VI, i.e., representative suit. It provides that where persons litigate bona fide in respect of a public right or a private right claimed in common for themselves and other persons interested in such right, shall, for the purpose of the Section, be deemed to have claimed under the persons so litigating. Explanation-VI apparently is not confined to the cases covered by Order 1, Rule 8 C.P.C., but would include any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. It is a kind of exception to the ordinary rule of res judicata which provide for the former litigation between

the same parties or their privies. Even persons, who are not parties in the earlier proceeding, in certain contingencies, may be debarred from bringing a suit subsequently if the conditions contemplated under Explanation-VI Section 11 are satisfied. The conditions to attract Explanation-VI so as to constitute *res judicata*, which must exist, are:

1. There must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit.
2. The parties not expressly named in the suit must be interested in such right.
3. The litigation must have been conducted bona fide on behalf of all the parties interested.
4. If the suit is one under Order 1, Rule 8, all the conditions of that Section must have been strictly complied with.

100. The essentials of representative suit vis-a-vis the principle of *res judicata* with reference to Explanation-VI, Section 11 was considered by Privy Council in AIR 1933 183 (Privy Council) . Prior to the enactment of CPC of 1877 there was no express legislation on the subject of representative suit. In these circumstances, the Courts assumed the task and followed the practice virtually obtained in the Court of Chancery in England. Existence of this practice was demonstrated by referring to a judgment of Madras High Court in *Srikanti v. Indupuram* (1866) 3 MHCR 226. The Court emphasized that convenience, where community of interest existed, required that a few out of a large number of persons should, under proper conditions, be allowed to represent the whole body, so that in the result all might be bound by the decree, although only some of the persons concerned were parties named in the record. It observed that absence of any statutory provision on the subject, the Courts in India, it would seem, prior to 1877 assumed the task and duty to determine in the particular case whether, without any real injustice to the plaintiffs in the later suit, the decree in the first could properly be regarded as an estoppel against further prosecution by them of the same claim. The first legislation was made vide Section 30 in CPC 1877 which is now found in Order I, Rule 8 CPC of 1908. The Privy Council held at page 186:

It is an enabling rule of convenience prescribing the conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. For the section to apply the absent persons must be numerous; they must have the same interest in the suit which, so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require; while liberty is reserved to any represented person to apply to be made a party to the suit.

101. The Privy Council also approved a Calcutta High Court decision in *Baiju Lal*

Parbatia and Others Vs. Bulak Lal Pathuk, , where Ameer Ali, J. explaining the position u/s 30 said:

The effect of S. 30 is that unless such permission is obtained by the person suing or defending the suit, his action has no binding effect on the persons he chooses to represent. If the course prescribed by S. 30 is not followed in the first case, the judgment does not bind those whose names are not on the record.

102. In *Waqf Khudawand Taala Banam Masjid Mauza Chaul Shahabuddinpur v. Seth Mohan Lal*, 1956 ALJ 225 a suit for declaration of the property in dispute as a public mosque was filed. It appears that earlier a suit was filed against some Muslims claiming to be the proprietor and notice under Order 1, Rule 8 C.P.C. was also issued to other residents of that locality. Defence taken by Muslims was that property in dispute was a public mosque. The suit was decreed and the defence was not found proved. Thereafter second suit was filed by Muslim parties of neighbouring village wherein the plea of *res judicata* was taken. Defending the said objection on behalf of plaintiffs it was contended that in earlier case notice under Order 1, Rule 8 was issued to the residents of Chaul Shahabuddinpur and not of the village to which the plaintiffs belonged which is a neighbouring village. However, the Court upholding the plea of *res judicata* observed that Explanation-VI to Section 11 C.P.C. is attracted in the matter and once in respect of a public right the matter has been adjudicated, the decision is binding on all persons interested in that right and they will be deemed to claim under the persons who litigated in the earlier suit in respect of that public right.

103. The question of issue estoppel and constructive *res judicata* in regard to a judgment in a representative suit came to be considered in *Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh C. (Dead), M.N. Singh and Others*, . The facts, in brief, are necessary to understand the exposition of law laid down therein. Gurdial Singh and Ishwar Singh of Village Jhandawala obtain permission from the Advocate General u/s 92 CPC to institute a suit against one Harnam Singh for his removal from Mahantship. It was stated in the plaint that there was one Guru Granth Sahib at Village Jhandawala, Tehsil and District Bhatinda which was managed by Mahant Harnam Singh as a Mahatmim and he was in possession of the Dera, and agricultural land belonging to Guru Granth Sahib which was a public religious place and was established by the residents of village; it was a public trust created by the residents of the village for the service of the public to provide food from lunger, to allow the people to fulfil religious beliefs and for worship etc. The two plaintiffs in their capacity as representatives of owners of land situated in the village and the residents thereof claim that they were entitled to file a suit u/s 92 CPC. Harnam Singh, Mahant in his written statement took the defence that there was no such interest in the public as to entitle the aforesaid plaintiffs to institute the suit. The trial court and the High Court recorded a concurrent finding that all Mahants of the institution from Bhai Saida Ram to Mahant Harnam Singh have been Nirmalas. However, the trial court held that such Nirmala Sadhus are not Sikhs and that the institution was not a

Sikh institution. High Court disagreed with this conclusion and held that Sadhus Nirmalas are a sect of the Sikhs and consequently the Sikhs had interest in the institution as it was a Sikh Gurdwara and upheld the plaintiffs claim to file a representative suit u/s 92 CPC. In appeal the Apex Court, however, held (i) Nirmala Sadhus are not Sikhs; (ii) The mere fact that at some stage there was a Guru Granth Sahib in the Dera in dispute cannot lead to any conclusion that the institution was meant for or belonged to the followers of the Sikh religion. The Dera was maintained for entirely a distinct sect known as Nirmalas Sadhus who cannot be regarded as Sikhs; (iii) The institution was held to be not belonging to the followers of the Sikh religion; (iv) The plaintiffs in their mere capacity of followers of Sikh religion could not be held to have such interest as to entitle them to institute a suit u/s 92 CPC. This judgment dated 24.02.1967 of the Apex Court is reported as Mahant Harnam Singh, Chela of Bhai Narain Singh Vs. Gurdial Singh and Another, . In the meantime it appears that u/s 7(1) of Sikh Gurdwaras Act, 1925, 60 persons claiming to be worshippers made a petition for declaring the institution in question, i.e., Guru Granth Sahib situated in Village Jhandawala, District Bhatinda to be a Sikh Gurdwara. The Punjab Government by notification dated 23.01.1961 made such a declaration u/s 7(3) of the aforesaid Act. It may be pointed out that these 60 persons also included the two plaintiffs of earlier litigation, i.e., Gurdial Singh and Ishwar Singh. Mahant Harnam Singh with others filed counter petition u/s 8 of Sikh Gurdwaras Act, 1925 stating that the institution was not a Sikh Gurdwara but was a Dera Bhai Saida Ram. A similar petition u/s 8 was also moved by 58 persons of the Dera making a similar claim. Both these petitions were forwarded by the State Government to the Tribunal for disposal. The Tribunal formulated the following two questions: (1) what is the effect of the judgment of the Apex Court in Mahant Harnam Singh, Chela of Bhai Narain Singh Vs. Gurdial Singh and Another, ; and (2) whether the institution in dispute was a Sikh Gurdwara. The Tribunal decided issue No. 1 as a preliminary issue vide order dated 08.03.1977 and held that the decision in Mahant Harnam Singh (supra) would not bar the jurisdiction of the Tribunal to decide claim petition u/s 7 of the Act. The order of the Tribunal attained finality since challenge before the High Court and Apex Court was unsuccessful. Thereafter, issue No. 2 was taken up and the Tribunal held that the institution was a Sikh Gurdwara, originally established by Sikhs and the object of worship was Guru Granth Sahib because the majority of villagers were Sikhs and Nirmalas are Sikhs. This order of the Tribunal in respect to issue No. 2 was challenged before the High Court. It held that the Tribunal has lost sight of the decision in Mahant Harnam Singh (supra). It is this order of the High Court which was taken in appeal before the Apex Court, which held that once in a suit instituted u/s 92, CPC a categorical finding was recorded that (i) Nirmala Sadhus are not Sikhs; (ii) the Dera was maintained for entirely a distinct sect known as Nirmals Sadhus who cannot be regarded as Sikhs; (iii) the mere fact that at some stage there was a Guru Granth Sahib in the Dera cannot lead to any conclusion that the institution was meant for or belonged to the followers of Sikh religion, these findings were rendered in suit filed u/s 92 CPC, therefore, cannot

be reagitated and any challenge thereto is precluded on the principle of issue estoppel. The nature of suit u/s 92 CPC was explained by the Apex Court in para 19 of the judgment referring to its earlier decision in *R. Venugopala Naidu and Others Vs. Venkatarayulu Naidu Charities and Others*, holding that a suit u/s 92 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 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 u/s 92 CPC and the suit-title in that event would show only their names as plaintiffs. In the circumstances, it cannot be said that the parties to the suit are only those persons whose names are mentioned in the suit-title. The named plaintiffs being the representatives of public at large, which is interested in the trust, of such interested persons, would be considered in the eyes of law to be parties to the suit. A suit u/s 92 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 6 to Section 11 CPC constructively bars by res judicata the entire body of interested persons from reagitating the matter directly and substantially in issue in an earlier suit u/s 92 CPC.

104. It is well settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the Section or to clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometimes, it is for exclusion of some thing and sometimes exclude something from the ambit of the main provision or condition of some words existing therein. Therefore, an explanation should be read harmoniously so as to clear any ambiguity in the main section. A clash of interest in the parties would oust the applicability of Explanation-VI.

105. In *Commissioner of Endowments and Others Vs. Vittal Rao and Others*, , it was held that even though an issue was not formerly framed but if it was material and essential for the decision of the case in the earlier proceeding and the issue has been decided, it shall operate as res judicata in the subsequent case.

106. In *Ishwar Dutt Vs. Land Acquisition Collector and Another*, the Court has discussed the doctrine of "cause of action", "estoppel" and "issue estoppel". It says, if there is an issue between the parties that is decided, the same would operate as res judicata between the same parties in subsequent proceedings.

107. In *Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Others Vs. Vithu Hira Mahar (Dead) by LR. and Others*, the Court observed that a suit for injunction when title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties when the same is put in issue in a later suit based on title between the same parties or their privies in a

subsequent suit, the decree in injunction suit equally operates as a res-judicata.

108. In Gram Panchayat of Village Naulakha Vs. Ujagar Singh and Others, it was held that even in an earlier suit for injunction, if there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was "necessary" in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the mere framing of an issue on title may not be sufficient.

109. Examining the argument of Sri R.C. Singh, learned counsel for the appellant, in the light of exposition of law, as discussed above, there can be no manner of doubt that Commissioner's report, when accepted by the Court, amounts to accepting and placing on record a piece of evidence. It is not adjudication directly or indirectly or incidentally by a court of law on a particular issue meriting upon the issues in suit. The order of Court accepting or placing Commissioner's report on record of suit would only mean that purpose of appointment of Commissioner has accomplished and the report is taken on record forming part of record of suit, as an evidence. Since there is no adjudication about merits of issue, such evidence will be taken into consideration to decide the issue separately. The Commissioner's report is not to be construed as a finding recorded by a court on a particular issue depriving the concerned Court, who appointed Commissioner for making investigation and submitting report, so as to independently examine the dispute/issue in suit itself. The entire argument proceeds with misunderstanding of status of Commissioner's report. The argument thus has to be rejected having no substance at all.

110. Now I come to the next aspect of the matter. Copy of plaint shows that though plaintiff-appellant asserted that he is Sirdar of plot No. 1492/2 and is in possession thereof but there is not even a single whisper by way of pleading that disputed part of land formed part of plot No. 1492/2 of which plaintiff appellant is Sirdar. In the entire plaint there is no such averment and despite repeated query, Sri R.C. Singh, learned counsel appearing for plaintiff appellant, could not point out any such pleading. He, however, drew my attention to the oral statement of PW 1 himself. The first sentence of statement made by him is that disputed land is plot No. 1492/2.

111. It is well established that in absence of pleading no evidence is admissible to prove a fact which is not pleaded. In Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, the Court said, "in the absence of pleading, evidence, if any, produced by the parties cannot be considered.....no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

112. In Kashi Nath (Dead) through Lrs. Vs. Jaganath, the Court said that where the evidence is not in line of pleadings and is at variance in it, the said evidence

cannot be looked into or relied upon.

113. In *Syed and Co. and Ors. v. State of Jammu and Kashmir and Ors.* it was held that without specific pleadings in that regard, evidence could not be led in since it is settled principle of law that no amount of evidence can be looked unless there is a pleading. Therefore, without amendment of pleadings merely trying to lead evidence is not permissible.

114. In *The National Textile Corporation Ltd. Vs. Nareshkumar Badrikumar Jagad and Others*, : (AIR 2012 SC 264) the Court said:

Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ.

The Apex Court relied on its earlier decisions in *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, ; *State of Maharashtra Vs. Hindustan Construction Company Ltd.*, ; and *Kalyan Singh Chouhan Vs. C.P. Joshi*, .

115. In *Naresh K. Aggarwala and Co. Vs. Canbank Financial Services Ltd. and Another*, though the pleadings did not contain a particular fact but the witness sought to cover up that fact by making statement in his evidence. The Court in para 17 of judgment observed, "in absence of pleadings the statement made by appellant had to be ignored."

116. In *J.P. Builders and Another Vs. A. Ramadas Rao and Another*, : (AIR 2012 SC (Civ) 230) the Court referred to and relied with approval its decision in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others*, observed that "no amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled." The Court also relied on another decision in *Bachhaj Nahar Vs. Nilima Mandal and Another*, wherein it was held:

It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like *res judicata*, *estoppel*, *acquiescence*, *non-joinder of causes of action or parties*, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property "A", court cannot

grant possession of property "B". In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

117. In *State Bank of India and Others Vs. S.N. Goyal*, the Court deprecated the practice of adducing any material at the stage of evidence in absence of pleadings.

118. In the present case since there are no pleading at all, looking to the evidence and then to argue that on the basis of evidence adduced in oral deposition the matter should have been decided, is clearly inconsistent and in the teeth of law, as discussed above. In absence of pleadings the other party would have been at disadvantage to understand the real contents and issue.

119. In view of aforesaid discussion neither it can be said that Commissioner's report by itself can be treated to be an adjudication of an issue nor principle of *res judicata* would apply if the Court after assessing evidence record its findings which are not in conformity with Commissioner's report since it is only one of the various evidences up for consideration before the Court and it is always open to the Court either to believe it or not. It is not the case of appellant that report has not been considered or it has been discarded for reasons which are perverse, illegal or otherwise erroneous in law in any manner. The questions Nos. 1, 3, 7, 8 and 9, therefore, are answered against plaintiff appellant.

120. Now so far as question No. 2 is concerned, in my view, it was irrelevant as to whether plaintiff-appellant continue with Sirdari rights over plot No. 1492/2 or not for the reason that the kind of injunction he sought could have been granted only if it would have been shown that defendants are raising construction over a land which belongs to plaintiff appellant, i.e., plot No. 1492/2 and if there was a serious dispute about identification of such land the remedy available to plaintiff-appellant was to approach appropriate forum for demarcating his land and its identification and only thereafter something could have been said. In the present case the courts below found that plaintiff-appellant has not been able to prove that defendants' construction where against the plaintiff appellant was aggrieved, lie in plot No. 1492/2 of which the plaintiff appellant is claiming himself to be a Sirdar. Therefore, even if the reference to Section 189 of Act, 1951 in Lower Appellate Court's order is held to be inconsequential, that does not turn up the ultimate result of matter and, therefore, I hold that in the case in hand it was not at all required to press into service Section 189 or 190 of Act, 1951 and this question is answered accordingly.

121. Now coming to questions Nos. 4, 5 and 6 which are interconnected and can be taken together, when there was a serious dispute about identification of a particular land and the document sought to be relied by parties raise a serious and genuine doubt about their accuracy, unless it is shown that there was no scope of any doubt since procedure prescribed in law was clearly observed, I do

not find that courts below erred in disbelieving the documents which apparently shown genuine doubts over authenticity. In such a case unless the land in question is identified clearly, the courts below have rightly referred to the provisions of U.P. Land Record Manual and also the lack of evidence adduced by plaintiff-appellant to show that entry contained in document is genuine and authenticated and I do not find any legal or otherwise error on the part of courts below.

122. However, I would like to further observe that the observations of courts below in respect to authenticity of document and identification of plot No. 1492/2 must be considered to be confined for the purpose of considering whether plaintiff-appellant has been able to show that defendants-respondents are raising construction over land belong to plaintiff-appellant are not. Since in this case he has failed to prove the identity of land in question, remedy for the said purpose may lie elsewhere and observations of courts below would not come in the way of plaintiff-appellant for availing such remedy as permissible in law, i.e., before the Revenue Courts.

123. Subject to above observations/clarifications, the question Nos. 4, 5 and 6 are also answered against plaintiff-appellant. In view of above, no interference, therefore, is called for with the judgments impugned in this appeal. The appeal is accordingly dismissed.