न्यायालय
सहायक कलक्टर/उपखण्ड अधिकारी
गुढामालानी–बाड़मेर

(पीठासीन अधिकारी –केशव कुमार मीना आर.ए.एस.)

वाद संख्याः– 2025 / 446 दर्ज तिथिः–22.12.2025

वादी	बनाम	प्रतिवादी
कालूराम पुत्र गंगाराम		मंगलाराम पुत्र वागाराम वगैरह
जरिये अधिवक्ता श्री चिमनसिंह चौधरी		जरिये अधिवक्ता श्री रामजीवन विश्नोई

प्रार्थना पत्र अन्तर्गत धारा–11
सिविल प्रक्रिया संहिता–1908
निर्णय तिथिः–22.12.2025

–:निर्णयः–

1. आज यह पत्रावली प्रार्थना–पत्र सिविल प्रक्रिया संहिता–1908 की धारा–11 के अन्तर्गत बाबत् निर्णय प्रस्तुत हुई। प्रकरण का सुक्ष्म एवं सारतः वृतान्त इस प्रकार है कि वादी ने राजस्थान काश्तकारी अधिनियम–1955 की धारा–53, 188 के तहत हाजा न्यायालय में वाद पत्र प्रस्तुत कर मौजा मुसलमानों की ढाणी तहसील गुड़ामालानी में अवस्थित आराजी खसरा संख्या 167, 176, 179, 180, 182, 26 / 1, 26 / 3, 30 / 1, 30 / 3 आराजी का विभाजन किये जाने बाबत दावा प्रस्तुत किया गया है।

2. प्रकरण दर्ज रजिस्टर किया जाकर प्रतिवादीगण को तलब किया गया। प्रतिवादीगण असालतन–वकालतन उपस्थित न्यायालय हुए। प्रतिवादीगण द्वारा उक्त प्रकरण में सिविल प्रक्रिया संहिता–1908 की धारा–11 के अन्तर्गत प्रार्थना–पत्र प्रस्तुत कर प्रतिवादी का सिविल प्रक्रिया संहिता–1908 की धारा–11 के अन्तर्गत प्रार्थना–पत्र स्वीकार किया जाकर दावा वादी खारिज किया जाने का निम्न प्रकार निवेदन किया–

    - कि उक्त समान आराजी से संबंधित एक दावा पूर्व में समान पक्षकारों के मध्य समान विभाजन के अनुतोष पर समान क्षैत्राधिकार वाले हाजा न्यायालय द्वारा वाद संख्या 64 / 2017 में दिनांक 24.05.2018 को निर्णित होकर डिक्री हो चुका है। उक्त निर्णय की पालना 11.03. 2019 को हो चुकी है। अतः समान आराजी से संबंधित एक दावा पूर्व में समान पक्षकारों के मध्य समान अनुतोष पर समान क्षैत्राधिकार वाले न्यायालय द्वारा निर्णित होने के आधार पर पश्चातवर्ती वर्तमान दावा रेस–ज्यूडिकेटा के कानून के तहत काबिल–ए–खारिज है।

3. प्रकरण में वादी द्वारा सिविल प्रक्रिया संहिता–1908 की धारा–11 के अन्तर्गत प्रार्थना–पत्र का जवाब प्रस्तुत कर प्रार्थी / प्रतिवादी का सिविल प्रक्रिया संहिता–1908 की धारा–11 के अन्तर्गत प्रार्थना–पत्र खारिज फ जाने का निम्न प्रकार निवेदन किया–

- कि पूर्व में निर्णित वाद संख्या 64/2017 में दिनांक 24.05.2018 द्वारा विभाजन विधिसंगत नहीं किया गया है। इस प्रकार वादी का पश्चातवर्ती वाद रेस—ज्यूडिकेटा की तारीफ में नहीं आता है।

4. प्रकरण में उभयपक्षकारान की उक्त प्रार्थना पत्र पर बहस सुनी गई। दौराने बहस विद्वान अधिवक्ता प्रतिवादी/प्रार्थी ने दौराने जिरह प्रार्थना पत्र के तथ्यों को दौहराते हुये प्रतिवादी का सिविल प्रक्रिया संहिता—1908 की धारा—11 के अन्तर्गत प्रार्थना—पत्र स्वीकार किया जाकर दावा वादी खारिज किया जाने का निवेदन किया। दौराने बहस विद्वान अधिवक्ता वादी/अप्रार्थी ने दौराने जिरह जवाब प्रार्थना पत्र के तथ्यों को दौहराते हुये वादी द्वारा सिविल प्रक्रिया संहिता—1908 की धारा—11 के अन्तर्गत प्रार्थना—पत्र का जवाब प्रस्तुत कर प्रार्थी/प्रतिवादी का सिविल प्रक्रिया संहिता—1908 की धारा—11 के अन्तर्गत प्रार्थना—पत्र खारिज फरमाया जाने का निवेदन किया।

Provision

5. प्रकरण में पत्रावली का अवलोकन किया गया व बहस पर मनन किया गया है। बाद पत्रावली अवलोकन व मनन बहस ज्ञात होता है कि प्रकरण सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रार्थना पत्र से संबंधित है। प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 का अवलोकन किया जाना प्रासंगिक है। जिसका उद्धरण इस प्रकार हैः—

> ***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 a suit in question whether or not it was instituted prior thereto.*
> *Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*
> *Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*
> *Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*
> *Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.*
> *Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .*
> *Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*
> *Explanation VIII. —An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of*

<u>*limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.*</u>

Interpretation

6. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की माननीय न्यायालयों द्वारा की गई व्याख्या के द्वारा विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *9.1. The doctrine of res judicata, having a very ancient history, embodies a rule of universal law and is a sum total of public policy reflected in various maxims like ‘<u>res judicata pro veritate occipitur’</u>, which means that a judicial decision must be accepted as correct; and ‘<u>nemo debet bis vexari pro una et eadem causa’</u>, which means that no man should be vexed twice for the same cause. The ancient history of this doctrine and its consistent recognition could well be underscored with reference to the following statement of law in the case of Sheoparsan Singh and Ors. v. Ramnandan Prasad Narayan Singh and Ors.: A.I.R. 1916 Privy Council 78: -*
>
> > *“…But in view of the arguments addressed to them, their Lordships desire to emphasise that <u>the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time.</u>*
> >
> > > *“ ‘It has been well said,’ declared Lord Coke, ‘interest reipublicoe ut sit finis litium, otherwise great oppression might be done under colour and pretence of law’ ”.-(6 Coke, 9 A.)*
>
> *Though the rule of the Code may be traced to an English source, <u>it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who escribes the plea thus: “If a person though defeated at law sue again he should be answered, ‘You were defeated formerly. This is called the plea of former judgment.”</u> [See “The Mitakshara(Vyavahara),” Bk. II, ch. I, edited by J. R. Gharpure, p. 14, and “The Mayuka,” Ch. I, sec. 1, p. 11 of Mandlik’s edition.]*
> *And so the application of the rule by the Courts in India should be influenced by no technical consideration of form, but by matter of substance within the limits allowed by law.”*
>
> *(emphasis supplied)*

7. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 8321 / 2010 उनवान *Alka Gupta vs Narender Kumar Gupta* में दिनांक 27.09.2010 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *14. (....) To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression `former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court.*
>
> *Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party*

> *or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.(....)*

Object

8. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के उद्देश्य को समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 636 / 1975 उनवान *Lal Chand (Dead) By L.Rs. & Ors vs Radha Kishan* में दिनांक 17.12.1976 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के उद्देश्य (object) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *(.......) Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical, those issues arise as between the same parties and thirdly, the issue now sought to be raised was decided finally by a competent quasi- judicial tribunal. The principle of res judicata is conceived in the larger public interest which requires that all 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 determination of the same issue. (.........)*

9. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7653—7654 / 1997 उनवान *V. Rajeshwari vs T.C. Saravanabava* में दिनांक 16.12.2003 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के उद्देश्य (object) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.*

10. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के उद्देश्य (object) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *9.1. The doctrine of res judicata, having a very ancient history, embodies a rule of universal law and is a sum total of public policy reflected in various maxims like 'res judicata pro veritate occipitur', which means that a judicial decision must be accepted as correct; and 'nemo debet bis vexari pro una et eadem causa', which means that no man should be vexed twice for the same cause.*

11. अंत में उक्त विश्लेषण एवं न्यायिक दृष्टांतों द्वारा प्रतिपादित कानूनी सिद्धांतों के परिपेक्ष्य में स्पष्ट है कि सिविल प्रक्रिया संहिता—1908 की धारा—11 के निम्न मुख्य उद्देश्य (Basic objects) प्रतीत होते हैं—
    1. समान विवाद एवं समान प्रकरण वाले दो या अधिक समानांतर वादपत्र पर समवर्ती क्षैत्राधिकार वाले न्यायालयों को समानांतर विचारण करने से रोकना।

2. समान विवाद एवं समान प्रकरण वाले दो या अधिक समानांतर वादपत्र पर समवर्ती क्षैत्राधिकार वाले न्यायालयों को परस्पर विरोधी निष्कर्ष वाले निर्णय करने से रोकना।

Application

12. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की अनुप्रयोज्यता को विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 636 / 1975 उनवान *Lal Chand (Dead) By L.Rs. & Ors vs Radha Kishan* में दिनांक 17.12.1976 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के पश्चातवर्ती दावे पर अनुप्रयोग (Application) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *(.......) By the present suit, the re- spondent is once again asking for the relief which was included in the larger relief sought by him in the application filed under the Slum Clearance Act and which was expressly denied to him. In the circumstances, the present suit is also barred by the principle of res judicata. The fact that s. 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension Of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical, those issues arise as between the same parties and thirdly, the issue now sought to be raised was decided finally by a competent quasi- judicial tribunal. (.......)*

13. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7653—7654 / 1997 उनवान *V. Rajeshwari vs T.C. Saravanabava* में दिनांक 16.12.2003 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के पश्चातवर्ती दावे पर अनुप्रयोग (Application) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal (See: (Raja) Jagadish Chandra Deo Dhabal Deb Vs. Gour Hari Mahato & Ors. AIR 1936 Privy Council 258, Medapati Surayya & Ors. Vs. Tondapu Bala Gangadhara Ramakrishna Reddi & Ors. AIR 1948 Privy Council 3, Katragadda China Anjaneyulu & Anr. Vs. Kattragadda China Ramayya & Ors. AIR 1965 A.P. 177 Full Bench). The view taken by the Privy Council was cited with approval before this Court in The State of Punjab Vs. Bua Das Kaushal (1970) 3 SCC 656. However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had through out been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.*

14. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 / 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के पश्चातवर्ती दावे पर अनुप्रयोग (Application) के संबंध में दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The court while undertaking an analysis of the applicability of the plea of res judicata determines first, if the requirements of section 11 CPC are fulfilled; and if this is answered in the affirmative, it will have to be determined if there has been any material alteration in law or facts since the first suit was decreed as a result of which the principle of res judicata would be inapplicable. We are unable to accept the submission of the appellants that res judicata can never be decided as a preliminary issue. In certain cases, particularly when a mixed question of law or fact is raised, the issue should await a full-fledged trial after evidence is adduced. In the present case, a determination of the components of res judicata turns on the pleadings and judgments in the earlier suits which have been brought on the record. The issue has been argued on that basis before the Trial court and the first appellate court; followed by two rounds of proceedings before the High Court (the second following upon an order of remand by this court on the ground that all parties were not heard. All the documentary material necessary to decide the issue is before the court and arguments have been addressed by the contesting sides fully on that basis.*

Method

15. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अनुप्रयोग के तरीके के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7653—7654 / 1997 उनवान *V. Rajeshwari vs T.C. Saravanabava* में दिनांक 16.12.2003 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के पश्चातवर्ती दावे पर अनुप्रयोग के तरीके (Method) के संबंध में विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai (Dead) By Lrs. & Ors. Vs. Mohd. Hanifa (Dead) by Lrs. & Ors. (1976) 4 SCC 780, the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh Vs. Bhooralal (1964) 7 SCR 831, placing on a par the plea of res judicata and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore Vs. Secretary of*

> *State For India in Council & Anr. (1887-88) 15 Indian Appeals 186, pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issues in the previous suit and what was heard and decided. Needless to say these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.*

16. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 / 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के पश्चातवर्ती दावे पर अनुप्रयोग के तरीके (Method) के संबंध में विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The Court noted that "the best method" to decide the question of res judicata is first to determine the case of the parties as they are put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata.*

Legal Base

17. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के कानूनी इतिहास व आधार के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित प्रावधान के कानूनी आधार (Legal Base) के संबंध में विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *9.3. It is also equally relevant to reiterate that Section 11 CPC is not the foundation of the doctrine of res judicata but is merely the statutory recognition thereof and, hence, is not considered exhaustive of the general principles of law. This doctrine, it is recognised, is conceived in larger public interest and is founded on equity, justice and good conscience. These aspects were tersely put by this Court in the case of Lal Chand (dead) by L.Rs. and Ors. v. Radha Krishan: (1977) 2 SCC 88 in the following words: -*
>
> > *"19. ... The fact that Section 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical, those issues arise as between the same parties and thirdly, the issue now sought to be raised was decided finally by a competent quasi-judicial tribunal. The principle of res judicata is conceived in the larger public interest which requires that all 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 determination of the same issue...."*
> >
> > *(emphasis supplied)*

9.4. It hardly needs any over-emphasis that but for this doctrine of res judicata, the rights of the persons would remain entangled in endless confusion and the very foundation of maintaining the rule of law would be in jeopardy. Even if this doctrine carries some technical aspects, as explained by this Court in Daryao (supra), it is in the interest of public at large that a finality should attached to the binding decisions of the Courts of competent jurisdiction; and it is also in public interest that individual should not be vexed twice with the same kind of litigation. As noticed, the Constitution Bench has placed this doctrine on a high pedestal, treating it to be a part of rule of law.

9.5. Having taken into comprehension the object and framework of doctrine of res judicata, a few ancillary principles, relevant to the case at hand, may also be usefully noticed.

18. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946/2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित प्रावधान के कानूनी आधार (Legal Base) के संबंध में विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

22. It has been held by this court that a determination of whether res judicata is attracted raises a mixed question of law and facts. In Madhukar D. Shende and Ram Harakh, it was held that the plea of res judicata was a mixed question of law and facts. In both the cases, the plea of res judicata was taken for the first time before this Court. Justice K. Ramaswamy writing for a three judge bench of this court in Sushil Kumar Mehta v. Gobind Ram Bohra 18 held that the principle of res judicata cannot be fit into the pigeon hole of 'mixed question of law and facts' in every case. Rather, the plea of res judicata would be a question of law or fact or a mixed question of both depending on the issue that is claimed to have been previously decided. The court while determining the applicability of the plea of res judicata would determine if there has been any material alteration in the facts and law applicable:

"26. The doctrine of res judicata under Section 11 CPC is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus, the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The Madhukar D Shende v. Tarabai Aba

Shedage, (2002) 2 SCC 85 Ram Harakh v. Hamid Ahmed Khan & Ors., (1998) 7 SCC 484 (1990) 1 SCC 193 decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata.

Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction."

23. In Mathura Prasad Bajoo Jaiswal v. Dossibai N.B Jeejeebhoy19, the application of the plaintiff in the Court of the Civil Judge for the determination of Standard Rent under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 was dismissed on the ground that the statute did not apply to a case of open land let for the construction of buildings. This decision was affirmed in appeal. However, in view of another decision of the Bombay High Court which held that the statute would be applicable to leased land, the plaintiff filed a fresh proceeding in the Court of Small Causes. The Trial Court and the High Court held that the subsequent suit was barred by res judicata. However, Justice J C Shah writing for a 3-judge bench held that the subsequent suit was not barred by res judicata:

"5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative (1970) 1 SCC 613 PART E direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. 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. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata.

[…]

11. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent

Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the 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 that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.
(emphasis supplied)

Features/ Essential Elements

19. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अनुप्रयोग हेतु आवश्यक तथ्य व कारक के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 8321 / 2010 उनवान *Alka Gupta vs Narender Kumar Gupta* में दिनांक 27.09.2010 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के आवश्यक तत्व / आधार / अवयव (Features/Essential Elements) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

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

20. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 / 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के आवश्यक तत्व / आधार / अवयव (Features/Essential Elements) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

17. In order to attract the principles of res judicata, the following ingredients must be fulfilled:

(i) The matter must have been directly and substantially in issue in the former suit;
(ii) The matter must be heard and finally decided by the Court in the former suit;

> *(iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and*
> *(iv) The Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.*

21. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691–7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता–1908 की धारा–11 के प्रावधान के आवश्यक तत्व / आधार / अवयव (Features/Essential Elements) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः–

> *In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William de Grey, (afterwards Lord Walsingham) in the leading Duchess of Kingston's case; Said Sir William de Grey, (afterwards Lord Walsingham) "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, 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; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose".*

Doctrine

22. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता–1908 की धारा–11 के प्रावधान के कानूनी सिद्धांत के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691–7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता–1908 की धारा–11 के प्रावधान के कानूनी सिद्धांत (Doctrine) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः–

> *As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation". Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause" (p. 187, paragraph 362). "Res judicata", it is observed in Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the, interest of the State that there should be an end to litigation interest republican ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause-nemo debet bis vexari pro eadem causa". In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel.*
>
> *"Estoppel rests on equity able principles and res judicata rests on maxims which are taken from the Roman Law" (2). Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted.*

> *The same question can be considered from another point of view. If a judgment has been pronounced by a court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law. Therefore, if a judgment has been pronounced by the High Court in a writ petition filed by a party rejecting his prayer for the issue of an appropriate writ on the ground either that he had no fundamental right as pleaded by him or there has been no contravention of the right proved or that the contravention is justified by the Constitution itself, it must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself. The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observed "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences". Similar is the statement of the law in Corpus Juris: "the doctrine of estoppel by judgment does not rest on any superior authority of the court rendering the judgment, and a judgment of one court is a bar to an action between the same parties for the same cause in the same court or in another court, whether the latter has concurrent or other jurisdiction.*
>
> *This rule is subject to the Limitation that the judgment in the former action must have been rendered by a court or tribunal of competent jurisdiction". "It is, however' essential that there should have been a judicial determination of rights in controversy with a final decision thereon" In other words, an original petition for a writ under Art. 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Art. 226. There can be little doubt that the jurisdiction of this Court to entertain applications under Art. 32 which are original cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of High Courts pronounced in writ petitions under Art. 226. Thus, on general considerations of public policy there seems to be no reason why the rule of res judicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Art,. 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained.*

23. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694/2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के कानूनी सिद्धांत के विभिन्न पहलूओं (Doctrine) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *11.1.1. In the aforesaid context, various features of the doctrine of res judicata were explained by this Court in the relied upon passage as follows: -*

> *"11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the 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 that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."*
>
> *(emphasis supplied)*

What to Consider

24. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अनुप्रयोग हेतु न्यायालय द्वारा ध्यान रखने योग्य तथ्यों के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7653—7654 ⁄ 1997 उनवान *V. Rajeshwari vs T.C. Saravanabava* में दिनांक 16.12.2003 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत न्यायालय को प्रस्तुत प्रकरण में तथ्यों पर ध्यान देने (What to Consider) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had through out been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.*
>
> *Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai (Dead) By Lrs. & Ors. Vs. Mohd. Hanifa (Dead) by Lrs. & Ors. (1976) 4 SCC 780, the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment*

> *which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh Vs. Bhooralal (1964) 7 SCR 831, placing on a par the plea of res judicata and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore Vs. Secretary of State For India in Council & Anr. (1887-88) 15 Indian Appeals 186, pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issues in the previous suit and what was heard and decided. Needless to say these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.*

25. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत न्यायालय को प्रस्तुत प्रकरण में तथ्यों पर ध्यान देने (What to Consider) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *11.1.1. In the aforesaid context, various features of the doctrine of res judicata were explained by this Court in the relied upon passage as follows: -*
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> > *"11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the 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 that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."*
>
> *(emphasis supplied).*

Role of Court

26. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अनुप्रयोग में न्यायालय की भूमिका के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 / 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत न्यायालय की भूमिका (Role of Court) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *11.1.1. In the aforesaid context, various features of the doctrine of res judicata were explained by this Court in the relied upon passage as follows: -*
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> *"11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the 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 that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."*
>
> *(emphasis supplied).*

Matter in Issue
Collaterally or incidentally
Vs
Directly and substantially

27. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान में पूर्ववर्ती व पश्चात्वर्ती न्यायिक कार्यवाही में निहित विषयवस्तु के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5390 / 1985 उनवान *SAJJADANASHIN SAYED MD.B.E.EDR.(D)BY LRS Vs MUSA DADABHAI UMMER & OTHERS* में दिनांक 23.02.2000 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत पूर्ववर्ती वाद में निर्णित किये गये विवाद के मुख्य बिन्दु (Matter in Issue) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The words `collaterally or incidentally in issue' have come up for interpretation in several common law jurisdictions in the context of the principle of res judicata. While the principle has been accepted that matters collaterally or incidentally in issue are not ordinarily res judicata, it has however been accepted that there are exceptions to this rule. The English, American, Australian and Indian Courts and Jurists have therefore proceeded to lay down certain tests to find out if even an earlier*

finding on such an issue can be res judicata in a later proceeding. There appears to be a common thread in the tests laid down in all these countries. We shall therefore refer to these developments.*

Matters collaterally or incidentally in issue:
It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

As pointed out in Halsbury's Laws of England (Vol. 16, para 1538) (4th Ed), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question (R Vs. Knaptoft Inhabitants (1824) B & C 883; Heptulla Bros Vs. Thakore (1956(1) WLR. 289 (297)(PC); or if any matter was incidentally cognizable (Sanders (otherwise Saunders) Vs. Sanders (otherwise Saunders) 1952 (2) All ERR p. 767 at 771). A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue (Mulla, CPC 15th Ed., p.104). Difficulty in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and tests laid down in various Courts:

Difficulty in this area of law has been felt in various jurisdictions and therefore some tests have been evolved. Halsbury says (Vol.16, para 1538) (4th Ed.) that while the general principle is clear, "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". Spencer Bower and Turner on 'The Doctrine of Res Judicata' (2nd Ed, 1969) (p.181) refer to the English and Australian experience and quote Dixon, J. of the Australian High Court in Blair Vs. Curran (1939)62. CLR. 464 (553) to say:

> *"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".*

The authors say that 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". American jurists and Courts have also found difficulty but they have tried to lay down some tests. It is conceded in Corpus Juris Secundum (Vol.50, para 725) that "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 (Per Taft,J.in North Carolina R Co.Vs. Story) (45 S.Ct.531 = 268 US 288). But this rule does not however prevent a judgment from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining the ultimate vital point. American Jurisprudence (Vol. 46 Judgments para 422) too 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". (Per Harlan, J. in Hoag vs. New Jersey) (356, US 464 = 78. S.Ct.829), quoting Restatement, Judgments (para 68(1)) and `Developments in the Law - Res Judicata' (1952) 65 Harv.L.Review 818(820). (See also collateral estoppel by judgment - by Prof. Scott. (1942) Harvha R 1.)

In India, Mulla has referred to similar tests (Mulla, 15th Ed.p.104). The learned author says: A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter 'directly and substantially' in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was 'directly and substantially' in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. (Mulla, p.104) One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwar Singh Vs. Sarwan Singh: AIR 1965 SC Mohd.S.Labbai Vs. Mohd. Hanifa: AIR 1965 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.

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

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

The Privy Council and the Supreme Court had occasion to deal with these points. Three decisions,- two of the Privy Council and one decided by the Supreme Court can be referred to in this context as illustrations of cases where in spite of an issue and a

decision in an earlier case, the finding was treated as being only collaterally or incidentally in issue and not res judicata. In Run Bahadur Vs. Lucho Koer (1885) ILR 11 Cal 301 (PC) (see Mulla p.107), A, a Hindu, died leaving a widow and a brother C.The widow sued B, the tenant for rent of certain property forming part of the estate of her husband. C, the husband's brother, claimed the rent on the ground that the property was joint family property and that he was entitled to the rent by survivorship. C was then joined as a defendant. Two issues were framed (1) whether the deceased alone received the whole rent of the property in his life time, or whether the rent was received by him jointly with his brother C? (2) whether any rent was due and if so, how much was due from B? The finding on the first issue was that the deceased alone received the whole rent in his life time. Subsequently, C sued the widow for declaration that he and his brother were joint, and he claimed the property by right of survivorship. The question arose whether the deceased and C were joint or separate and the earlier finding was held not res judicata inasmuch as the matter was not 'directly and substantially' in issue in the earlier suit. It was in issue in the earlier suit only 'collaterally or incidentally', as it did not cover the entire question of C's title but related merely to the joint or separate receipt of rent.

The next decision, again of the Privy Council is the one in Asrar Ahmed Vs. Durgah Committee, Ajmer (AIR 1947 PC 1) relating to the famous Dargah of Moinuddin Chisti, Ajmer. In a former suit of 1880 under Section of the Religious Endowments Act, 1863 filed by the President and one Member of the Durgah Committee for removal of one Ameer Ali, the Mutavalli on ground of maladministration, the question as to the hereditary nature of the office was the subject matter of a specific issue and it was held that the office was hereditary, accepting the plea of the defendant. While decreeing the suit for removal of the Mutavalli, the Court however held that if the Mutavalli behaved properly, he could be reinstated as the office was hereditary. In 1918, the Dargah Committee filed a suit against Nisar Ahmed, brother of the deceased Mutawalli, whom the Commissioner proposed to recognise as legal heir and Mutawalli, thus treating the office as hereditary. But in that case the Committee claimed that the office was not hereditary. Nisar Ahmed, the defendant claimed the office as hereditary and relied upon the earlier finding. This suit however abated. Nisar Ahmed died in 1940. Then Ameer Ali's son filed a suit claiming the office to be hereditary. The suit was decreed by the District Judge but dismissed on appeal. In the plaintiff's appeal to the Privy Council, their Lordships rejected the plea of res judicata and held that the issue as to the hereditary nature of the office was irrelevant in the earlier suit and the decision was incidental to and not the substance of the earlier suit.

The Supreme Court decided a similar case in Pragdasji Vs. Ishwarlal Bhai (AIR 1952 SC 143).There the question of res judicata arose at two stages of the same proceeding. The plaintiffs filed a suit under Section 92 CPC in 1928 for (i) a declaration that the properties under the management of the defendant were religious and charitable trust properties (ii) the defendant be removed from the Gadi from possession of the properties and a suitable successor be appointed, (iii) the defendant be called upon to account for his period of management and (iv) to frame a scheme for proper management of the institution. The defendant traversed the material allegations and pleaded that the suit was not maintainable inasmuch as no public trust existed and the properties were private properties of the defendant. On these pleadings, a number of issues were framed of which two were

treated as preliminary issues (i) whether the temple and the properties in suit were public charitable properties? and (ii) if not, whether this Court has jurisdiction to try the suit? On the preliminary issues, the District Court gave a judgment on 18.7.1935 against the plaintiff and dismissed the suit. The High Court however held on 24.1.1938 that the charity was a public one covered by Section 92 of the Code of Civil Procedure. In the application for special leave, the Privy Council refused the application inasmuch as the case was at a preliminary stage but said that the order was without prejudice to the presentation of a fresh petition (for special leave) after all the issues were determined. Later, the District Court took up the suit for decision on merits. The court held that allegations of breach of trust and misconduct were not proved and the suit was dismissed but "subject to the declaration already given by the High Court that the temple and the properties in possession of the defendant were public, religious and charitable properties". The High Court affirmed the same on appeal by the plaintiff. The defendant came up in appeal to the Supreme Court objecting to the 'declaration' as to the public nature of the properties, virtually attacking the earlier finding dated 24.1.38. The Supreme Court vacated the 'declaration' made as to the public character of the charity and its properties on the ground that the said question was beyond the scope of Section 92 CPC in the earlier suit. This Court also held that in a suit under Section 92 CPC the only reliefs that could be claimed were those specified in Section 92 CPC and "a relief praying for a declaration that the properties in the suit are trust properties, does not come under any of these clauses". This Court observed:

> *"When the defendant denies the existence of the trust, a declaration that the trust does exist might be made as auxiliary to the main reliefs under the section if the plaintiff is held entitled to it".*

It was then stated by this Court that when the suit failed for want of cause of action, there was no warrant for giving the plaintiff a declaratory relief as to the public nature of the trust under Section 92 CPC. The finding as to the existence of a public trust in such circumstances was not more than an obiter dictum according to this Court. The appeal of the defendants was allowed and the declaration as to the trust being a public trust was set aside.

These three cases are therefore instances where in spite of a specific issue and an adverse finding in an earlier suit, the finding was treated as not res judicata as it was purely incidental or auxiliary or collateral to the main issue in each of these cases, and not necessary for the earlier case nor its foundation. Before parting with this point, we would like to refer to two more rulings. In Sulochana Amma Vs. Narayanan Nair (1994 (2) SCC 14), this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in Uthiva Somasundareswarar Vs. Rajanga (AIR 1965 Mad 355) held (see para 8 therein) that the previous suit was only for injunction relating to the crops. May be, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right.

These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be

treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum(Vol.50, para 735, page 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> *"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".*

We have gone into the above aspects in some detail so that when a question arises before the Courts as to whether an issue was earlier decided only incidentally or collaterally, the Courts could deal with the question as a matter of legal principle rather than on vague grounds.

Test

28. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अनुप्रयोजन हेतु आवश्यक परीक्षण विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946/2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित प्रावधान के अनुप्रयोजन हेतु आवश्यक परीक्षण के संबंध में विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *40. In view of the authorities cited above, the twin test that is used for the identification of whether an issue has been conclusively decided in the previous suit is:*
>
> *A. Whether the adjudication of the issue was 'necessary' for deciding on the principle issue ('the necessity test'); and*
>
> *B. Whether the judgment in the suit is based upon the decision on that issue ('the essentiality test').*

Question in Res-judicata

29. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा के तहत निहित मुख्य प्रश्न के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1061, 1627—1629/1966 उनवान *Mathura Prasad Bajoo Jaiswal & Ors vs Dossibai N. B. Jeejeebhoy* में दिनांक 23.02. 2000 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा के तहत निहित मुख्य प्रश्न (Question in Res-judicata) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

But the doctrine of res judicata belongs to the domain of procedure : it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. 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. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the, transaction which is the foundation of the right and the relevant law applicable to the determination of the transactions which is the soured of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision of law can not be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent Proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

The authorities on the question whether a decision on a question of, law operates as res-judicata disclose widely differing views. In some cases it was decided that a decision on a question of law can never be res judicata in a subsequent proceeding between the same parties :Parthasardhi Ayyangar v. Chinnakrishna Ayyangar(1); Chamanlal v. Bapubhai (2) ; and Kanta Devi v. Kalawati(3). On the other hand Aikman, J., in Chandi Prasad v. Maharaja Mahendra Mahendra Singh(1) held that a decision on a question of law is always res judicata. But as observed by Rankin, C.J., in Tarini Charan Bhattacharjee v. Kedar Nath Haldar(5) :

> *"Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration."*

Exception

30. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अपवाद के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1061, 1627—1629 / 1966 उनवान *Mathura Prasad Bajoo Jaiswal & Ors vs Dossibai N. B.*

Jeejeebhoy में दिनांक 23.02.2000 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा के क्षेत्र के अपवाद (Exception) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *Thus, in order to contend in a latter suit or proceeding that an earlier judgment was contained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram's case for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab & Haryana High Curt in Jagar Ram's case. The Full Bench has not referred to section 44 of the Evidence Act not to any other precedents of other Courts or to any basic legal principle.*
>
> *The law in England also appears to be the same, that no independent suit is necessary. In Spencer-Bower and Turner on Res Judicata (2nd Ed., 1969) it is stated (para 369) that there are exceptions to the principle of res judicata. If the party setting up res judicata as an estoppel has alleged all the elements of an estoppel (i.e ingredients of res judicata), it is still open to the latter (the opposite party) to defeat the estoppel by setting up and establishing certain affirmative answers. Of these there are four main classes-fraud, cross-estoppel, contract and public policy. The author clearly says that no active proceedings for 'rescission' of the earlier judgment are necessary. They state (para 370) as follows:*
>
> > *"The avoidance of a judicial act on the ground of fraud or collusion is effected not only by active proceedings for rescission........but also by setting up the fraud as a defence to an action on the decision, or as an answer to any case which, whether by way of estoppel or otherwise, depends for its success on the decision being treated as incontrovertible."*
>
> *Thus, the law is well settled that no independent suit as a condition precedent is necessary.*
>
> *Collusion, say Spencer-Bower and Turner (para 378), is essentially play- acting by two or more persons for one common purpose-a concerted performance of a fabula disguised as a judicium-an unreal and fictitious pretence of a contest by confederates whose game is the same. As stated by Lord Selborne LC in Boswell v. Cooks, (1894) 6 Rep. 167, there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him, there is no party litigating.......no real interest brought into question and to use the words of a very sensible civilian on this point, fabula nonjudicium, hoc est; in scena, non in foro, res agitur. That, in our view, is the true meaning of the word 'collusion' as applied to a judicial proceeding.*
>
> *Further property of a public institution cannot be allowed to be jeopardised by persons who, at an earlier point of time, might have represented it and who were expected to effectively defend public interest and community property. Persons representing public bodies are expected to discharge their functions faithfully and in keeping with the trust reposed in them.*
>
> *We may also add one other important reason which frequently arises under section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not*

सत्यमेव जयते

one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed\. Musa Dadabhai Ummer, [2000] 3 SCC 350, where this Court, on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceedings 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 of title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case.

Appeal and Res-judicata

31. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अपील के संबंध में अनुप्रयोजन के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 802—803 / 1963 *Sheodan Singh vs Smt. Daryao Kunwar* में दिनांक 14.01.1966 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान में निहित रेस—ज्यूडिकेटा के सिद्धांत एवं पूर्ववर्ती निर्णय के विरूद्ध की गई अपील के मध्य संबंध (Appeal and Res-judicata) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

(....)To hold otherwise would make res judicata impossible in cases where the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the me- rits. It is well-settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes res subjudice and it is the decree of the appeal court which will then be res judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming into the trial court's decision given on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismis- sal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We 30 9 are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

XXX

(....)We may in this connection refer to Syed Ahmad Ali Khan Alavi v. Hinga Lalwhere it was held that where the appeal was struck off as having abated, the decision would operate as res judicata. If the view taken by the Lahore High Court is correct,

the result would be that there may be inconsistent decisions on the same issue with respect to the point involved in that case, namely, whether a certain lease had expired or not and the' very object of resjudicata is to avoid inconsistent decision. Where therefore the result of the dismissal or abatement of an appeal is to confirm the decision of the trial court on the merits such dismissal must amount to the appeal being heard and finally decided and would operate as resjudicata. (....)

XXX

(....)Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be resjudicata whatever may be the reason for the dismissal. (....)

Interlocutary Proceeding

32. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के अंतरिम न्यायिक कार्यवाही पर अनुप्रयोजन के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 802—803 / 1963 *Sheodan Singh vs Smt. Daryao Kunwar* में दिनांक 14.01.1966 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान में निहित रेस—ज्यूडिकेटा के सिद्धांत एवं Interlocutary Proceeding/Order के मध्य संबंध के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again ?

Dealing with this question almost a century ago the Privy Council in Maharaja Moheshur Singh v. The Bengal Government (5) held that it is open to the appellate court which had not earlier considered the matter to investigate in an appeal from the final decision grievances of a party in respect of an interlocutory order. That case referred to the question of assessment of revenue on lands. On December 6, 1841, judgment was pronounced by the Special Commissioner to the effect that 3,513 beeghas of land alone were assessable, and that the collections made by the Government on the other lands should be restored to the possessors. This judgment was affirmed by another Special Commissioner on March 8, 1842. On September 21, 1847, a petition for review on behalf of the Government of Bengal was presented to another Special Commissioner. That petition for review was granted. After due hearing the judgment of March 8, 1842, was reversed. The question arose before the Privy Council whether the review had been granted in conformity with the Regulations existing at that time with respect to the granting a review. It was urged however on behalf of the Government of Bengal that it was then too late to impugn the regularity of the proceeding to grant the review and that if the appellant deemed himself aggrieved by it, he ought to have appealed at the time, and that it was too late to do so after a decision had been pronounced against him.Dealing with this objection the Privy Council observed :-

> *" We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which be may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities, We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."*

XXX

There can be little doubt about the salutary effect of the rule as laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it, important that in the earlier litigation the decision must be final in the strict sense of the term. When a court has decided the matter it is certainly final as regards that court. Should it always be treated as final in later stages of the proceeding in a higher

court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred? As was pointed out by the Privy Council in Moheshur Singh's Case (supra) the effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior courts, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher courts for redress of the grievances, even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the Legislature included in the Code of Civil Procedure from the very beginning a provision that in an appeal from a decree it will be open to a party to challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case. In the Code of 1859 s. 363 after laying down that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to a decree provided " but if the decree be appealed against, any error, defect or irregularity in any such order affecting the merits of the case or the jurisdiction of the court may be set forth as a ground of objection in the memorandum of appeal." When the Code of 1877 made provisions in Chapter 43 for appeal against certain orders, s. 591 thereof provided " Except as provided in this chapter, no appeal shall lie from any order passed by any court on the exercise of its original or appellate jurisdiction " and went on to say " but if any decree be appealed against any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." The position remained the same in the Code of 1882. The present Code in its 105th section uses practically the same phraseology except that the word ,,any such order" has been substituted by ,any order" and an additional provision has been made in the second sub-section in respect of orders of remand. The expression " such order " in s. 591 gave rise to a contention in some cases before the Privy Council that s. 591 applied to non-appealable orders only. This contention was overruled by the Privy Council and that view was adopted by the Legislature by changing the words " any such order " to " any order ". As regards the orders of remand it had been held that under s. 591 of the Code a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under s. 588 and had not done so. The second sub-section of s. 105 precludes an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand.

It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A

special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second sub-section did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason the supreme Court against an order of remand. There appears to be no reason therefore why the appellant should be precluded from raising before this Court the question about the applicability of s. 28 merely because he had not appealed from the High Court's order of remand, taking the view against him that the section was applicable. We are unable to agree with the learned Advocate that the decision of the Privy Council in Ram Kirpal Shukul's Case affects this matter at all.

XXX

It will be noticed that in all these three cases, viz., Ram Kirpal Shukul's Case, Bani Ram's Case and Hook's Case, the previous decision which was found to be res judicata was part of a decree. Therefore though in form the later proceeding in which the question was sought to be raised again was a continuation of the previous proceeding, it was in substance, an independent subsequent proceeding. The decision of a dispute as regards execution it is hardly necessary to mention was a decree under the Code of Civil Procedure and so in Ram Kirpal's Case and Bani Ram's Case, such a decision being a decree really terminated the previous proceedings. The fact therefore that the Privy Council in Ram Kirpal Shukul's Case described Mr. Probyn's order as an " interlocutory judgment " does not justify the learned counsel's contention that all kinds of interlocutory judgments not appealed from become res judicata. Interlocutory judgments which have the force of a decree must be distinguished from other interlocutory judgments which are a step towards the decision of the dispute between parties by way of a decree or a final order. Moheshur Singh',s Case, Forbes' Case and Sheonath's Case dealt with interlocutory judgments which did not terminate the proceedings and led up to a decree or final order. Ram Kirpal Shukul's Case, Bani Ram's Case and Hook's Case deal with judgments which though called interlocutory, had, in effect, terminated the previous proceedings. These cases are therefore of no assistance to the learned counsel for the respondent in his argument that the order of remand made by the High Court not having been appealed from to this Court the correctness of that order cannot be challenged now.

Preliminary Issue

33. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत वाद के प्राथमिक विवाद्यक के मध्य संबंध के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 / 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित रेस—ज्यूडिकेटा एवं न्यायालय द्वारा

वाद के प्राथमिक विवाद्यक के मध्य संबंध विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Res Judicata as a Preliminary issue

19. Before we undertake an analysis on the applicability of the principles of res judicata vis-à-vis the three suits that were initiated with regard to the suit property it is necessary to discuss the submission of counsel for the appellant that res judicata, being a mixed question of law and facts ought not to have been decided as a preliminary issue by the trial court. It was contended that any determination of the application of the principle of res judicata can only be made after evidence is adduced pursuant to a full-fledged trial. For this purpose, reliance was placed on the decision of a two judge bench of this court in Alka Gupta v. Narender Kumar Gupta ("Alka Gupta") authored by Justice RV Raveendran. In Alka Gupta, the trial court had dismissed the subsequent suit on various preliminary grounds, one of which was that the filing of the subsequent suit stood barred by res judicata. However, on appeal, the two judge bench of this court held that the second suit was not barred by res judicata:

> *"19. The learned Trial Bench passed the order on 13-3-2009 on the preliminary issue (Issue 1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of (2010) 10 SCC 141 course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable."This was not interfered by the Appellate Bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons.*
>
> *20. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea.[…]*
>
> *26. In the instant case, the High Court has not stated what was the ground of attack that the appellant-plaintiff ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata."*
>
> *(emphasis supplied)*

20. The finding of the trial judge on the applicability of the principles of res judicata was set aside on the ground that the plea was not clearly established and the plaintiff was not given the opportunity to contest the plea. Thus, in Alka Gupta (supra), this court set aside the decision of the High Court on the above ground.

21. Order 14 Rule 2 CPC states that if questions of fact and law arise in the same suit, the court can dispose the case on the question of law alone if it relates to the following:

> *"(a) the jurisdiction of the Court, or*
> *(b) a bar to the suit created by any law for the time being in force, and for that purpose may [...]"*
> *(emphasis supplied)*

22. It has been held by this court that a determination of whether res judicata is attracted raises a mixed question of law and facts. In Madhukar D. Shende 16 and Ram Harakh 17, it was held that the plea of res judicata was a mixed question of law and facts. In both the cases, the plea of res judicata was taken for the first time before this Court. Justice K. Ramaswamy writing for a three judge bench of this court in Sushil Kumar Mehta v. Gobind Ram Bohra 18 held that the principle of res judicata cannot be fit into the pigeon hole of 'mixed question of law and facts' in every case. Rather, the plea of res judicata would be a question of law or fact or a mixed question of both depending on the issue that is claimed to have been previously decided. The court while determining the applicability of the plea of res judicata would determine if there has been any material alteration in the facts and law applicable:

> *"26. The doctrine of res judicata under Section 11 CPC is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus, the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The Madhukar D Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85 Ram Harakh v. Hamid Ahmed Khan & Ors., (1998) 7 SCC 484 (1990) 1 SCC 193 decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata.Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot*

> *confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction."*

23. In Mathura Prasad Bajoo Jaiswal v. Dossibai N.B Jeejeebhoy19, the application of the plaintiff in the Court of the Civil Judge for the determination of Standard Rent under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 was dismissed on the ground that the statute did not apply to a case of open land let for the construction of buildings. This decision was affirmed in appeal. However, in view of another decision of the Bombay High Court which held that the statute would be applicable to leased land, the plaintiff filed a fresh proceeding in the Court of Small Causes. The Trial Court and the High Court held that the subsequent suit was barred by res judicata. However, Justice J C Shah writing for a 3-judge bench held that the subsequent suit was not barred by res judicata:

> *"5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative (1970) 1 SCC 613 direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. 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. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata.*
> *[…]*
>
> *11. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the 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 that*

order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

(emphasis supplied)

The court while undertaking an analysis of the applicability of the plea of res judicata determines first, if the requirements of section 11 CPC are fulfilled; and if this is answered in the affirmative, it will have to be determined if there has been any material alteration in law or facts since the first suit was decreed as a result of which the principle of res judicata would be inapplicable. We are unable to accept the submission of the appellants that res judicata can never be decided as a preliminary issue. In certain cases, particularly when a mixed question of law or fact is raised, the issue should await a full-fledged trial after evidence is adduced.

Representative Suit

34. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के प्रतिनिधिक प्रकृति के वाद पर अनुप्रयोजन के संबंध में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 ⁄ 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित रेस—ज्यूडिकेटा एवं प्रतिनिधिक वाद के मध्य संबंध विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

2.2 Representative Suit and Res judicata

34. We next advert to identifying if the parties in the instant proceedings (OS 149/1998) are the same as the first suit (OS 92/1950-51). The first suit was a representative suit filed by interested parties of the Mosque-Jamia Masjid while the instant suit was filed by the President of the Jamia Masjid in his representative capacity. In Raje Anandrao v. Shamrao 22, Chief Justice PB Gajendragadkar (as he then was) speaking for a two judge Bench of this Court said:

"13…a suit under Section 92 is a representative suit and binds not only the parties thereto but all those who are interested in the trust."

35. In Ahmad Adam Sait v. M E Makhri 23, Chief Justice PB Gajendragadkar (as he then was) speaking for a three judge Bench held:

"16…when a suit is brought under Section 92, it is brought by two or more persons interested in the trust who have taken upon themselves the responsibility of representing all (1961) 3 SCR 930 (1964) 2 SCR 647 the beneficiaries of the Trust. In such a suit, though all the beneficiaries may not be expressly impleaded, the action is instituted on their behalf and relief is claimed in a representative character. This position immediately attracts the provisions of Explanation VI to Section 11 of the Code. Explanation VI provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear that Section 11 read with its Explanation VI leads to the result that a decree passed in suit instituted by persons to which Explanation VI applies will bar further claims by persons interested in the same right in

> *respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive res judicata. Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the said earlier suit."*

The same principle was reiterated in R. Venugopala Naidu (supra). In a two judge Bench decision in Shiromani Gurdwara Parbhandhak Committee v. Mahant Harnam Singh C. (Dead) M.N. Singh 24, this Court held:

> *"19. As observed by this Court in R. Venugopala Naidu v. Venkatarayulu Naidu Charities [1989 Supp (2) SCC 356 : AIR 1990 SC 444] a suit under Section 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 the vindication of public rights. The beneficiaries of the trust, which may consist of the public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at AIR 2003 SC 3349 large which is interested in the trust, all such interested persons would be considered in the eyes of the law to be parties to the suit. A suit under Section 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 VI to Section 11 CPC constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 CPC."*

On a perusal of the above authorities it is evident that a representative suit is binding on all the interested parties. Therefore, the judgment of the court in the first suit would be binding on Jamia Masjid and would preclude it from instituting another suit on the same issue if it has been conclusively decided. It is now to be analysed if the substantive issue in the instant suit was conclusively decided in the first suit.

Conclusive Decision

35. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के निर्णायक निर्णय के संबंध में अनुप्रयोजन के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 ⁄ 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित रेस—ज्यूडिकेटा एवं न्यायालय द्वारा वाद के निर्णायक निर्णय के मध्य संबंध की विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

36. The locus classicus on the point of determining if an issue was 'directly and substantially' decided in the previous suit is the decision of Justice M Jagannadha Rao (writing for a two judge bench) in Sajjadanashin Syed MD B.E. Edr. (D) by Lrs. v. Musa Dadabhai Ummer. 25. During the course of the judgment, the Court analysed the expression "directly and substantially in issue" in Section 11 and laid down the twin test of essentiality and necessity:

> *"12. It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue." (2000) 3 SCC 350 […]*
>
> *18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter "directly and substantially" in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was "directly and substantially" in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh [AIR 1965 SC 948] and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in Mulla is a correct statement of the law.*
>
> *19. We have here to advert to another principle of caution referred to by Mulla (p. 105):*
>
> *"It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision."*
>
> *(emphasis supplied)*

37. Adverting to the decision in Mahant Pragdasji Guru Bhagwandasji (supra) and two earlier decisions, the Court held that these were instances where in spite of adverse findings in

an earlier suit, the finding on that specific issue was not treated as res judicata as it was purely incidental, auxiliary or collateral to the main issue in each of these cases and not necessary in the earlier case.

38. In another decision in Gram Panchayat of Village Naulakha v. Ujagar Singh, it has been held that the decision in an earlier suit for an injunction, where no question of title was adjudicated upon will not be binding on the question of title:

> *"10. We may also add one other important reason which frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into or decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed v. Musa Dadabhai Ummer [(2000) 3 SCC 350] where this Court, on a detailed consideration of law in India and elsewhere held, that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a later 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 as pointed out in that case."*

However, in Sajjadanashin Syed (supra), an earlier judgment in Sulochana Amma (supra) and the Madras High Court's judgment in Vanagiri 28 were referred to in order to lay emphasis on the unique facts of each case and its importance for determination of whether the issue was substantially decided. In both the referred cases, the issue was whether the finding of title in an injunction suit would operate as res judicata to a subsequent suit for declaration of title. While in Sulochana Amma, it was held that by the doctrine of res judicata, the finding would bar the subsequent suit, in Vanagiri, it was held that the title was not conclusively decided and that the subsequent suit would not be barred. It was observed that the twin tests (2000) 7 SCC 543 Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari, AIR 1965 Mad 355 of necessity and essentiality might lead to different conclusions on suits of a similar nature based on the facts and circumstances in each of them.

39. In a more recent decision in Nand Ram (Dead) Through Legal Representatives v. Jagdish Prasad (Dead) Through Legal Representatives 29, a Bench of two judges reiterated the principle that if a matter has only collaterally or in an auxiliary manner been in issue or decided in an earlier proceeding, the finding would not ordinarily be res judicata in a later proceeding where the matter is directly and substantially in issue. Justice Hemant Gupta (writing for a two judge bench) noted that the material test to be applied is whether the adjudication of the issue is material and essential for the decision. In Nand Ram, the land leased by the plaintiffs to the defendants was acquired under the Land Acquisition Act, 1894. A dispute arose on the apportionment of the compensation. The suit was decided against the defendant on the ground that defendant did not pay the lease rent for more than 12 months and thus according to the lease agreement, the lease had come to an end. It was thus held that the defendant would not be entitled to the compensation. Subsequently, the plaintiff filed an

eviction suit asserting that the defendant was in possession of the land that was not included in the lease deed. The High Court in the second appeal held that the subsequent suit was barred by res judicata since the former suit had conclusively decided on the title of the suit property. On appeal, this court set aside the judgment of the High Court on the ground that the issue of title was not conclusively decided in the former suit.

Compromised Decree

36. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के समझौते से उत्पन्न डिक्री एवं रेस—ज्यूडिकेटा के मध्य संबंध के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 10946 / 2014 उनवान *Jamia Masjid vs K.V.Rudrappa (D) Th.Lrs* में दिनांक 23.09.2021 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 में निहित रेस—ज्यूडिकेटा एवं न्यायालय द्वारा वाद में आपसी समझौते के आधार पर जारी डिक्री के मध्य संबंध की विवेचना करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

2.4 Compromise decree and Res Judicata

46. It is contended by the counsel for the appellant that since a compromise deed was arrived at between the Mysore State Board of Wakf, Abdul Khuddus and the lessee with regard to the possession of the suit property, the other reliefs have been abandoned. It was thus contended that in view of the compromise deed, the claim of title to the suit property has been abandoned and cannot be raised in the subsequent suit. In Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao 30 and Sunderabai v. Devaji Shankar Deshpande 31, this Court held that since a compromise decree is not a decision of the court, the principle of res judicata cannot be made applicable. However, it was held that the compromise decree may in effect create estoppel by conduct between the parties, and the parties by estoppel will be prevented from initiating a subsequent suit. Chief Justice Bhagwati (as he was then) writing for a three judge bench in Sunderabai observed:

> *"12. The bar of res judicata however, may not in terms be applicable in the present case, as the decree passed in Suit No. 291 of 1937 was a decree in terms of the compromise. The terms of Section 11 of the CPC would not be strictly applicable to the same but the underlying principle of estoppel would still apply. Vide: the commentary of Sir Dinshaw Mulla on Section 11 of the CPC at p. 84 of the 11th Edn. under the caption Consent decree and estoppel:*
> *<u>"The present section does not apply in terms to consent decrees; for it cannot be said in the cases of such decrees that the matters in issue between the parties 'have been heard and finally decided' within the meaning of this section. A consent decree, however, has to all intents and purposes the same AIR 1967 SC 591 AIR 1954 SC 82 effect as res judicata as a decree passed in invitum. It raises an estoppel as much as a decree passed in invitum."</u>*

<u>Since it is the principle of estoppel by conduct that will bar the institution of the subsequent suit, it is pertinent that we refer to the compromise decree to determine if any compromise was arrived at between the parties on the title to the suit property.</u> On a perusal of the compromise deed, it is evident that a compromise was reached only on the issue of possession and

lease. When no compromise was arrived at between the parties on the title to the suit property, then no estoppel by conduct could also be inferred. Additionally, the counsel for the respondent referred to Order 23 Rule 3A to contend that a subsequent suit is barred when the previous suit is dismissed through a compromise decree. However, the provision would not be applicable to the case at hand since it only bars the challenge to a compromise decree on the ground that it is unlawful. Therefore, the disposal of the second suit in view of the compromise would not bar the filing of the suit out of which the instant proceedings arise.

Same Proceedings

37. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा के एक ही न्यायिक कार्यवाही के विभिन्न चरणों ⁄ प्रार्थना—पत्रों पर अनुप्रयोजन के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 ⁄ 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की एक ही वाद में अनुप्रयोज्यता (Same Proceedings) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

9.5.1. The principle that the doctrine of res judicata is attracted not only in separate subsequent proceedings but also at subsequent stage of the same proceedings is hardly of any doubt or dispute. A 3-Judge Bench of this Court in the case of Y.B. Patil (supra), has tersely underscored this principle of law in the following terms: -

> *"4. ...It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding...."*

Erroneous Judgement

38. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा एवं त्रुटिपूर्ण निर्णय पर अनुप्रयोज्यता के मध्य संबंध के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694 ⁄ 2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की पूर्ववर्ती वाद में न्यायालय द्वारा दिये गये त्रुटियुक्त निर्णय के संबंध में अनुप्रयोज्यता (Erroneous Judgement) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

9.5.2. It is also well-settled, as laid down in several decisions, that even an erroneous decision remains binding on the parties to the same litigation and concerning the same issue, if rendered between the same parties by a Court of competent jurisdiction. In the case of Gorie Gouri Naidu (supra), this Court, inter alia, said,

> *"4.....The law is well settled that even if erroneous, an inter-party judgment binds the party if the court of competent jurisdiction has decided the lis...."*

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11.1.2. This Court held that in the given case, the earlier decision of the Civil Judge that he had no jurisdiction to entertain the application for determination of standard rent was

plainly erroneous; and if such a decision was regarded as conclusive, 'it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature'. Therefore, the operation of doctrine of res judicata was ruled out in that case.

Precedent and Res-judicata

39. इसी प्रकार इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694/2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की Precedent and Res-judicata के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *9.5.3. In Makhija Construction & Engg. (P) Ltd. (supra), this Court also clarified the distinction between a precedent and the operation of the doctrine of res judicata in the following terms:*
>
> > *"19. ...A precedent operates to bind in similar situations in a distinct case. Res judicata operates to bind parties to proceedings for no other reason, but that there should be an end to litigation."*

Statuory Provision and Res-judicata

40. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा एवं वैधानिक प्रावधान के मध्य संबंध के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 7691—7694/2022 उनवान *S. Ramachandra Rao vs S. Nagabhushana Rao* में दिनांक 19.10.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान की राज्य द्वारा निर्धारित वैधानिक में अनुप्रयोज्यता (Statuory Provision and Res-judicata) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *11.2. In the case of Allahabad Development Authority (supra), the relevant aspects were that after a notification under Section 4(1) of the Land Acquisition Act, 1894 ('the Act of 1894') for acquiring a large extent of land for Transport Nagar Scheme, the enquiry under Section 5-A was dispensed with in exercise of power under Section 17(1-A), as amended by the Legislature of the State; and possession of land in question was taken on 02.11.1977, whereby the land stood vested in the State under Section 16 of the Act of 1894. However, the High Court passed an order declaring that the acquisition proceedings stood lapsed by operation of Section 11-A, which requires that after acquisition, an award must be made within a period of two years from the date of publication of declaration and if no award is made within that period, the entire proceeding for acquisition of land would lapse. The same question was examined by this Court in Satendra Prasad Jain v. State of U.P.: (1993) 4 SCC 369 and Awadh Bihari Yadav v. State of Bihar: (1995) 6 SCC 31, where it was held that Section 11-A of the Act of 1894 would not apply to the cases of land acquisition under Section 17 where possession had already been taken and the land stood vested in the State. In the given context and while referring to a decision in the case of Municipal Committee v. State of Punjab: (1969) 1 SCC 475, this Court held as under: -*
>
> > *"6. In view of the above ratio, it is seen that when the legislature has directed to act in a particular manner and the failure to act results in a consequence, the question is whether the previous order operates as res judicata or estoppel as against the persons in dispute. When the previous decision was found to be erroneous on its face, this*

> *Court held in the above judgment that it does not operate as res judicata. We respectfully follow the ratio therein. The principle of estoppel or res judicata does not apply where to give effect to them would be to counter some statutory direction or prohibition. A statutory direction or prohibition cannot be overridden or defeated by a previous judgment between the parties. In view of the fact that land had already stood vested in the State free from all encumbrances, the question of divesting does not arise. After the vesting has taken place, the question of lapse of notification under Section 4(1) and the declaration under Section 6 would not arise. Considered from this perspective, original direction itself was erroneous and the later direction with regard to delivery of possession of the land, in consequence, was not valid in law….." (emphasis supplied) 11.3. Thus, in the case of Mathura Prasad (supra), this Court observed that when the earlier decision on the question of jurisdiction was erroneous, it could not be treated as conclusive, else it would assume a special status to rule of law applicable to the parties relating to the jurisdiction, in derogation of the rule declared by the legislature. In Allahabad Development Authority (supra), this Court was concerned with operation of the statutory direction and inapplicability of the provisions of lapsing of acquisition where possession was already taken and the land stood vested in the State. Simply put, in these cases, the doctrine of res judicata has been held inapplicable in relation to the question of jurisdiction and in relation to the question of statutory direction/prohibition.*

Constructive Res-judicata

41. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रचनात्मक रेस—ज्यूडिकेटा के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा 1977 AIR 1680 उनवान *State Of Uttar Pradesh vs Nawab Hussain* में दिनांक 04.04. 1977 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत Constructive Res-judicata के सिद्धांत की व्याख्या की है। जिसके प्रासंगिक पैरा का विवरण निम्न प्रकार हैः—

> *As we shall show, that was quite an erroneous view of the decision of this Court ,on the question of constructive res-judicata. It will help in appreciating the view of this Court correctly if we make a brief reference to the. earli- er' decisions in Amalgamated Coalfields Ltd. and others v. Janapada Sabha, Chhindwara and Amalgamated Coalfields Ltd. and another v. Janapada Sabha, Chhindwara, which was also a case between the same parties. In the first of these cases a writ petition was filed to challenge the coal tax on some grounds. An' effort was made to canvass an addi- tional ground, but that was not allowed by this Court and the writ petitton was dismissed. Another writ petition was filed to challenge the levy of the tax for the subsequent periods on grounds distinct and separate from those which were rejected by this Court. The High Court held that the writ petition was barred by res-judicata 'because: of the earlier decision of this Court. The matter came up in appeal to this Court in the second case. The question which directly arose for decision was whether the principle of constructive res judicata was applicable to petitions*

under articles 32 and 226 of the Constitution and it was answered as follows,--

> *"It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct, and so, the decision of the High Court can be upheld only if the principle of constructive res judicata can be said to apply to writ petitions filed under Art. 32 or Art.*
>
> *226. In our opinion, constructive res judica- ta which is a special and artificial form of res judicata enacted by section 11 of the Civil Procedure Code should not generally be applied to writ petitions field under Art. 32 or Art. '226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impungned tax liability is for different years."*

It may thus appear that this Court rejected the application of the principle of constructive res judicata on the ground that it was a "special and artificial form of res judica- ta" and should not generally be applied to writ petitions, .but the matter did not rest there. It again arose for consideration in Devilal Modi's case (supra). Gajendragadkar, J. who had spoken for the court in the second case of Amalgamated Coalfields Ltd. spoke for the Court in that case also. The petitioner in that case was assessed to sales tax and filed a writ petition to challenge the assessment. The petition- was dismissed by the High Court and he came in appeal to this Court. He sought to make some' additional contentions in this Court, but was not permitted to do so.. He. there- fore filed another writ petition in the High Court raising ,those' additional contentions and challenged the order of assessment for the same year. The High Court dismissed the petition on merits, and the case came up again to this Court in appeal. The question which specifically arose for consideration was whether the principle of constructive res judicata was applicable to writ petitions of that kind. While observing that the rule of constructive res judicata was "in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure", this Court declared the law in the following terms,--

> *"This rule postulates that if a plea could have been taken by a party in a proc- ceding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basi- cally, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open. to the party to take one proceeding after another an urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred."*

While taking that view, Gajendragadkar C.J., tried to ex- plain earlier decision in Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara(1) and categorically held that the principle

of constructive res judicata was applicable to writ petitions also. As has been stated, that case was brought to the notice of the High Court, but its signifi- cance appears to have been lost because of the decisions, in Janakirama Iyer and others v.P.M. Nilakanta lyer (supra) and Gulabchand's ease (supra). We have made a reference to the decision in Janakirama Iyer's case which has no bearing on the' present controversy, and we may refer to the deci- sion in Gulabchand's case as well. That was a case where the question which specifically arose for consideration was whether a decision of the High Court on merits. on a certain matter after contest, in a writ petition under article 226 of the Constitution, operates as res judicata in a regular suit with respect to the same matter between the same par- ties. After a consideration of the earlier decisions in England and in this country, Raghubar Dayal J., who spoke for the majority of this Court, observed as follows,-

> *These decisions of the Privy Council well lay down that the provisions of s. 11 C.P.C. are not exhaustive with respect to an earlier decision in a proceeding operating as res judicata in a subsequent suit with respect ,to the same matter inter parties, and do not preclude the. application to regular suits of the general principles of res judicata based on public policy' and applied .from ancient. times."*

He made a reference to the decision in Daryao and others v. The State of U.P. and others(1) on the question of res judi- cata and the decisions in Amalgamated Coalfields Ltd. and others v. Janapada Sabha, Chhindwara(2) and Devilal Modi's case (supra) and summarised the decision of the Court as follows :--

> *"As a result of the above discussion, we are of opinion that the provisions of s. 11 C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in contro- versy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial."*

He however went on to make the following further observation,-

> *"We may make it clear that it was not necessary, and we have not considered, wheth- er the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so, raised therein."*

It was this other observation which led the High Court to take the view that the question whether the principle of constructive res judicata could be invoked by a party to a subsequent suit on the ground that a plea which might or ought to have been raised in the earlier proceeding but was not so raised therein, was left open. That in turn led the High Court to the conclusion that the principle of construc- tive res judicata could not be made applicable to a writ petition, and that was why it took the

> *view that it was competent for the plaintiff in this case to. raise an additional plea in the suit even though it was available to him in the writ petition which was filed by him earlier but was not taken. As is obvious, the High Court went wrong in taking that view because the law in regard to the applicability of the principle of constructive res judicata having been clearly laid down in the decision in Devilal Modi's case (supra), .it was not necessary to reiterate it in Gulabchand's case (supra) as it did not arise for consid- eration there. The clarificatory observation of this Court in Gulabchand's case (supra) was thus misunderstood by the High Court in observing that the matter had been "left open"' by this Court.*
>
> *It is not in controversy before us that the respondent did not raise the plea, in the writ petition which had been filed in the High Court, that by virtue of clause (1) of article 311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. It is also not in controversy that that was an important plea which was within the knowledge of the re- spondent and could well have been taken in the writ peti- tion, but he contented himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the Case against him in the departmental inquiry and that the action taken against him was mala fide. It was there- fore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that 'he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle constructive res judicata and the High Court erred in taking a contrary view.*

42. इसी प्रकार माननीय उच्चतम न्यायालय द्वारा सिविल अपील 8321/2010 उनवान *Alka Gupta vs Narender Kumar Gupta* में दिनांक 27.09.2010 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत Constructive Res-judicata के सिद्धांत की व्याख्या की है। जिसके प्रासंगिक पैरा का विवरण निम्न प्रकार हैः—

> *To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression `former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court.*
> *Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. <u>The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".</u>*
>
> *15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or*

attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from Greenhalgh v. Mallard [1947 (2) All ER 257] thus:

> *"....it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*
>
> *(emphasis supplied)*

In Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra [1990 (2) SCC 715], a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100) thus:

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

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

O2 R2 & Ras-judicata

43. प्रकरण में तथ्यों के कानूनी बिन्दुओं के परिप्रेक्ष्य में विश्लेषण से पूर्व सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान के तहत रेस—ज्यूडिकेटा एवं सिविल प्रक्रिया संहिता—1908 के आदेश—02 नियम—02 के मध्य संबंध के बारे में विस्तार से समझना प्रासंगिक है। इस संदर्भ में माननीय उच्चतम न्यायालय द्वारा सिविल अपील 8321 / 2010 उनवान *Alka Gupta vs Narender Kumar Gupta* में दिनांक 27.09.2010 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 की धारा—11 के प्रावधान एवं सिविल प्रक्रिया संहिता—1908 के आदेश—02 नियम—02 के मध्य अंतर को समझाते हुए न्यायिक दृष्टांत प्रतिपादित किया है। जिसके प्रासंगिक पैरा का विवरण निम्न प्रकार हैः—

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

8. We may extract Order 2 Rules 1 and 2 of the Code for ready reference:

> *"1. Frame of suit: Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.*
> *2. Suit to include the whole claim:*

> *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
> *(2) Relinquishment of part of claim: Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
> *(3) Omission to sue for one of several reliefs: A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."*

The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action.

Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

9. This Court in Gurbux Singh v. Bhoora Lal [AIR 1964 SC 1810] held :

> *"In order that a plea of a bar under O. 2, R. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."*

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court can not examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the trial bench andappellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the

grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

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

(.....)12. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of `Takshila Institute' and the second suit referred to a partnership in regard to business run at Pachhim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata.

13. The learned trial bench passed the order on 13.3.2009 on the preliminary issue (Issue No.1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the appellate bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant plaintiff an opportunity to meet the case based on such plea.

44. उपरोक्त विधिक प्रावधान एवं न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता—1908 की धारा—11 के अवलोकन से ज्ञात होता है कि मूलतः एवं सारतः वाले पूर्ववर्ती वाद के सक्षम न्यायालय में विचाराधीन रहते हुए समान पक्षकारों के मध्य समान विषय—वस्तु को लेकर पश्चात्वर्ती वाद के विचारण के न्यायालय को

प्रतिबंधित किया गया है। उक्त कानूनी प्रावधानों न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता–1908 की धारा–11 के तहत प्रस्तुत प्रार्थना–पत्र उक्त प्रावधान व न्यायिक दृष्टांतों द्वारा प्रतिपादित परीक्षण पर जांच किया जाना आवश्यक है।

45. प्रकरण में उक्त कानूनी प्रावधानों न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता–1908 की धारा–11 के तहत प्रस्तुत प्रार्थना–पत्र की उक्त प्रावधान व न्यायिक दृष्टांतों द्वारा प्रतिपादित परीक्षण पर जांच व विश्लेषण किया जाना आवश्यक है। इस हेतु पूर्ववर्ती व पश्चात्वर्ती वादपत्र की तुलना निम्न प्रकार हैः–

परीक्षण का आधार	पूर्ववर्ती वाद संख्या 64/2017	पश्चात्वर्ती वाद संख्या 2025/446
वाद का प्रकार	दावा	
पक्षकार एवं शीर्षक	लगभग समान	
सम्पति/आराजी	लगभग समान	
सक्षम न्यायालय	समान	
विषय–वस्तु	समान	
निर्णय प्रकृति	अंतिम निर्णय	विचाराधीन

46. प्रकरण में पूर्ववर्ती वाद के निर्णय का अवलोकन किया जाना आवश्यक है। पूर्ववर्ती व वर्तमान वाद के अवलोकन से ज्ञात होता है कि उक्त समान आराजी से संबंधित एक दावा पूर्व में समान पक्षकारों के मध्य समान विभाजन के अनुतोष पर समान क्षैत्राधिकार वाले हाजा न्यायालय द्वारा वाद संख्या 64/2017 में दिनांक 24.05.2018 को निर्णित होकर डिक्री हो चुका है। उक्त निर्णय की पालना 11.03.2019 को हो चुकी है। उक्त पूर्ववर्ती निर्णय के विरूद्ध किसी प्रकार की अपील विचाराधीन होने के बारे में वादी द्वारा कोई अभिकथन या प्रमाण प्रस्तुत नहीं किये है। इस आधार पर पूर्ववर्ती निर्णय को ही वर्तमान में प्रभावी माना जाना उचित प्रतीत होता है। इस प्रकार स्पष्ट है कि हस्तगत वाद में निहित विषयवस्तु/आराजी का पूर्ववर्ती वाद 64/2017 में सक्षम न्यायालय का गुणावगुण के आधार पर अंतिम निर्णय होना स्पष्ट है। अतः प्रकरण में सिविल प्रक्रिया संहिता–1908 की धारा–11 का प्रावधान अनुप्रयोजित होने के आधार पर उक्त प्रार्थना पत्र स्वीकार किया जाना उचित प्रतीत होता है। अतः

आदेश है कि

सिविल प्रक्रिया संहिता–1908 की धारा–11 के तहत अप्रार्थी द्वारा प्रस्तुत प्रार्थना पत्र स्वीकार किया जाकर हस्तगत दावा रेस ज्यूडिकेटा से प्रतिबंधित होने के कारण खारिज किया जाता है।

उक्त निर्णय आज 22.12.2025 को मेरे द्वारा सरे इजलास सुनाया जाकर हस्ताक्षर एवं मोहर युक्त जारी किया गया।

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