7. SCOPE: CODE NOT EXHAUSTIVE

The Code is exhaustive on matters specifically dealt with by it.16 However, it is not exhaustive on the points not specifically dealt with therein.15 The legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing procedure for them.16 With regard to those matters, the court has inherent power to act according to the principles of justice, equity and good conscience.17 The Code specifically provides that, "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."18

8. INTERPRETATION

Though substantive laws are very important, value and importance of procedural laws cannot be underestimated. But the procedural law must be regarded as such. The function of adjective law is to facilitate justice and further its ends.19 The rules of procedure are intended to be a handmaid to the administration of justice and they must, therefore, be construed liberally and in such manner as to render the enforcement of substantive rights effective.20 A "hypertechnical view" should not be adopted by the court in interpreting procedural laws.21 A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure.22

16 Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 at p. 532-33:1962 Supp (1) SCR 450; Padam Sen v. State of U.P., AIR 1961 SC 218: (1961) 1 SCR 884.

17 Hukum Chand v. Kamalanand Singh, ILR (1906) 33 Cal 927.

18 S. 151. For detailed discussion see infra, Pt. V, Chap. 4.

19 Hukum Chand v. Kamalanand Singh, ILR (1906) 33 Cal 927; Sangram Singh v. Election Tribunal, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 5; Manharlal v. State of Maharashtra, (1971) 2 SCC 119 at pp. 124-25: AIR 1971 SC 1511 at pp. 1515-16; Shreenath v. Rajesh, (1998)
4 SCC 543: AIR 1998 SC 182.

20 Jai Jai Ram Manohar v. National Building Material Supply, (1969) 1 SCC 869 at p. 871: AIR 1969 SC 1267 at p. 1269; Babu Lal v. Hazari Lal, (1982) 1 SCC 525 at p. 539: AIR 1982 SC 818 at p. 826; Deena v. Union of India, (1983) 4 SCC 645 at pp. 679-80: AIR 1983 SC 1155 at p. 1180; CST v. Auraiya Chamber of Commerce, (1986) 3 SCC 50 at p. 61: AIR 1986 SC 1556; Chinnammal v. P. Arumugham, (1990) 1 SCC 513 at p. 520: AIR 1990 SC 1828 at p. 1833; Sardar Amarjit Singh v. Pramod Gupta, (2003) 3 SCC 272; N. Balaji v. Virendra Singh, (2004) 8 SCC 312; Prem Lala Nahata v. Chandi Prasad Sikaria, (2007) 2 SCC 551: AIR 2007 SC 1247.

21 Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91 at p. 96: AIR 1978 SC 484 at p. 488; N.T. Veluswami v. G. Raja Nainar, AIR 1959 SC 422 at p. 426:1959 Supp (1) SCR 623.

22 Jai Jai Ram Manohar v. National Building Material Supply, (1969) 1 SCC 869 at p. 871: AIR 1969 SC 1267 at p. 1269; see also K.C. Kapoor v. Radhika Devi, (1981) 4 SCC 487 at p. 499: AIR 1981 SC 2118; Kalipada Das v. Bimal Krishna, (1983) 1 SCC 14 at p. 16-17: AIR 1983 SC 876; Bhagwan Dass Arora v. ADJ, (1983) 4 SCC 1 at p. 6: AIR 1983 SC 954 at pp.

"Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it."23 Our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the Code of Civil Procedure, therefore, must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it.24

The principle underlying interpretation of procedural laws has been succinctly laid down by the Supreme Court in the case of State of Punjab v. Shamlal Murari25, wherein, speaking for the Court, Krishna Iyer, J. observed:

"We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, though procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product of technicalities."26 (emphasis supplied)

956-57; Harcharan v. State of Haryana, (1982) 3 SCC 408 at pp. 411-12: AIR 1983 SC 43 at p. 45; CST v. Auraiya Chamber of Commerce, (1986) 3 SCC 50: AIR 1986 SC 1556.

23 Raj Narain v. Indira Nehru Gandhi, (1972) 3 SCC 850 at p. 858: AIR 1972 SC 1302 at p. 1307.

24 Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46 at p. 56: AIR 1984 SC 1004 at p. 1010.

25 (1976) 1 SCC 719: AIR 1976 SC 1177.

26 Ibid, at p. 722 (SCC): at p. 1179 (AIR); see also, the following opt-quoted observations of Bose, J. in Sangram Singh v. Election Tribunal, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 8: "[A] Code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it." See also Chinnammal v. P. Arumugham, (1990) 1 SCC 513 at p. 520: AIR 1990 SC 1828 at p. 1833; Ramankutty Guptan v. Avara, (1994) 2 SCC 642 at p. 646: AIR 1994 SC 1699 at p. 1701. For further discussion see infra, "Pleadings".

9. SCHEME OF THE CODE

The Code can be divided into two parts: (i) the body of the Code containing 158 sections; and (ii) the (First) Schedule, containing 51 Orders and Rules. The sections deal with provisions of a substantive nature, laying down the general principles of jurisdiction, while the (First) Schedule relates to the procedure and the method, manner and mode in which the jurisdiction may be exercised. The body of the Code containing sections is fundamental and cannot be amended except by the legislature. The (First) Schedule of the Code, containing Orders and Rules, on the other hand, can be amended by High Courts.27

Looking to the scheme of the Code as a whole, it becomes abundantly clear that the amendments made by High Courts in the Rules contained in the (First) Schedule also become part of the Code for all purposes "as if enacted in the Code".28 The sections and the rules, therefore, must be read together and harmoniously construed,29 but if the rules are inconsistent with the sections, the latter will prevail.30

10. RETROSPECTIVE OPERATION

It is a well-settled principle of interpretation of statutes that procedural laws are always retrospective in operation unless there are good reasons to the contrary.31 Their provisions will apply to proceedings already commenced at the time of their enactment. The reason is that no one can have a vested right in forms of procedure.32 The Code of Civil Procedure is not retrospective in operation.33

27 Ss. 121, 122, 125-131; see also Vareed Jacob v. Sosamma Greevarghese, (2004) 6 SCC 378: AIR 2004 SC 3992.

28 Ss. 2(1), 2(18), 121, 122, 127; see also State of U.P. v. Pt. Chandra Bhushan, (1980) 1 SCC 198 at pp. 199-200: AIR 1980 SC 591.

29 Nadella Satyanarayana v. Yamanoori Venkata Subbiah, AIR 1957 AP 172 at p. 181 (FB); State of U.P. v. Babu Ram, AIR 1961 SC 751 at p. 761: (1961) 2 SCR 679; STO v. H. Farid Ahmed & Sons, (1976) 1 SCC 245: AIR 1975 SC 756.

30 Director of Inspection of Income Tax (Investigation) v. Pooran Mal & Sons, (1975) 4 SCC 568: AIR 1975 SC 67; State of U.P. v. Babu Ram Upadhya, AIR 1961 SC 751 at p. 761: (1961)
2 SCR 679.

31 Nani Gopal Mitra v. State of Bihar, AIR 1970 SC 1636: (1969) 2 SCR 411; K. Kapen Chako v. Provident Investment Co. (P) Ltd., (1977) 1 SCC 593: AIR 1976 SC 2610; Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354 at p. 361: AIR 1981 SC 416 at p. 420; Craies, Statute Law (1971) at p. 401; Maxwell, Interpretation of Statutes (1972) at p. 222; Halsbury's Laws of England (4th Edn.) Vol. 44 at p. 574; Gurbachan Singh v. Satpal Singh, (1990) 1 SCC 445 at p. 460: AIR 1990 SC 209 at p. 219.

32 Anant Gopal v. State of Bombay, AIR 1958 SC 915 at p. 917:1959 SCR 919; Mahadeo Prasad Singh v. Ram Lochan, supra; Maxwell, supra; Craies, supra.

33 Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540:1957 SCR 488; Mahadeo Prasad Singh v. Ram Lochan, supra; Mohanlal Jain v. Sawai Man Singhji, AIR 1962 SC 73: (1961) 1 SCR 702.

11. CODE AT A GLANCE

The substantive part of the Code of Civil Procedure contains 158 sections. The (First) Schedule comprises 51 Orders and Rules providing procedure. Appendices contain Model Forms of Pleadings, Processes, Decrees, Appeals, Execution proceedings, etc.

Sections 1 to 8 are preliminary in nature. Section 1 provides for commencement and applicability of the Code. Section 2 is a definition clause and a sort of statutory dictionary of important terms used in the body of the Code. Sections 3 to 8 deal with constitution of different types of courts and their jurisdiction.

Part I (Sections 9 to 35-B) and Orders 1 to 20 of the (First) Schedule deal with suits. Section 9 enacts that a civil court has jurisdiction to try all suits of a civil nature unless they are barred expressly or impliedly. Whereas Section 10 provides for stay of suit (res sub judice), Section 11 deals with a well-known doctrine of res judicata. Sections 13 and 14 relate to foreign judgments.

Sections 15 to 21-A regulate the place of suing. They lay down rules as to jurisdiction of courts and objections as to jurisdiction. Sections 22 to 25 make provisions for transfer and withdrawal of suits, appeals and other proceedings from one court to another.

Orders 1 to 4 deal with institution and frame of suits, parties to suit and recognised agents and pleaders. Order 5 contains provisions as to issue and service of summons. Order 6 deals with pleadings. Orders 7 and 8 relate to plaints, written statements, set-offs and counter-claims. Order 9 requires parties to the suit to appear before the court and enumerates consequences of non-appearance. It also provides the remedy for setting aside an order of dismissal of the suit of a plaintiff and of setting aside an ex parte decree against a defendant.

Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Orders 11 to 13 deal with discovery, inspection and production of documents and also admissions by parties. Order 14 requires the court to frame issues and Order 15 enables the court to pronounce judgment at the "first hearing" in certain cases.

Orders 16 to 18 contain provisions for summoning, attendance and examination of witnesses, and adjournments. Order 19 empowers the court to make an order or to prove facts on the basis of an affidavit of a party.

Sections 75 to 78 (Part III) and Order 26 make provisions as to issue of Commissions. Sections 94 and 95 (Part VI) and Order 38 provides for arrest of a defendant and attachment before judgment. Order 39 lays down the procedure for issuing temporary injunction and passing interlocutory orders. Order 40 deals with appointment of receivers.

Order 25 provides for security for costs. Order 23 deals with withdrawal and compromise of suits. Order 22 declares effect of death, marriage or insolvency of a party to the suit.

After the hearing is over, the court pronounces a judgment. Section 33 and Order 20 deal with judgments and decrees. Section 34 makes provision for interest. Sections 35,35-A, 35-B and Order 20-A deal with costs.

Parts IV and V (Sections 79-93) and Orders 27 to 37 lay down procedure for suits in special cases, such as, suits by or against Government or public officers (Section 79 to 82 and Order 27); suits by or against aliens, foreign rulers, ambassadors and envoys (Sections 83 to 87-B); suits by or against soldiers, sailors and airmen (Order 28); suits by or against corporations (Order 29); suits by or against partnership firms (Order 30); suits by or against trustees, executors and administrators (Order 31); suits by or against minors, lunatics and persons of unsound mind (Order 32); suits relating to family matters (Order 32-A); suits by indigent persons (paupers) (Order 33); suits relating to mortgages (Order 34); interpleader suits (Section 88 and Order 35); friendly suits (Section 90 and Order 36); summary suits (Order 37); suits relating to public nuisances (Section 91) and suits relating to public trusts (Section 92). Section 89 as inserted from 1 July 2002 provides for settlement of disputes outside the court through arbitration, conciliation, mediation and Lok Adalats.

Parts VII and VIII (Sections 96 to 115) and Orders 41 to 47 contain detailed provisions for Appeals, Reference, Review and Revision. Sections 96 to 99-A and Order 41 deal with First Appeals. Sections 100 to 103 and Order 42 discuss law relating to Second Appeals. Sections 104 to 108 and Order 43 contain provisions as to Appeals from Orders. Sections 109, 112 and Order 45 provide for Appeals to the Supreme Court. Order 44 enacts special law concerning Appeals by indigent persons (paupers). Section 113 and Order 46 pertain to References to be made to a High Court by a subordinate court when a question of constitutional validity of an Act arises. Section 114 and Order 47 permit review of judgments in certain circumstances. Section 115 confers revisional jurisdiction on High Courts over subordinate courts.

Part II (Sections 36 to 74) and Order 21 cover execution proceedings. The principles governing execution of decrees and orders are dealt with in Sections 36 to 74 (substantive law) and Order 21 (procedural law). Order 21 is the longest Order covering 106 Rules.

Part X (Sections 121 to 131) enables High Courts to frame rules for regulating their own procedure and the procedure of civil courts subject to their superintendence.

Part XI (Sections 132 to 158) relates to miscellaneous proceedings. Explanation to Section 141 as added by the Amendment Act of 1976 clarifies that the expression "proceedings" would not include proceedings under Article 226 of the Constitution. Section 144 embodies the doctrine of restitution and deals with the power of the court to grant relief of restitution in case a decree is set aside or modified by a superior court.

Section 148-A as inserted by the Code of Civil Procedure (Amendment) Act, 1976 is an important provision which permits a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him. It is the duty of the court to issue notice and afford an opportunity of hearing to a caveator to appear and oppose interim relief sought by an applicant.

Sections 148 to 153-A confer inherent powers in every civil court. Section 148 enables a court to enlarge time fixed or granted by it for doing any act. Section 149 authorises a court to permit a party to make up deficiency of court fees on plaint, memorandum of appeal, etc. Section 151 is a salutary provision. It saves inherent powers in every court to secure the ends of justice and also to prevent the abuse of process of the court. Sections 152 to 153-A empower a court to amend judgments, decrees, orders and other records arising from accidental slip or omission.

Section 153-B as added by the Amendment Act of 1976 expressly declares that the place of trial shall be open to the public. The proviso, however, empowers the Presiding Judge, if he thinks fit, to order that the general public or any particular person shall not have access to the court.

PART I
9
Definitions

SYNOPSIS

1. GENERAL

IN MOST of the statutes a section provides for definition of some important expressions used in the body of the Act. A definition clause is a sort of statutory dictionary1, a legislative device with a view to avoid making different provisions of the statute needlessly cumbersome.2 Where a word is defined in a statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted.3 This normal rule may be departed from if there be something in the context to show that the definition should not be applied or when the context strongly suggests its departure.4

2. IMPORTANT DEFINITIONS

In Section 2 of the Code of Civil Procedure, inter alia, the following important definitions are given:

(1) Decree5

(a) Meaning

The adjudications of a court of law may be divided into two classes: (i) decrees, and (ii) orders.

Section 2(2) of the Code defines the term "decree" in the following words:

'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary

1 Carew & Co. Ltd. v. Union of India, (1975) 2 SCC 791 at p. 805: AIR 1975 SC 2260 at p. 2272.

2 Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1 at p. 96: AIR 1975 SC 2299 at p. 2357.

3 Ibid. ("unless there is anything repugnant in the subject or context"; S. 2).

4 Carew & Co. Ltd. v. Union of India, supra.

5 See also infra, Pt. II, Chap. 15; Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129; K.V. Muthu v. Angamuthu, (1997) 2 SCC 53 at pp. 57- 58: AIR 1997 SC 628 at p. 631; K. Balakrishna v. Haji Abdulla, (1980) 1 SCC 321: AIR 1980 SC 214; Printers (Mysore) Ltd. v. CTO, (1994) 2 SCC 434; Chandi Prasad v. jagdish Prasad, (2004) 8 SCC 724; Rachakonda Venkat v. R. Satya Bai, (2003) 7 SCC 452; Paramjeet Singh v. ICDS Ltd., (2006) 13 SCC 322: AIR 2007 SC 168.

or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include:
(a) any adjudication from which an appeal lies as an appeal from an order, or
(b) any order of dismissal for default.
Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."
(b) Essential elements
In order that a decision of a court may be a "decree", the following elements must be present:6
(i) There must be an adjudication;
(ii) Such adjudication must have been done in a suit;
(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
(iv) Such determination must be of a conclusive nature; and
(v) There must be a formal expression of such adjudication.
(i) Adjudication.—For a decision of a court to be a decree, there must be an adjudication, i.e. a judicial determination of the matter in dispute. If there is no judicial determination of any matter in dispute, it is not a decree.7 Thus, a decision on a matter of an administrative nature, or an order dismissing a suit for default of appearance of parties or dismissing an appeal for want of prosecution cannot be termed as a decree inasmuch as it does not judicially deal with the matter in dispute.8 Further, such judicial determination must be by a court. Thus, an order passed by an officer who is not a court is not a decree.9
(ii) Suit— The expression "suit" is not defined in the Code. But in Hansraj Gupta v. Official Liqiddators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.10, Their Lordships of the Privy Council have defined the term in the following words, "The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding

6 S. Satnam Singh v. Surender Knur, (2009) 2 SCC 562.
7 Madan Naik v. Hansubnla Devi, (1983) 3 SCC 15: AIR 1983 SC 676.
8 Motilal v. Padmaben, AIR 1982 Guj 254: (1982) 2 Guj LR 107:1982 Guj LH 349.
9 Deep Chand v. Land Acquisition Officer, (1994) 4 SCC 99 at p. 102: AIR 1994 SC 1901 at p. 1903; Diwan Bros. v. Central Bank of India, (1976) 3 SCC 800: AIR 1976 SC 1503.
10 AIR 1933 PC 63 at p. 64: (1932-33) 60 IA 13; see also Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at p. 2248; Usmanali Khan v. Sugar Mal, AIR 1965 SC 1798 at p. 1800: (1965) 3 SCR 201; Secy, to the Govt. of Orissa v. Sarbeswar Rout, (1989) 4 SCC 578 at p. 581: AIR 1989 SC 2259 at p. 2261.

instituted by the presentation of a plaint." (emphasis supplied) Thus, every suit is instituted by the presentation of a plaint. It means that when there is no civil suit, there is no decree. Thus, rejection of an application for leave to sue in forma pauperis is not a decree, as there is no plaint till the application is granted.

It may, however, be noted that under certain enactments specific provisions have been made to treat applications as suits, e.g. proceedings under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc. They are statutory suits and the decisions given thereunder are, therefore, decrees. Therefore, a proceeding which does not commence with a plaint and which is not treated as a suit under any other Act, cannot be said to be a "suit" under the Code also and the decision given therein cannot be said to be a "decree" under Section 2(2) of the Code. Thus, a decision of a tribunal, even though described as "decree" under the Act, is a decree passed by a tribunal and not by a court covered by Section 2(2).n

(iii) Rights of parties in controversy.—The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit. The word "rights" means substantive rights of the parties and not merely procedural rights.12 Thus, rights of the parties inter se relating to status, limitation, jurisdiction, frame of suit, accounts, etc. are "rights of the parties" under this section. The rights in matters of procedure are not included in it. Thus, an order for dismissal of a suit for default of appearance, or an order dismissing an application for execution for non-prosecution, or an order refusing leave to sue in forma pauperis, or a mere right to sue, are not decrees as they do not determine the rights of parties.

The term "parties" means parties to the suit, i.e. the plaintiff and the defendant.13 Thus, an order on an application by a third party, who is a stranger to the suit, is not a decree. In interpleader suits, the contesting defendants will be deemed to be parties to the suit.

The expression "matters in controversy" refers to the subject-matter of the suit with reference to which some relief is sought.14 At the same time, however, it should not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. Interlocutory orders on

11 Diwan Bros. v. Central Bank of India, (1976) 3 SCC 800 at pp. 807-08: AIR 1976 SC 1503 at p. 1518.
12 Dattatraya v. Radhabai, AIR 1921 Bom 220: ILR (1921) 45 Bom 627.
13 Kanji Hirjibhai v. Jivaraj Dharamshi, AIR 1976 Guj 152: (1975) 16 Guj LR 469; Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992:1963 Supp (2) SCR 616.
14 Ahmed Musaji Saleji v. Hashim Ibrahim Saleji, (1914-15) 42 IA 91: AIR 1915 PC 116.

matters of procedure which do not decide the substantive rights of the parties are not decrees. Similarly, the proceedings preliminary to the institution of a suit also will not be included in the definition.

(iv) Conclusive determination.—Such determination must be of a conclusive nature. In other words, the determination must be final and conclusive as regards the court which passes it.15 Thus, an interlocutory order, which does not decide the rights of the parties finally is not a decree, e.g. an order refusing an adjournment or an order striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate court deciding some issues and remitting other issues to the trial court for determination under Order 41 Rule 23 of the Code, are not decrees because they do not decide rights of parties conclusively.

On the other hand, an order may determine conclusively the rights of the parties although it may not dispose of the suit. Thus, an order dismissing an appeal summarily under Order 41 of the Code or holding it to be not maintainable or a decision dismissing a suit for want of evidence or proof are decrees inasmuch as they decide conclusively the rights of the parties to the suit.16

The crucial point which requires to be decided in such a case is whether the decision is final and conclusive in essence and substance. If it is, it is a decree, if not, it is not a decree.17

(v) Formal expression—There must be a formal expression of such adjudication. All the requirements of form must be complied with. The formal expression must be deliberate and given in the manner provided by law. The decree follows the judgment and must be drawn up separately.18 Thus, if a decree is not formally drawn up in terms of the judgment, no appeal lies from that judgment. But the decree need not be in a particular form. Thus, a misdescription of a decision as an order which amounts to a decree does not make it less than a decree.

(c) Test

Whether or not an order of the court is a decree, the Court should take into account pleadings of the parties and the proceedings leading up to the passing of an order.19

15 Narayan Chandra v. Pratirodh Sahini, AIR 1991 Cal 53.

16 For detailed discussion, see infra, "First Appeal".

17 Jethanand & Sons v. State of U.P., AIR 1961 SC 794: (1961) 3 SCR 754; Sukhdeo v. Govinda Hari, AIR 1980 Bom 231; Narayan Chandra v. Pratirodh Sahini, AIR 1991 Cal 53.

18 Or. 20 Rr. 6, 6-A, 7; see also Shakuntala Devi v. Kuntal Kumari, AIR 1969 SC 575: (1969) 1 SCR 1006.

19 Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992: 1963 Supp (2) SCR 616; Hameed Joharan v. Abdul Salam, (2001) 7 SCC 573; Ratansingh v. Vijaysingh, (2001) 1 SCC 469: AIR 2001 SC 279; Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659: AIR 2003 SC 2434.

(d) Decisions which are decrees: Illustrations The following decisions are held to be decrees:
(i) Order of abatement of suit;
(ii) Dismissal of appeal as time barred;
(iii) Dismissal of suit or appeal for want of evidence or proof;
(iv) Rejection of plaint for non-payment of court fees;
(v) Granting or refusing to grant costs or instalment;
(vi) Modification of scheme under Section 92 of the Code;
(vii) Order holding appeal not maintainable;
(viii) Order holding that the right to sue does not survive;
(ix) Order holding that there is no cause of action;
(x) Order refusing one of several reliefs.
(e) Decisions which are not decrees: Illustrations
The following decisions, on the other hand, are held not to be decrees:
(i) Dismissal of appeal for default;
(ii) Appointment of Commissioner to take accounts;
(iii) Order of remand;
(iv) Order granting or refusing interim relief;
(v) Return of plaint for presentation to proper court;
(vi) Dismissal of suit under Order 23 Rule 1;
(vii) Rejection of application for condonation of delay;
(viii) Order holding an application to be maintainable;
(ix) Order refusing to set aside sale;
(x) Order directing assessment of mesne profits.
(f) Classes of decrees
The Code recognises the following classes of decrees:
(i) Preliminary decree;
(ii) Final decree; and
(iii) Partly preliminary and partly final decree.
In Shankar v. Chandrakant,20 the Supreme Court stated:
"A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries, conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. A final decree may be said to become final in two ways:

20 (1995) 3 SCC 413: AIR 1995 SC 1211.

(i) When the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the Highest Court;
(ii) When the time for appeal has expired without any appeal being filed against the preliminary decree the same stands completely disposed of.
It is in the latter sense that the word 'decree' is used in Section 2(2) of the CPC."21
(i) Preliminary decree—Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a preliminary decree. A preliminary decree is passed in those cases in which the court has first to adjudicate upon the rights of the parties and has then to stay its hands for the time being, until it is in a position to pass a final decree in the suit. In other words, a preliminary decree is only a stage in working out the rights of the parties which are to be finally adjudicated by a final decree.22 Till then the suit continues.23
The Code provides for passing of preliminary decrees in the following suits:

(1)	Suits for possession and mesne profits	Order 20, R. 12
(2)	Administration suits	Order 20, R. 13
(3)	Suits for pre-emption	Order 20, R. 14
(4)	Suits for dissolution of partnership	Order 20, R. 15
(5)	Suits for accounts between principal and agent	Order 20, R. 16
(6)	Suits for partition and separate possession	Order 20, R. 18
(7)	Suits for foreclosure of a mortgage	Order 34, Rr. 2-3
(8)	Suits for sale of mortgaged property	Order 34, Rr. 4-5
(9)	Suits for redemption of a mortgage	Order 34, Rr. 7-8

The above list is, however, not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the Code.24
There is a conflict of opinion as to whether there can be more than one preliminary decree in the same suit. Some High Courts have taken

21 Ibid, at p. 416 (SCC): at p. 1212 (AIR); see also Hasham Abbas v. Usman Abbas, (2007) 2 SCC 355: AIR 2007 SC 1077; Bicoba v. Hirabai, (2008) 8 SCC 198.
22 Mool Chand v. Director, Consolidation, (1995) 5 SCC 631: AIR 1995 SC 2493; Shankar v. Chandrakant, (1995) 3 SCC 413: AIR 1995 SC 1211; Hasham Abbas v. Usman Abbas, (2007)
22 SCC 355: AIR 2007 SC 1077.
23 Awadhendra Prasad v. Raghubansmani Prasad, AIR 1979 Pat 50:1978 BLJR 835.
24 Narayanan Thampi v. Lekshmi Narayana Iyer, AIR 1953 TC 220 at p. 222 (FB); Peary Mohan Mookerjee v. Manohar Mookerjee, AIR 1924 Cal 160 at p. 162: 27 CWN 989; Union of India v. Khetra Mohan, AIR 1960 Cal 190 at p. 198; Bhagwan Singh v. Kallo Maula Shah, AIR 1977 MP 257:1977 MP LJ 583:1977 Jab LJ 576 (FB).

the view that there can be only one preliminary decree in a suit,25 while other High Courts have held that there can be more than one preliminary decree.26

As regards partition suits, the debate is concluded by the pronouncement of the Supreme Court in Phoolchand v. Gopal Lal27, wherein it has been observed that there is nothing in the Code of Civil Procedure which prohibits passing of more than one preliminary decree, if circumstances justify the same and it may be necessary to do so. But the above observations are restricted to partition suits as the Court specifically observed, "We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which preliminary and final decrees are also passed."28

The question whether a decision amounts to a preliminary decree or not is one of great significance in view of the provisions of Section 97 of the Code which provides that, "Where any party aggrieved by a preliminary decree...does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."29

Since the passing of a preliminary decree is only a stage prior to the passing of a final decree, if an appeal preferred against a preliminary decree succeeds, the final decree automatically falls to the ground for there is no preliminary decree thereafter in support of it.30 It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree.30

(ii) Final decree—A decree may be said to be final in two ways:

(i) when within the prescribed period no appeal is filed against the decree or the matter has been decided by the decree of the highest court; and

(ii) when the decree, so far as regards the court passing it, completely disposes of the suit.31

It is in the latter sense that the words "final decree" are used here.

25 Bharat Indu v. Yakub Hasan, ILR (1913) 35 All 159; Kedarnath v. Pattu Lal, AIR 1915 Oudh 312; Joti Parshad v. Ganeshi Lal, AIR 1961 Punj 120.

26 Peary Mohan Mookerjee v. Manohar Mookerjee, AIR 1924 Cal 160; Kasi v. Ramanathan Chettiar, (1947) 2 MLJ 523; Parashuram Rajaram v. Hirabai Rajaram, AIR 1957 Bom 59.

27 AIR 1967 SC 1470: (1967) 3 SCR 153.

28 Ibid, at p. 1473 (AIR): at p. 159 (SCR); see also Jadu Nath v. Parameswar Mullick, AIR 1940 PC 11: (1939-40) 67 IA 11.

29 Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992:1963 Supp (2) SCR 616; Mool Chand v. Director, Consolidation, (1995) 5 SCC 631: AIR 1995 SC 2493.

30 Sital Parshad Saxena v. Kishori Lal, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

31 Shankar v. Chandrakant, (1995) 3 SCC 413 at p. 418: AIR 1995 SC 1211; Hasham Abbas v. Usman Abbas, (2007) 2 SCC 355: AIR 2007 SC 1077.

A final decree is one which completely disposes of a suit and finally settles all questions in controversy between parties and nothing further remains to be decided thereafter.

Thus, in a suit for recovery of money, if the amount found due to the decree-holder is declared and the manner in which the amount is to be paid has also been laid down, the decree is a final decree. Similarly, a decree passed for a sum representing past mesne profits and future mesne profits at a particular rate, without directing any further enquiry, is a final decree. Thus, where a decree passed by a special court did not contemplate any further proceedings, the decree, even though described as a preliminary decree, in substance was a final decree.

Ordinarily, there will be one preliminary decree and one final decree in one suit.32

In Gulusam Bivi v. Ahamadasa Rowther33, the High Court of Madras, referring to Rules 12 and 18 of Order 20 of the Code, stated:

"Neither rule contemplates more than one preliminary decree and one final decree in one suit. In fact, the Code no where contemplates more than one final decree in one suit. To have two final decree and to call the first one a final decree will be really a misnomer as it will not be final." (emphasis supplied)

In Kasi v. Ramanathan Chettiar34, the same court considered the question at considerable length. It was noted that there was divergence of opinion whether there could be more than one preliminary decree as also more than one final decree in a suit. Then considering the question in detail and describing the observations in Ghulsam Bivi as obiter dicta, the Court observed that there could be more than one preliminary decree and more than one final decree in a suit.

Patanjali Sastri, J. (as he then was) rightly concluded the matter thus:

"(The question is not whether the Code allows more than one preliminary decree or one final decree to be made, but whether the Code contains a prohibition against the Court in a proper case passing more than one such decree."35

32 Babburu Basavayya v. Babburu Guravayya, AIR 1951 Mad 938 (FB); Sudarshan Dass v. Ramkripal Dass, AIR 1967 Pat 131; Nallasivam Chettiar v. Avudayammal, AIR 1958 Mad 462; Kanji Hirjibhai v. Jivaraj Dharamshi, AIR 1976 Guj 152: (1975) 16 Guj LR 469; Anandi Devi v. Mahendra Singh, AIR 1997 Pat 7.

33 AIR 1919 Mad 998 at p. 1000: (1918) 42 Mad 296: 51 IC140.

34 (1947) 2 MLJ 523.

35 Ibid, at p. 527 (MLJ); see also Maulvi Mohd. Abdul Majid v. Mohd. Abdul Aziz, (1896-97) 24 IA 22 (PC); Babburu Basavayya v. Babburu Guravayya, supra; Kanji Hirjibhai v. Jivaraj Dharamshi, supra; Veerappa v. Sengoda, (1995) 1 Mad LJ 53; Azizabi v. Fatimabi, ILR 1977 AP 461: (1976) 2 AP LJ 397.

Finally, in Shankar v. Chandrakant36 the Supreme Court said:
"It is settled law that more than one final decree can be passed".
(iii) Partly preliminary and partly final decree—A decree may be partly preliminary and partly final, e.g. in a suit for possession of immovable property with mesne profits, where the court:
(a) decrees possession of the property; and
(b) directs an enquiry into the mesne profits.
The former part of the decree is final, while the latter part is only preliminary because the final decree for mesne profits can be drawn only after enquiry, and the amount due is ascertained. In such a case, even though the decree is only one, it is partly preliminary and partly final.37
(g) Deemed decree
(i) Meaning—The term "deemed" is generally used to create a statutory fiction for the purpose of extending the meaning which it does not expressly cover.38
In CIT v. Bombay Trust Corpn.39, the Privy Council stated, "(When a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament or the Legislature requires him to be treated as if he were."
(ii) Nature and scope—Whenever the legislature uses the word "deemed" in any statute in relation to a person or thing, it implies that the Legislature, after due consideration, conferred a particular status on a particular person or thing.40
Such statutory fiction created by the legislature cannot be ignored. The effect of such legal fiction must be given. In East End Dwellings Co. Ltd. v. Finsbury Borough Council41, Asquith, J. rightly said, "The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination

36 (1995) 3 SCC 413 at p. 418: AIR 1995 SC 1211 at p. 1214; see also Hasham Abbas v. Usman Abbas, (2007) 2 SCC 355: AIR 2007 SC 1077. For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. IV, Or. 20 R. 18.
37 Lucy Kochuvareed v. P. Mariappa Gounder, (1979) 3 SCC 150 at p. 159: AIR 1979 SC 1214 at p. 1220.
38 St. Aubyn v. Attorney-General, (1951) 2 All ER 473:1952 AC 15; Lalji Haridas v. State of Maharashtra, (1969) 2 SCC 662: AIR 1971 SC 44; CIT v. Bombay Trust Corpn. Ltd., AIR 1930 PC 54: (1929-30) 57 IA 49; East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109: (1951) 2 All ER 587 (HL).
39 AIR 1930 PC 54: 57 IA 49 (per Viscount Dunedin).
40 Supra, n. 37; see also K. Kamaraja Nadar v. Kunju Thevar, AIR 1958 SC 687:1959 SCR 583; M. Venugopal v. LIC, (1994) 2 SCC 323: AIR 1994 SC 1343: (1994) 27 ATC 84; State of Maharashtra v. Laljit Rajshi, (2000) 2 SCC 699: AIR 2000 SC 937.
41 1952 AC 109: (1951) 2 All ER 587 (HL); see also Cambay Electric Supply Industrial Co. v. CIT, (1978) 2 SCC 644: AIR 1978 SC 1099.

to boggle when it comes to the inevitable corollaries of that state of affairs."

(iii) Decree and deemed decree: Distinction—An adjudication not fulfilling the requisites of Section 2(2) of the Code cannot be said to be a "decree". By a legal fiction, certain orders and determinations are deemed to be "decrees" under the Code.

(iv) Deemed decrees under CPC—The rejection of a plaint and the determination of questions under Section 144 (Restitution) are deemed decrees. Similarly, adjudications under Order 21 Rule 58, as also under Order 21 Rule 98 or 100 are deemed decrees.

(h) Rejection of plaint

Even though an order rejecting a plaint does not preclude the plaintiff from presenting a fresh plaint on the same cause of action,42 Section 2(2) of the Code specifically provides that rejection of a plaint shall be deemed to be a decree. The rejection of a plaint must be one authorised by the Code. If it is not under the Code, the rejection will not amount to a decree.

An order returning a plaint or memorandum of appeal to be presented to the proper court is also not a decree. The reason is that such an order does not negate any rights of a plaintiff or appellant and is not a decision on the rights of parties. An order returning a plaint to be presented to the proper court is an appealable order.43

The question whether an order is one of rejection or of dismissal of a suit or appeal must be determined with reference to the substance and not the form of the order.

(i) Restitution

The determination of any question within Section 144 of the Code is expressly included in the definition of "decree" though such determination is neither made in a suit, nor is it drawn up in the form of a decree. Section 144 deals with restitution and determination of a question under that section, and is included in the definition of "decree" for the purpose of giving a right of appeal.44

Every order under Section 144, however, is not a decree. It is necessary that such order must have decided the rights of parties with regard to matters in controversy in proceedings under that section. In other words, it must be a final decision either granting a relief or refusing an application. Thus, determination of a mere issue made prior to the passing of a final order or an order merely determining a point of

42 Or. 7 R. 13; see also Shamsher Singh v. Rajinder Prashad, (1973) 2 SCC 524 at pp. 527-28: AIR 1973 SC 2384 at p. 2386.

43 Or. 43 R. 1(a).

44 Mahijibhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477 at p. 1485: (1965) 2 SCR 436.

law arising incidentally in the course of proceedings for determining rights of parties is not a decree.

(j) Execution

Prior to the Code of Civil Procedure (Amendment) Act, 1976, the determination of any question under Section 47 was also expressly included in the definition of "decree".45 The Joint Committee of both Houses of Parliament was of the view that this provision was mainly responsible for delay in execution of decrees. The Committee, therefore, recommended to omit the words "Section 47 or" from the definition of "decree" and as such now a decision under Section 47 is not a decree and consequently is not appealable as a decree.46 Under the New Code, now it will not be very difficult for the decree-holder to get the fruits of a decree passed in his favour. It is, however, doubtful whether the amendment has achieved its object.

(k) Dismissal for default

The definition of "decree" does not include any order of "dismissal for default". The words "dismissal for default" include, for want of prosecution of suit or appeal, default for non-appearance or for other reasons.

(l) Appealable orders

The term "decree" expressly excludes an adjudication from which an appeal lies as an appeal from an order. Such orders are specified in Section 104 and Order 43 Rule 1 of the Code.47 Thus, an order returning a plaint for presentation to the proper court, or an order rejecting an application for an order to set aside an ex parte decree, or setting aside or refusing to set aside a sale under Order 21, or an order rejecting an application for permission to sue as an indigent person, etc. are appealable orders and not decrees.

The distinction between a decree and an appealable order lies in the fact that in the case of a decree, a Second Appeal lies in some cases,48 but no Second Appeal lies from an appealable order.49

45 The Code of Civil Procedure, before the Amendment Act of 1976, defined "decree" in the following words:
" 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include... etc."

46 For detailed discussion see infra, Pt. IV, Chap. 7.

47 Madan Naik v. Hansubala Devi, (1983) 3 SCC 15 at p. 19: AIR 1983 SC 676 at p. 679.

48 S. 100; see also infra, Pt. III, Chap. 3.

49 S. 104(2); see also infra, Pt. III, Chap. 4.

(m) Decree and judgment: Distinction50
(n) Decree and order: Distinction51
(o) Decree and deemed decree: Distinction52
(2) Judge
"Judge" means the presiding officer of a civil court.53 The term "court" has not been defined in the Code. According to the dictionary meaning, court means "an assembly of judges or other persons acting as a tribunal in civil and criminal cases".54 In other words, it is "a place where justice is judicially administered".55
When a statute provides that a particular matter will be determined by a court, the officer presiding over the said court will be deemed to exercise jurisdiction as a court and not as a persona designata. But by the mere fact that, under the relevant statute, some functions are to be performed by a judicial officer, it cannot be said that he is acting as a court.
(3) Judgment56
(a) Meaning
"Judgment" means the statement given by a judge of the grounds of a decree or order.57
(b) Essentials
The essential element of a judgment is that there should be a statement for the grounds of the decision.58 Every judgment other than that of a Court of Small Causes should contain (i) a concise statement of the case; (ii) the points for determination; (iii) the decision thereon; and (iv) the reasons for such decision. A judgment of a Court of Small Causes may contain only points (ii) and (iii). Sketchy orders which are not self- contained and cannot be appreciated by an appellate or revisional court without examining all the records are, therefore, unsatisfactory and cannot be said to be judgments in that sense.

50 See infra, "Judgment and decree".
51 See infra, "Order and decree".
52 See supra, under that head.
53 S. 2(8).
54 Concise Oxford Dictionary (1990) at p. 266; Stroud's Judicial Dictionary (1971) Vol. 1 at p. 632.
55 E.D. Sinclair v. L.P.D. Broughton, (1893) 9 Cal 341 at p. 354 (PC).
56 See also infra, Pt. II, Chap. 15.
57 S. 2(9).
58 Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129; Swaran Lata v. H.K. Banerjee, (1969) 1 SCC 709: AIR 1969 SC 1167; State of T.N. v. S. Thangavel, (1997) 2 SCC 349: AIR 1997 SC 2283; Balraj Taneja v. Sunil Madan, (1999) 8 SCC 396: AIR 1999 SC 3381.

As the Supreme Court in Balraj Taneja v. Sunil Madan59, a judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. Even the Small Causes Court's judgments must be intelligible and must show that the judge has applied his mind. The judgment need not, however, be a decision on all the issues in a case. Thus, an order deciding a preliminary issue in a case, e.g. constitutional validity of a statute, is a judgment.

Conversely, an order passed by the Central Administrative Tribunal cannot be said to be a judgment, even if it has been described as such.60 Similarly, the meaning of the term "judgment" under the Letters Patent is wider than the definition of "judgment" under the CPC.61

(c) Judgment and decree: Distinction

As stated above, "judgment" means the statement given by a judge on the grounds of a decree or order. It is not necessary for a judge to give a statement in a decree though it is necessary in a judgment. Likewise, it is not necessary that there should be a formal expression of the order in the judgment, though it is desirable to do so. Rule 6-A of Order 20 as inserted by the Amendment Act of 1976, however, enacts that the last paragraph of the judgment should state precisely the relief granted. Thus, a judgment contemplates a stage prior to the passing of a decree or an order, and, after the pronouncement of the judgment, a decree shall follow.62

(4) Order

(a) Meaning

"Order" means the formal expression of any decision of a civil court which is not a decree.63 Thus, the adjudication of a court which is not a decree is an order. As a general rule, an order of a court of law is founded on objective considerations and as such the judicial order must contain a discussion of the question at issue and the reasons which prevailed with the court which led to the passing of the order.

(b) Order and decree: Similarities

As discussed above, the adjudication of a court of law may either be (a) a decree; or (b) an order; and cannot be both. There are some common elements in both of them, viz. (1) both relate to matters in controversy;

59 (1999) 8 SCC 396 at p. 415: AIR 1999 SC 3381 at p. 3391.
60 State of T.N. v. S. Thangavel, (1997) 2 SCC 349: AIR 1997 SC 2283.
61 Shah Babulal v. Jayaben D. Kania, (1981) 4 SCC 8: AIR 1981 SC 1786.
62 S. 33.
63 S. 2(14). See also Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129.

(2) both are decisions given by a court; (3) both are adjudications of a court of law; and (4) both are "formal expressions" of a decision.

(c) Order and decree: Distinction

In spite of the above common elements, there are fundamental distinctions between the two expressions:

(i) A decree can only be passed in a suit which commenced by presentation of a plaint. An order may originate from a suit by presentation of a plaint or may arise from a proceeding commenced by a petition or an application.

(ii) A decree is an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy; an order, on the other hand, may or may not finally determine such rights.

(iii) A decree may be preliminary or final, or partly preliminary and partly final, but there cannot be a preliminary order.

(iv) Except in certain suits, where two decrees, one preliminary and the other final are passed, in every suit there can be only one decree; but in the case of a suit or proceeding, a number of orders may be passed.

(v) Every decree is appealable, unless otherwise expressly provided,64 but every order is not appealable. Only those orders are appealable as specified in the Code.65

(vi) A Second Appeal lies to the High Court on certain grounds from the decree passed in First Appeal.66 Thus, there may be two appeals; while no Second Appeal lies in case of appealable orders.67

(5) Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.68 From this definition, it is clear that the decree-holder need not necessarily be the plaintiff. A person who is not a party to a suit but in whose favour an order capable of execution has been passed is also a decree-holder.69

Thus, where a decree for specific performance is passed, such a decree is capable of execution, both by the plaintiff as well as the defendant, and, therefore, either of the parties is a decree-holder. Similarly, if a decree confers upon someone a right to execute the decree, he is

64 S. 96. For detailed discussion, see infra, Pt. III, Chap. 2.

65 S. 104, Or. 43 R. 1. For detailed discussion, see infra, Pt. III, Chap. 4.

66 S. 100. For detailed discussion, see infra, Pt. III, Chap. 3.

67 S. 104(2).

68 S. 2(3).

69 Dhani Ram v. Lala Sri Ram, (1980) 2 SCC 162 at pp. 165-66: AIR 1980 SC 157 at pp. 159-61.

a decree-holder. Conversely, if, in an eviction order, time to vacate the premises is granted to the tenant, the landlord cannot be said to be a decree-holder in the strict sense till the period is over and the decree becomes executable.

(6) Judgment-debtor

"Judgment-debtor" means any person against whom a decree has been passed, or an order capable of execution has been made.70 Where a decree is passed against a surety, he is a judgment-debtor within the meaning of this section. On the other hand, a person who is a party to a suit, but no decree has been passed against him, is not a judgment- debtor.

(7) Foreign court

"Foreign Court" means a court situate outside India and not established or continued by the authority of the Central Government.71 Two conditions must be satisfied in order to bring a court within the definition of a foreign court:

(1) It must be situate outside India; and

(2) It must not have been established or continued by the Central Government.

Thus, courts in England, Scotland, Ceylon, Burma, Pakistan and those of the Privy Council are foreign courts.

(8) Foreign judgment72

"Foreign judgment" means a judgment of a foreign court.73 The crucial date to determine whether the judgment is of a foreign court or not is the date of the judgment and not the date when it is sought to be enforced or executed.74

Thus, a judgment of a court which was a foreign court at the time of its pronouncement would not cease to be a foreign judgment by reason of the fact that subsequently the foreign territory has become a part of the Union of India.74 On the other hand, an order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could at that

70 S. 2(10).

71 S. 2(5); see also Lalji Raja & Sons v. Firm Hansraj Nathuram, (1971) 1 SCC 721: AIR 1971 SC 974.

72 See also infra, Pt. II, Chap. 3.

73 S. 2(6).

74 Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran, AIR 1962 SC 1737 at p. 1744: (1963) 2 SCR 577 at pp. 593-94.

date have been enforced by an Indian court, does not lose its efficacy by reason of the partition.75

(9) Legal representative

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.76

The expression "legal representative" is inclusive in character, its scope is very wide and, thus, over and above a person who in law represents the estate of a deceased, it includes a person who intermeddles with the estate of a deceased and also a person on whom the estate devolves on the death of the party suing or sued, where a party sues or is sued in a representative character.77 The following persons are held to be legal representatives—executors, administrators, reversioners, Hindu coparceners, residuary legatees, etc. But a trespasser is not a legal representative as he does not intermeddle with the intention of representing the estate of the deceased. Similarly, an executor de-son Tort, a succeeding trustee, official assignee or receiver is not a legal representative.

(10) Mesne profits78

(a) Meaning

"Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.79

(1b) Object

Every person has a right to possess his property. And when he is deprived of such right by another person, he is not only entitled to restoration of possession of his property, but also damages for wrongful possession from that person. The mesne profits are thus a compensation paid to the real owner.

The object of awarding a decree for mesne profits is to compensate the person who has been kept out of possession and deprived of

75 Kishori Lal v. Shanti Devi, AIR 1953 SC 441 at p. 442:1953 Cri LJ 1923; Shitole case (supra); Lalji Raja & Sons v. Finn Hansraj Nathuram, (1971) 1 SCC 721: AIR 1971 SC 974.

76 S. 2(11).

77 BANCO National Ultramarino v. Nalini Bai Naique, 1989 Supp (2) SCC 275 at pp. 277-78: AIR 1989 SC 1589; Chiranjilal v. Jasjit Singh, (1993) 2 SCC 507.

78 See also infra, Pt. II, Chap. 15.

79 S. 2(12).

enjoyment of his property even though he was entitled to possession thereof.80

(c) Against whom mesne profits can be claimed

Wrongful possession of the defendant is the essence of a claim for mesne profits and the very foundation of the defendant's liability therefor. As a rule, therefore, generally, a person in wrongful possession and enjoyment of immovable property is liable for mesne profits.81 It is very clear that mesne profits can be claimed with regard to immovable property only.

Thus, a decree for mesne profits can be passed against a trespasser, or against a person against whom a decree for possession is passed, or against a mortgagor in possession of mortgaged property after a decree for foreclosure has been passed against him, or against a mortgagee in possession of property even after a decree for redemption is passed, or against a tenant holding over at will after a notice to quit has been served upon him.

Where the plaintiff is dispossessed by several persons, every one of them would be liable to pay mesne profits to the plaintiff even though he might not be in actual possession or the profits might not have been received by him. The Court in such cases may hold all the trespassers jointly and severally liable, leaving them to have their respective rights adjusted in a separate suit for contribution; or, may ascertain and apportion the liability of each of them.82

(d) Assessment

Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case can be laid down and "the Court may mould it according to the justice of the case".82 In assessing the mesne profits, usually the court will take into account what the defendant has gained or reasonably might have gained by his wrongful possession of the property.83

(e) Test

The test to ascertain mesne profits is not what the plaintiff has lost by being out of possession but what the defendant gained or might reasonably

80 Lucy Kochuvareed v. P. Mariappa Gounder, (1979) 3 SCC 150 at p. 159: AIR 1979 SC 1214 at p. 1219.

81 Lucy Kochuvareed v. P. Mariappa Gounder, ibid; Chittoori v. Kudappa, AIR 1965 SC 1325: (1965) 2 SCR 661.

82 Ibid, see also Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 at pp. 1412-13: (1964) 1 SCR 515; Marshall Sons & Co. (P) Ltd. v. Sahi Oretrans (P) Ltd., (1999) 2 SCC 325: AIR 1999 SC 882.

83 Ibid, see also Harry Kempson Gray v. Bhagu Mian, AIR 1930 PC 82.

and with ordinary prudence have gained by such wrongful possession.84

(f) Principles

The following principles would ordinarily guide a court in determining the amount of mesne profits:

(i) no profit by a person in wrongful possession;

(ii) restoration of status before dispossession of decree-holder; and

(iii) use to which a decree-holder would have put the property if he himself was in possession.

(g) Illustration

Thus, in a suit for title and possession where the land is in the occupation of a tenant, mesne profits should be awarded on the basis of rent and not on the basis of the produce or value of the property At the same time, however, mesne profits cannot be calculated on the basis of standard rent or maximum rent that a landlord could have received if premises were let out afresh. Though the amount of standard rent is a relevant factor for calculating mesne profits, it is not decisive.85

But when a person in wrongful possession plants indigo on the land and it is proved that a prudent agriculturist would have planted sugarcane, wheat or tobacco, the mesne profits should be assessed on the basis of those more profitable crops.86

(h) Interest

Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself.87 The rate of interest is at the discretion of the court, subject to the limitation that the said rate shall not exceed six per cent per annum.88 Such interest can be allowed till the date of payment.89

(i) Deductions

While awarding mesne profits, the court may allow deductions to be made from the gross profits of the defendant in wrongful possession of the property, such as land revenue, rent, cesses, cost of cultivation

84 Ibid, see also R.P. David v. M. Thiagarajan, 1996 AIHC 1194; Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd., (1999) 2 SCC 325: AIR 1999 SC 882.

85 Chander Kali Bai v. Jagdish Singh, (1977) 4 SCC 402: AIR 1977 SC 2262; Purificacao Fernandes v. Dr. Hugo Vicente de Perpetuo, AIR 1985 Bom 202; Ratilal Thakordas Tamkhuwala v. Vithaldas, AIR 1985 Bom 134.

86 Harry Kempson Gray v. Bhagu Mian, AIR 1930 PC 82.

87 Mahant Narayana Dasjee v. Tirumalai Tirupathi Devasthanam, AIR 1965 SC 1231 at p. 1235; Lucy Kochuvareed v. P. Mariappa Gounder, supra, paras 45, at pp. 54-58.

88 Mahant Narayan Dasjee case, supra, at p. 1236 (AIR).

89 Lucy v. Mariappa, supra, paras 45, at pp. 54-58; Mahant Narayana Dasjee v. Tirumalai Tirupathi Devasthanam, AIR 1965 SC 1231 at p. 1235.

and reaping, the charges incurred for collection of rent, etc. In other words, mesne profits should be net profits.90

(11) Public officer

"Public officer" means a person falling under any of the following descriptions, namely:

(a) every judge;

(b) every member of an All-India Service;

(c) every commissioned or Gazetted Officer in the military, naval or air forces of the Union while serving under the Government;

(d) every officer of a court of justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge of or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve an order, in a Court, and every person especially authorised by a court of justice to perform any of such duties;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of the Government, or to make, authenticate, or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty.91

Thus, a Minister of a State, a Receiver, a village Headman, an Officer in the Indian Army, a Sheriff of Bombay, a Bench Clerk of a civil court, an Inspector of Police, a Custodian of Evacuee Property, Provident Fund Commissioner, an Advocate engaged by the Government on day fees, an Income Tax Officer, etc., are public officers. But a retired

90 Dakshina v. Saroda, (1892-93) 20 IA 160: (1894) 21 Cal 142 (PC).

91 S. 2(17).

government servant, a Port Commissioner, a Liquidator under the Cooperative Societies Act, a Chairman of a Municipality, a Municipal Councillor, an officer of a Corporation, etc. are not public officers.

3. OTHER IMPORTANT TERMS

There are certain other terms. Though they are important, they have not been defined in the Code. Let us consider some of them:

(1) Affidavit

An affidavit is a declaration of facts, reduced to writing and affirmed or sworn before an officer having authority to administer oaths. It should be drawn up in the first person and contain statements and not inferences.92

(2) Appeal

The expression "Appeal" may be defined as "the judicial examination of the decision by a higher court of the decision of an inferior court". It is a complaint made to a higher court that the decree passed by a lower court is wrong. It is a remedy provided by law for getting the decree of a lower court set aside. The right of appeal is a creature of a statute and unless it is granted clearly and expressly it cannot be claimed by a person. Again, it is a vested right and can be taken away only by a statutory provision, either expressly or by necessary implication.93

(3) Cause of action

Cause of action may be described as "a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed". A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. If a plaint does not disclose a cause of action, a court will reject such plaint.94

(4) Caveat

According to its dictionary meaning, a "caveat" is an official request that a court should not take a particular action without issuing notice to the party lodging the caveat and without affording an opportunity of hearing him.95

(5) Civil

The word "civil" pertains to rights and remedies of a citizen as distinguished from criminal, political, etc. The expression "civil proceedings"

92 For detailed discussion, see infra, Pt. II, Chap. 8.
93 For detailed discussion, see infra, Pt. III, Chap. 2.
94 For detailed discussion, see infra, Pt. II, Chap. 7.
95 For detailed discussion, see infra, Pt. V, Chap. 3.

covers all proceedings in which a party asserts civil rights conferred by a civil law.96

(6) Court

"Court" is a place where justice is administered. To be a court, the person constituting it must have been entrusted with judicial functions97

(7) Defendant

Defendant means a person who defends or a person sued in a court of law by a plaintiff. In every suit there must be two parties, namely, the plaintiff and the defendant. A defendant is a person against whom a relief is claimed by a plaintiff.98

(8) Execution

Stated simply, "execution" means "the process of enforcing or giving effect to the judgment, decree or order of a Court".99

(9) Issue

According to the Concise Oxford Dictionary, "issue" means "a point in question, an important subject of debate or litigation".100 Issues are of three kinds: (i) Issues of fact; (ii) Issues of law; and (iii) Mixed issues of fact and law. Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.101

(10) Jurisdiction

Stated simply, "jurisdiction" means authority to decide. "Jurisdiction" may be defined to be the power or authority of a court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Jurisdiction means the extent of the authority of a court to administer justice prescribed with reference to subject-matter, pecuniary value and territorial limits. Consent can neither confer nor take away jurisdiction of a court.102

(11) Plaint

A "Plaint" is a statement of claim, a document, or a memorial by the presentation of which a suit is instituted. It contains the grounds on

96 For detailed discussion, see infra, Pt. II, Chap. 1.
97 For detailed discussion, see infra, Pt. II, Chap. 1.
98 Concise Oxford Dictionary (1990) at p. 303; Chamber's Twentieth Century Dictionary (1976) at p. 338.
99 For detailed discussion, see infra, Pt. IV "Execution".
100 Concise Oxford Dictionary (1990) at p. 630.
101 For detailed discussion, see infra, Pt. II, Chap. 10.
102 For detailed discussion, see infra, Pt. II, Chap. 1.

which the assistance of a court is sought by a plaintiff. It is a pleading of the plaintiff.103

(12) Plaintiff

Plaintiff is a person who brings a suit or commences an action against a defendant. It is the plaintiff who approaches a court of law by filing a suit for reliefs claimed in the plaint.104

(13) Suit

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. In its comprehensive sense, the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law permits.105

(14) Summons

A summons is a document issued from an office of a court of justice, calling upon the person to whom it is directed to attend before a judge or an officer of the court for a certain purpose. It is a written order that legally obligates someone to attend a court of law at a specified date.106

When a plaintiff files a suit, the defendant must be informed about it. The intimation which is sent to the defendant by the court is technically known as "summons". A summons can also be issued to witnesses. Service of summons can be effected in any of the modes recognised by the Code.107

(15) Written statement

Written statement may be defined as a reply of a defendant to the plaint filed by a plaintiff. Thus, it is a pleading of a defendant dealing with every material fact of a plaint. It may also contain new facts in favour of a defendant or legal objections against the claim of a plaintiff. It is a pleading of a defendant.108

103 For detailed discussion, see infra, Pt. II, Chap. 5.

104 Concise Oxford Dictionary (1990) at p. 910; Chamber's Twenty-first Century Dictionary (1997) at p. 1060.

105 For detailed discussion, see supra, "Decree", infra, Pt. II, Chap. 2.

106 Concise Oxford Dictionary (1990) at p. 1395; Chamber's Twenty-first Century Dictionary (1997) at p. 1414.

107 For detailed discussion, see infra, Pt. II, Chap. 7.

108 For detailed discussion, see infra, Pt. II, Chap. 7.

Part Two
Suits

PART II
1
Jurisdiction of Civil Courts

SYNOPSIS

1. GENERAL

THE FUNDAMENTAL principle of English Law that wherever there is a right, there is a remedy (ubi jus ibi remedium) has been adopted by the Indian legal system also. In fact, right and remedy are but the two sides of the same coin and they cannot be separated from each other. Accordingly, a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance

is either expressly or impliedly barred by any statute.1 A suit for its maintainability requires no authority of law and it is enough that no statute bars it.2

2. JURISDICTION: MEANING

The term "jurisdiction" has not been defined in the Code. The word (jurisdiction) is derived from Latin terms "juris" and "dido" which means "I speak by the law." Stated simply, "jurisdiction" means the power or authority of a court of law to hear and determine a cause or a matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding.3 In other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.4

Thus, jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject- matter, pecuniary value and local limits.5

In Official Trustee v. Sachindra Nath6, after referring to various decisions, the Supreme Court observed:

"From the above discussion it is clear that before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties."7 (emphasis supplied)

1 Abdul Waheed Khan v. Bhawani, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; Brij Raj Singh v. Laxman Singh, AIR 1961 SC 149 at p. 152: (1961) 1 SCR 616; Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286 at p. 318: AIR 1995 SC 2001 at p. 2022.

2 Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393 at p. 397: AIR 1974 SC 1126 at p. 1129; Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma (ibid).

3 Concise Oxford English Dictionary (2002) at p. 768; P.R. Aiyar, Advanced Law Lexicon (2005) Vol. III at pp. 2527-30.

4 Official Trustee v. Sachindra Nath, AIR 1969 SC 823 at p. 827: (1969) 3 SCR 92; Ujjam Bai v. State of U.P., AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778; Raja Soap Factory v. S. P. Shantharaj, AIR 1965 SC 1449: (1965) 2 SCR 800.

5 Raja Soap Factory v. S.P. Shantharaj, AIR 1965 SC 1449: (1965) 2 SCR 800.

6 AIR 1969 SC 823: (1969) 3 SCR 92.

7 Ibid, at p. 828 (AIR); see also Union of India v. Tarachand Gupta and Bros., (1971) 1 SCC 486: AIR 1971 SC 1558; Anisminic Ltd. v. Foreign Compensation Commission, (1969) 1 All ER 208: (1969) 2 WLR 163: (1969) 2 AC 147 (HL). See also, the following statement of law in Halsbury's Laws of England (4th Edn.) Vol. 10, para 715:

"By jurisdiction is meant authority by which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way

3. JURISDICTION AND CONSENT

It is well-settled that consent cannot confer nor take away jurisdiction of a court. In the leading case of A.R. Antulay v. R.S. Nayak8, Mukharji, J. (as he then was) stated, "This Court, by its directions, could not confer jurisdiction on the High Court of Bombay to try any case for which it did not possess...."

It was further stated:

"The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal."9

If the court has no inherent jurisdiction, neither acquiescence nor waiver nor estoppel can create it.10 A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. Such a basic and fundamental defect cannot be cured by consent of parties and the judgment or order passed by a court, however precisely certain and technically correct, is null and void and the validity thereof can be challenged at any stage.11 A decree passed without jurisdiction is non est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution

for its decision. The limits of this authority are imposed by Statute or Charter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which a particular Court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics."

8 (1988) 2 SCC 602 at p. 650: AIR 1988 SC 1531.

9 Ibid, at p. 650 (SCC).

10 Dhirendra Nath v. Sudhir Chandra, AIR 1964 SC 1300 at p. 1304: (1964) 6 SCR 1001; Chief justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; Nai Bahu v. Lala Ramnarayan, (1978) 1 SCC 58 at pp. 61-62: AIR 1978 SC 22 at p. 25; Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707 at p. 709; Bahrein Petroleum Co. Ltd. v. P.J. Pappu, AIR 1966 SC 634 at p. 636: (1966) 1 SCR 461; Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; Khardah Co. Ltd. v. Raymon & Co. India (P) Ltd., AIR 1962 SC 1810 at pp. 1815-16: (1963) 3 SCR 183; United Commercial Bank Ltd. v. Workmen, AIR 1951 SC 230 at pp. 237-42: 1950 SCR 380; Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270: AIR 1992 SC 1514; Chiranjilal v. Jasjit Singh, (1993) 2 SCC 507.

11 Ibid, see also Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670: AIR 1970 SC 1475; Chandrika Misir v. Bhaiya Lal, (1973) 2 SCC 474 at p. 476: AIR 1973 SC 2391 at p. 2393.

or in collateral proceedings. In short, a decree passed by a court without jurisdiction is a coram non judice.12

In the case of Kiran Singh v. Chaman Paswan13, the Supreme Court observed:

"It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction ... strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."14 (emphasis supplied)

Conversely, where a court has jurisdiction to decide a dispute, the same cannot be taken away or ousted by consent of parties. An agreement to oust absolutely the jurisdiction of the court would be unlawful and void, being against public policy (ex dolo malo non oritur actio).15 But if two or more courts have jurisdiction to try the suit, it is open to the parties to select a particular forum and exclude the other forums. And, therefore, the parties may agree among themselves that the suit should be brought in one of those courts and not in the other, since there is no inherent lack of jurisdiction in the court. Such an agreement would be legal, valid and enforceable.16

4. LACK OF JURISDICTION AND IRREGULAR EXERCISE OF JURISDICTION

There is always a distinction between want of jurisdiction and irregular exercise of it. Once it is held that a court has jurisdiction to entertain and decide a matter, the correctness of the decision given cannot be said to be without jurisdiction inasmuch as the power to decide necessarily carries with it the power to decide wrongly as well as rightly.17

12 Ibid, see also Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193 at p. 205; Isabella Johnson v. M.A. Susai, (1991) 1 SCC 494 at p. 498: AIR 1991 SC 993 at p. 995; Patel Roadways Ltd. v. Prasad Trading Co., (1991) 4 SCC 270: AIR 1992 SC 1514; Harshad Chiman Lal v. DLF Universal Ltd., (2005) 7 SCC 791: AIR 2005 SC 4446; Chief Engineer, Hydel Project v. Ravinder Nath, (2008) 2 SCC 350.

13 AIR 1954 SC 340: (1955) 1 SCR 117.

14 Ibid, n. 10 at p. 342 (AIR); see also supra, Sushil Kumar v. Gobind Ram.

15 A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163 at p. 170: AIR 1989 SC 1239; Supdt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766: AIR 1975 SC 2065 at p. 2071; Rewa Mahton v. Ram Kishen, (1885-86) 13 IA 106 at p. III (PC).

16 Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286: AIR 1971 SC 740; Globe Transport Corpn. v. Triveni Engg. Works, (1983) 4 SCC 707 at p. 709; A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163; R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130: AIR 1993 SC 2094; Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal, (2005) 10 SCC 704; Laxman Prasad v. Prodigy Electronics Ltd., (2008) 1 SCC 618.

17 Ujjam Bai v. State of U.P., AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778; Rajendra Jha v. Labour Court, 1984 Supp SCC 520 at pp. 526-27: AIR 1984 SC 1696 at pp. 1699-1700;

In the words of Lord Hobhouse,18 "A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed." In other words, if there is inherent lack of jurisdiction, the decree passed by a civil court is a nullity, and that nullity can be set up in any collateral proceedings.19 However, if a court has jurisdiction but it is irregularly exercised, the defect does not go to the root of the matter, and the error, if any, in exercising the jurisdiction can be remedied in appeal or revision and when there is no such remedy or is not availed of, the decision is final.

In Ittyavira Mathai Mathai v. Varkey Varkey20, it was contended that the decree passed by the court was a nullity since the suit was time barred. Negativing that contention, the Supreme Court observed:

"If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well-settled that a court having jurisdiction over the subject-matter of the suit and over parties thereto though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do... . If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."21 (emphasis supplied)

The difficult question, however, is, What is the distinction between absence of jurisdiction and erroneous or irregular exercise thereof?

Ebrahim Aboobakar v. Custodian-General of Evacuee Property, AIR 1952 SC 319:1952 SCR 696; S. Govinda Menon v. Union of India, AIR 1967 SC 1274: (1967) 2 SCR 566; Ittyavira Mathai Mathai v. Varkey Varkey, AIR 1964 SC 907: (1964) 1 SCR 495.

18 Ibid, see also Malkarjun v. Narhari, (1900) 27 IA 216 at p. 225: (1901) 25 Bom 337 (PC); Supdt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766: AIR 1975 SC 2065 at p. 2071.

19 Amrit Bhikaji Kale v. Kashinath Janardhan Trade, (1983) 3 SCC 437 at p. 444: AIR 1983 SC 643 at p. 647.

20 AIR 1964 SC 907: (1964) 1 SCR 495.

21 Ittyavira Mathai Mathai v. Varkey Varkey, AIR 1964 SC 907 at p. 910: (1964) 1 SCR 495; see also Ujjam Bai v. State of U.P., AIR 1962 SC 1621 at pp. 1629-30: (1963) 1 SCR 778; Rajendra Jha case, supra; Chittoori v. Kudappa, AIR 1965 SC 1325: (1965) 2 SCR 661. See also, the following observations of S.K. Das, J. (as he then was) in Ujjam Bai v. State of U.P., AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778:

"Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact."

After the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission22, the legal position is considerably changed. It virtually assimilated the distinction between lack of jurisdiction and erroneous exercise thereof. As observed in M.L. Sethi v. R.P. Kapur23, the difference between jurisdictional error and error of law within jurisdiction has been reduced almost to a vanishing point.

The following observations24 pithily put the legal position thus:

" After Anisminic every error of law is a jurisdictional error... . The distinction between jurisdictional and non-jurisdictional error is ultimately based upon a foundation of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply lawful whether or not jurisdictionally lawful."25

(emphasis supplied)

5. BASIS TO DETERMINE JURISDICTION

It is well-settled that for deciding the jurisdiction of a civil court, the averments made in the plaint are material. To put it differently, the jurisdiction of a court should normally be decided on the basis of the case put forward by the plaintiff in his plaint and not by the defendant in his written statement.

Thus, in Abdidla Bin Ali v. Galappa26, the plaintiff filed a suit in the civil court for declaration of title and for possession and mesne profits treating the defendants as trespassers. The defendants contended that the civil court had no jurisdiction since he was a tenant.

Negativing the contention of the defendants, the Supreme Court observed, "There is no denying the fact that the allegations made in plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement. On a reading of the plaint as a whole it is evident that the plaintiffs-appellants had filed the suit giving rise to the present appeal treating the defendants as trespassers as they denied the title of the plaintiffs-appellants. Now a suit against the trespasser would lie only in the civil court and not in the Revenue Court.... We are, therefore, of the considered opinion that on the allegations made in the plaint the suit was cognizable by the civil court."27

22 (1969) 1 All ER 208: (1969) 2 WLR163: (1969) 2 AC 147 (HL).

23 (1972) 2 SCC 427 at p. 435: AIR 1972 SC 2379 at p. 2385.

24 De Smith, Judicial Review of Administrative Action (5th Edn.) at p. 256.

25 Readers interested in analytical discussion may refer to C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. 1 at pp. 53-60.

26 (1985) 2 SCC 54: AIR 1985 SC 577.

27 Ibid, n. 23 at pp. 56-57 (SCC): at p. 579 (AIR); see also Bismillah v. Janeshwar Prasad, (1990) 1 SCC 207 at pp. 210-11: AIR 1990 SC 540; Sanwarmal Kejriwal v. Vishwa Coop.

The plaintiff, however, cannot by drafting his plaint cleverly circumvent the provisions of law in order to invest jurisdiction in civil court which it does not possess.28 It is also well established that in deciding the question of jurisdiction, what is important is the substance of the matter and not the form.29

Thus, in Bank of Baroda v. Mod Bhai30, the plaintiff Bank lent a certain amount to the defendant in the usual course of its commercial business. By way of a collateral security, however, it obtained a hypothecation bond and a deed of mortgage from the defendant under the Tenancy Act conferring exclusive jurisdiction on the revenue court. When the suit was filed in the civil court for recovery of amount, it was contended by the defendant that the civil court had no jurisdiction to try the suit.

Negativing the contention, the Supreme Court observed that the business of the bank was to lend money. If only by way of collateral security the bank obtains a hypothecation bond or a deed of mortgage, the provisions of the Tenancy Act cannot be attracted. Primarily and basically, the suit filed by the bank was for the recovery of the amount due to it by the defendant on the basis of the promissory note executed by the defendant. The main relief sought by the bank was that the suit should be decreed for repayment of amount. The civil court had, therefore, jurisdiction to entertain the suit filed by the bank. On the question of jurisdiction, one must always have regard to the substance of the matter and not to the form of the suit.31 (emphasis supplied)

Again, when a court of limited jurisdiction (Rent Controller) has jurisdiction to decide only a particular dispute (fixation of standard rent), it has jurisdiction to consider the collateral issue (title of the landlord to the property) only prima facie and the jurisdiction of a civil court to decide such issue finally is not taken away.32

Housing Society Ltd., (1990) 2 SCC 288 at pp. 306-07: AIR 1990 SC 1563; Vasudev Gopal v. Happy Home Coop. Housing Society Ltd., AIR 1967 SC 369: (1964) 3 SCR 964; Mani Nariman v. Phiroz N. Bhatena, (1991) 3 SCC 141: AIR 1991 SC 1494; Begum Sabiha v. Nawab Mohd. Mansur, (2007) 4 SCC 343: AIR 2007 SC 1636.

28 Ram Singh v. Mehal Kalan Gram Panchayat, (1986) 4 SCC 364: AIR 1986 SC 2197; ONGC v. Utpal Kumar Basu, (1994) 4 SCC 711.

29 Moolji Jaitha and Co. v. Khandesh Spg. and Wvg. Mills Co. Ltd., AIR 1950 FC 83 at p. 92; Begum Sabiha v. Nawab Mohd. Mansur, supra.

30 (1985) 1 SCC 475: AIR 1985 SC 545.

31 Ibid, at p. 478 (SCC): at p. 547 (AIR). See also Bismillah v. Janeshwar Prasad (ibid); Ram Singh v. Gram Panchayat Mehal Kalan, (1986) 4 SCC 364: AIR 1986 SC 2197.

32 LIC v. India Automobiles & Co., (1990) 4 SCC 286: AIR 1991 SC 884.

It is submitted that the following observations of the Full Bench of the Allahabad High Court in Ananti v. Chhannu33, and approved by the Supreme Court34, lay down the correct law on the point:

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If ... he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint, as framed, would not justify the other kind of court to grant him the relief... . If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognizable by the court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court.

If, on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety."35

(emphasis supplied)

6. JURISDICTIONAL FACT

The jurisdiction of a court, tribunal or authority may depend upon fulfilment of certain conditions or upon existence of a particular fact. This is called "jurisdictional fact". The existence of such a preliminary or collateral fact is a sine qua non or a condition precedent to the assumption of jurisdiction by the authority. If it exists, the authority has jurisdiction and it can act. If it does not exist, there is no jurisdiction and the authority cannot act. If the authority wrongly assumes existence of such fact, a writ of certiorari can be issued.36

7. DECISION AS TO JURISDICTION

Whether a court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction by that court. The question depends not on the truth or falsehood of the facts into which it has

33 AIR 1930 All 193: ILR 52 All 501 (FB).

34 Topandas v. Gorakhram, AIR 1964 SC 1348: (1964) 3 SCR 214.

35 Ibid, at p. 1352 (AIR).

36 Anisminic Ltd. v. Foreign Compensation Commission, (1969) 1 All ER 208: (1969) 2 WLR 163: (1969) 2 AC 147 (HL); Ebrahim Aboobakar v. Custodian-General of Evacuee Property, AIR 1952 SC 319: 1952 SCR 696; Ujjam Bai v. State of U.P., AIR 1962 SC 1621: (1963) 1 SCR 778. For detailed discussion, see, V.G. Ramachandran, Law of Writs (1993) at pp. 747-54; C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. 1 at pp. 62-64.

to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion of the inquiry".37

Whenever the jurisdiction of a court is challenged, that court has inherent jurisdiction to decide the said question.38 Every court or tribunal is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within its jurisdiction or not.39 Similarly, where a tribunal derives its jurisdiction from the statute that creates it and imposes conditions under which it can function, it goes without saying that before the tribunal assumes jurisdiction in a matter, it must be satisfied that those conditions in fact exist. Such facts are known as preliminary or jurisdictional facts.40

8. COURTS AND TRIBUNALS

A civil court has inherent power to decide the question whether it has jurisdiction to entertain, deal with and decide the matter which has come before it41

The jurisdiction of a tribunal or any other authority stands on a different footing. Where Parliament has invested such tribunal with the power to decide and determine finally the preliminary facts on which its jurisdiction depends, it can decide such facts and the finding recorded by the tribunal cannot be challenged by certiorari. But where a statute creating or establishing a tribunal does not confer that power on a tribunal, an inferior tribunal cannot, on a wrong decision on preliminary or collateral fact, assume and confer on itself jurisdiction which it does not possess. Such an order can be challenged by certiorari.42

37 R. v. Boltan, (1841) 1 QB 66 at p. 74: (1835-1842) All ER Rep 71; Ujjam Bai case, supra, at p. 1629.

38 Bhatia Coop. Housing Society Ltd. v. D.C. Patel, AIR 1953 SC 16 at p. 19: 1953 SCR 185; Athmanathaswami Devasthanam v. K. Gopalswami Ayyangar, AIR 1965 SC 338 at p. 342: (1964) 3 SCR 763; LIC v. India Automobiles & Co., (1990) 4 SCC 286 at pp. 293-94: AIR 1991 SC 884 at p. 889.

39 Ibid, see also Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572 at p. 584: AIR 1979 SC 404 at p. 412.

40 For discussion about "Jurisdictional fact", see, Author's Lectures on Administrative Law (2008) Lecture IX.

41 Bhatia Coop. Housing Society Ltd. v. D.C. Patel, AIR 1953 SC 16 at p. 19: 1953 SCR 185; Athmanathaswami Devasthanam v. K. Gopalswami Ayyangar, AIR 1965 SC 338 at p. 342: (1964) 3 SCR 763; Official Trustee v. Sachindra Nath, AIR 1969 SC 823 at p. 828: (1969) 3 SCR 92; LIC v. India Automobiles & Co., (1990) 4 SCC 286 at p. 293-94: AIR 1991 SC 884 at p. 889.

42 Ibid, see also Ujjam Bai v. State of U.P., AIR 1962 SC 1621: (1963) 1 SCR 778; Chaube jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492: 1959 Supp (1) SCR 733; Addanki T.T. Desika v. State of A.P., AIR 1964 SC 807; R. v. Commr.for Special Purposes of Income Tax, (1888) 21 QB 313: 36 WR 776; BASF Styrenics (P) Ltd. v. Offshore Industrial Construction (P) Ltd., AIR 2002 Bom 289.

9. JURISDICTION OF FOREIGN COURTS43

10. KINDS OF JURISDICTION

Jurisdiction of a court may be classified under the following categories:

(1) Civil and criminal jurisdiction

Civil jurisdiction is that which concerns and deals with disputes of a "civil nature". Criminal jurisdiction, on the other hand, relates to crimes and punishes offenders.

(2) Territorial or local jurisdiction

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction. These limits are fixed by the Government. The District Judge has to exercise jurisdiction within his district and not outside it. The High Court has jurisdiction over the territory of a State within which it is situate and not beyond it. Again, a court has no jurisdiction to try a suit for immovable property situated beyond its local limits.

(3) Pecuniary jurisdiction

The Code provides that a court will have jurisdiction only over those suits the amount or value of the subject-matter of which does not exceed the pecuniary limits of its jurisdiction44 Some courts have unlimited pecuniary jurisdiction, e.g. High Courts and District Courts have no pecuniary limitations. But there are other courts having jurisdiction to try suits up to a particular amount. Thus, a Presidency Small Causes Court cannot entertain a suit in which the amount claimed exceeds Rs 1000.

(4) Jurisdiction as to subject-matter

Different courts have been empowered to decide different types of suits. Certain courts are precluded from entertaining certain suits. Thus, a Presidency Small Causes Court has no jurisdiction to try suits for specific performance of a contract, partition of immovable property, foreclosure or redemption of a mortgage, etc. Similarly, in respect of testamentary matters, divorce cases, probate proceedings, insolvency proceedings, etc., only the District Judge or Civil Judge (Senior Division) has jurisdiction.

(5) Original and appellate jurisdiction

Original jurisdiction is jurisdiction inherent in, or conferred upon, a court of first instance. In the exercise of that jurisdiction, a court of

43 For detailed discussion, see infra, Chap. 3.

44 S. 6.

first instance decides suits, petitions or applications. Appellate jurisdiction is the power or authority conferred upon a superior court to rehear by way of appeal, revision, etc., of causes which have been tried and decided by courts of original jurisdiction.

Munsiffs Courts, Courts of Civil Judges, Small Cause Courts are having original jurisdiction only, while District Courts, High Courts have original as well as appellate jurisdiction.

(6) Exclusive and concurrent jurisdiction

Exclusive jurisdiction is that which confers sole power on one court or tribunal to try, deal with and decide a case. No other court or authority can render a judgment or give a decision in the case or class of cases.

Concurrent or co-ordinate jurisdiction is jurisdiction which may be exercised by different courts or authorities between the same parties, at the same time and over the same subject-matter. It is, therefore, open to a litigant to invoke jurisdiction of any of such court or authority.

(7) General and special jurisdiction

General jurisdiction extends to all cases comprised within a class or classes of causes. Special or limited jurisdiction, on the other hand, is jurisdiction which is confined to special, particular or limited causes.

(8) Legal and equitable jurisdiction

Legal jurisdiction is a jurisdiction exercised by Common Law Courts in England, while equitable jurisdiction is a jurisdiction exercised by Equity Courts. Courts in India are courts of both, law and equity.

(9) Municipal and foreign jurisdiction

Municipal or domestic jurisdiction is a jurisdiction exercised by municipal courts, i.e., courts in a country. Foreign jurisdiction means jurisdiction exercised by a court in a foreign country. A judgment rendered or decision given by a foreign court is a "foreign judgment".

(10) Expounding and expanding jurisdiction

Expounding jurisdiction means to define, clarify and explain jurisdiction. Expanding jurisdiction means to expand, enlarge or extend the jurisdiction. It is the duty of the court to expound its jurisdiction. It is, however, not proper for the court to expand its jurisdiction.

11. JURISDICTION OF CIVIL COURTS

(1) Section 9

Under the Code of Civil Procedure, a civil court has jurisdiction to try all suits of a civil nature unless they are barred. Section 9 of the Code reads as under:

"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
Explanation I—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
Explanation II.—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

(2) Conditions

A civil court has jurisdiction to try a suit if two conditions are fulfilled:
(i) The suit must be of a civil nature; and
(ii) The cognizance of such a suit should not have been expressly or impliedly barred.

(a) Suit of civil nature

(i) Meaning—In order that a civil court may have jurisdiction to try a suit, the first condition which must be satisfied is that the suit must be of a civil nature. But what is a suit of a civil nature? The word "civil" has not been defined in the Code. But according to the dictionary meaning,45 it pertains to private rights and remedies of a citizen as distinguished from criminal, political, etc. The word "nature" has been defined as "the fundamental qualities of a person or thing; identity or essential character; sort, kind, character". It is thus wider in content. The expression "civil nature" is wider than the expression "civil proceeding".46 Thus, a suit is of a civil nature if the principal question therein relates to the determination of a civil right and enforcement thereof. It is not the status of the parties to the suit, but the subject-matter of it which determines whether or not the suit is of a civil nature.

(ii) Nature and scope—The expression "suit of a civil nature" will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression. A suit in which the principal question relates to caste or religion is not a suit of a civil nature. But if the principal question in a suit is of a civil nature (the right to property or to an office) and the adjudication incidentally involves the

45 Concise Oxford Dictionary (1990) at p. 206; see also S.A.L. Narayan v. Ishwarlal, AIR 1965 SC 1818 at p. 1823: (1966) 1 SCR 190; Ramesh v. Gendalal, AIR 1966 SC 1445 at p. 1447-48: (1966) 3 SCR 198; Arbind Kumar v. Nand Kishore, AIR 1968 SC 1227: (1968) 3 SCR 322.
46 Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286 at pp. 318-19: AIR 1995 SC 2001 at pp. 2022-23.

determination relating to a caste question or to religious rights and ceremonies, it does not cease to be a suit of a civil nature and the jurisdiction of a civil court is not barred.47 The court has jurisdiction to adjudicate upon those questions also in order to decide the principal question which is of a civil nature48 Explanation II has been added by the Amendment Act of 1976. Before this Explanation, there was a divergence of judicial opinion as to whether a suit relating to a religious office to which no fees or emoluments were attached can be said to be a suit of a civil nature. But the legal position has now been clarified by Explanation II which specifically provides that a suit relating to a religious office is maintainable whether or not it carries any fees or whether or not it is attached to a particular place.

(iii) Doctrine explained—Explaining the concept of jurisdiction of civil courts under Section 9, in Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma49, the Supreme Court stated:

"The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word 'shall' and the expression 'all suits of a civil nature' unless 'expressly or impliedly barred'.

Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory. No Court can refuse to entertain a suit if it is of the description mentioned in the section. That is amplified by the use of the expression, 'all suits of civil nature'. The word 'civil' according to the dictionary means, 'relating to the citizen as an individual; civil rights'. In Black's Law Dictionary it is defined as, 'relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings'. In law it is understood

47 Expln. I to S. 9.

48 Sinha Ramanuja v. Ranga Ramanuja, AIR 1961 SC 1720: (1962) 2 SCR 509.

49 1995 Supp (4) SCC 286: AIR 1995 SC 2001.

as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company, etc. were added to it later. But they too pertain to the larger family of 'civil'. There is thus no doubt about the width of the word 'civil'.
Its width has been stretched further by using the word 'nature' along with it. That is even those suits are cognizable which are not only civil but are even of civil nature... .
The word 'nature' has been defined as 'the fundamental qualities of a person or thing; identity or essential character, sort; kind; character'. It is thus wider in content. The word 'civil nature' is wider than the word 'civil proceeding'. The section would, therefore, be available in every case where the dispute was of the characteristic of affecting one's rights which are not only civil but of civil nature."50
(emphasis supplied)
(iv) Test—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies.51
(v) Suits of civil nature: Illustrations—The following are suits of a civil nature:
(i) Suits relating to rights to property;
(ii) Suits relating to rights of worship;
(iii) Suits relating to taking out of religious processions;
(iv) Suits relating to right to shares in offerings;
(v) Suits for damages for civil wrongs;
(vi) Suits for specific performance of contracts or for damages for breach of contracts;
(vii) Suits for specific reliefs;
(viii) Suits for restitution of conjugal rights;
(ix) Suits for dissolution of marriages;
(x) Suits for rents;
(xi) Suits for or on accounts;
(xii) Suits for rights of franchise;
(xiii) Suits for rights to hereditary offices;
(xiv) Suits for rights to Yajmanvritis;
(xv) Suits against wrongful dismissals from service and for salaries, etc.
(vi) Suits not of civil nature: Illustrations—The following are not suits of a civil nature:
(i) Suits involving principally caste questions;
(ii) Suits involving purely religious rites or ceremonies;

50 Ibid, at pp. 318-19 (SCC): at pp. 2022-23 (AIR).
51 Sinha Ramanuja v. Ranga Ramanuja, AIR 1961 SC 1720 at p. 1724: (1962) 2 SCR 509.

(iii) Suits for upholding mere dignity or honour;
(iv) Suits for recovery of voluntary payments or offerings;
(v) Suits against expulsions from caste, etc.

(b) Cognizance not barred

As stated above, a litigant having a grievance of a civil nature has a right to institute a civil suit unless its cognizance is barred, either expressly or impliedly.

(i) Suits expressly barred—A suit is said to be "expressly barred" when it is barred by any enactment for the time being in force.52 It is open to a competent legislature to bar jurisdiction of civil courts with respect to a particular class of suits of a civil nature, provided that, in doing so, it keeps itself within the field of legislation conferred on it and does not contravene any provision of the Constitution.53

But every presumption should be made in favour of the jurisdiction of a civil court and the provision of exclusion of jurisdiction of a court must be strictly construed.54 If there is any doubt about the ousting of jurisdiction of a civil court, the court will lean to an interpretation which would maintain the jurisdiction.55 Thus, matters falling within the exclusive jurisdiction of Revenue Courts or under the Code of Criminal Procedure or matters dealt with by special tribunals under the relevant statutes, e.g. by Industrial Tribunal, Election Tribunal, Revenue Tribunal, Rent Tribunal, Cooperative Tribunal, Income Tax Tribunal, Motor Accidents Claims Tribunal, etc., or by domestic tribunals, e.g. Bar Council, Medical Council, University, Club, etc. are expressly barred from the cognizance of a civil court. But if the remedy provided by a statute is not adequate and all questions cannot be decided by a special tribunal, the jurisdiction of a civil court is not barred.56 Similarly, when a court of limited jurisdiction prima facie and

52 Umrao Singh v. Bhagwati Singh, AIR 1956 SC 15: 1956 SCR 62; Mohd. Mahmood v. Tikam Das, AIR 1966 SC 210 at p. 211: (1966) 1 SCR 128; Gurucharan Singh v. Kamla Singh, (1976) 2 SCC152: AIR 1977 SC 5 at p. 12; Bata Shoe Co. Ltd. v. City of Jabalpur Corpn., (1977) 2 SCC 472: AIR 1977 SC 955 at p. 963; Annamreddi Bodayya v. Lokanarapu Ramaswamy, 1984 Supp SCC 391: AIR 1984 SC 1726; Sayed Mohd. Baquir v. State of Gujarat, (1981) 4 SCC 383: AIR 1981 SC 2016; CIT v. Parmeshwari Devi, (1998) 3 SCC 481: AIR 1998 SC 1276. For instance, S. 170 of the Representation of the People Act, 1951 reads:
"No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under this Act in connection with an election."

53 State of Vindhya Pradesh v. Moradhwaj Singh, AIR 1960 SC 796: (1960) 3 SCR 106.

54 Abdul Waheed Khan v. Bhawani, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; Dhulabhai v. State of M.P., AIR 1969 SC 78: (1968) 3 SCR 662.

55 Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, Dhamangaon, AIR 1966 SC 249 at p. 261: (1965) 3 SCR 499; Dhulabhai v. State of M.P. (ibid.).

56 State of T.N. v. Ramalinga Samigal, (1985) 4 SCC 10: AIR 1986 SC 794.

incidentally states something, the jurisdiction of a civil court to finally decide the time is not ousted.57

(ii) Suits impliedly barred—A suit is said to be impliedly barred when it is barred by general principles of law.

Where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form than that given by the statute.58 Where an Act creates an obligation and enforces its performance in a specified manner, that performance cannot be enforced in any other manner.59

Similarly, certain suits, though of a civil nature, are barred from the cognizance of a civil court on the ground of public policy.60 "The principle underlying is that a court ought not to countenance matters which are injurious to and against the public weal."61 Thus, no suit shall lie for recovery of costs incurred in a criminal prosecution or for enforcement of a right upon a contract hit by Section 23 of the Indian Contract Act, 1872; or against any judge for acts done in the course of his duties. Likewise, political questions belong to the domain of public administrative law and are outside the jurisdiction of civil courts. A civil court has no jurisdiction to adjudicate upon disputes of a political nature.

(3) Who may decide?

It is well-settled that a civil court has inherent power to decide its own jurisdiction.62

(4) Presumption as to jurisdiction

In dealing with the question whether a civil court's jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind that every presumption should be made in favour of the jurisdiction of a civil

57 LIC v. India Automobiles & Co., (1990) 4 SCC 286: AIR 1991 SC 884.

58 Premier Automobiles v. Kamlekar Shantaram, (1976) 1 SCC 496 at p. 506: AIR 1975 SC 2238 at p. 2245; Jitendra Nath v. Empire India and Ceylone Tea Co., (1989) 3 SCC 582 at pp. 588-89: AIR 1990 SC 255 at p. 260; Munshi Ram v. Municipal Committee, Chheharla, (1979) 3 SCC 83: AIR 1979 SC 1250; Punjab SEB v. Ashwani Kumar, (1997) 5 SCC 120.

59 Premier Automobiles, ibid, at pp. 505-06 (SCC): at p. 2244 (AIR). See also, observations of Lord Tenderden, C.J. in Deo v. Bridges, (1831) 1 B & Ad 847:199 ER 1001:

"Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

60 Ibid, see also Indian Airlines Corpn. v. Sukhdeo Rai, (1971) 2 SCC 192: AIR 1971 SC 1828; Sitaram v. Pigment Cakes & Chemicals Mfg. Co., (1979) 4 SCC 12: AIR 1980 SC 16; Mulla, Code of Civil Procedure (1995) Vol. 1 at pp. 75-76.

61 Per Kapur, J. in Union of India v. Ram Chand, AIR 1955 Punj 166 at p. 169; Baboo Gunnesh v. Mugneeram Chowdhry, (1872) 11 Suth WR 283 (PC).

62 Bhatia Coop. Housing Society Ltd. v. D.C. Patel, AIR 1953 SC 16 at p. 19:1953 SCR 185; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 at p. 701: AIR 1988 SC 1531.

court. The exclusion of jurisdiction of a civil court to entertain civil causes should not be readily inferred unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature.63

(5) Burden of proof

It is well-settled that it is for the party who seeks to oust the jurisdiction of a civil court to establish it. It is equally well-settled that a statute ousting the jurisdiction of a civil court must be strictly construed.64 Where such a contention is raised, it has to be determined in the light of the words used in the statute, the scheme of the relevant provisions and the object and purpose of the enactment. In the case of a doubt as to jurisdiction, the court should lean towards the assumption of jurisdiction.65A civil court has inherent power to decide the question of its own jurisdiction; although as a result of such inquiry it may turn out that it has no jurisdiction to entertain the suit.66

(6) Objection as to jurisdiction67

(7) Exclusion of jurisdiction: Limitations

A litigant having a grievance of a civil nature has, independent of any statute, a right to institute a suit in a civil court unless its cognizance is either expressly or impliedly barred. The exclusion of the jurisdiction of a civil court is not to be readily inferred and such exclusion must be clear.68

63 Firm of Illuri Subbayya Chetty & Sons v. State of A.P., AIR 1964 SC 322 at p. 324: (1964) 1 SCR 752. See also Secy. of State v. Mask & Co., AIR 1940 PC 105 at p. 110: 67 IA 222; Shiromani Gurdwara Parbandhak Committee v. Shiv Rattan, AIR 1955 SC 576 at p. 581: (1955) 2 SCR 67; Magiti Sasamal v. Pandab Bissoi, AIR 1962 SC 547 at pp. 549-50:. (1962) 3 SCR 673; Addanki T.T. Desika v. State of A.P., AIR 1964 SC 807; Kamala Mills Ltd. v. State of Bombay, AIR 1965 SC 1942 at pp. 1950-51: (1966) 1 SCR 64; Abdul Waheed Khan v. Bhawani, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; Musamia Imam Haider v. Rabari Govindbhai, AIR 1969 SC 439 at p. 446: (1969) 1 SCR 785; Dhulabhai v. State of M.P., AIR 1969 SC 78: (1968) 3 SCR 662; State of W.B. v. Indian Iron & Steel Co. Ltd., (1970) 2 SCC 39 at pp. 43-44: AIR 1970 SC 1298 at pp. 1301-02; Katikan Chintamani Dora v. Guntreddi Annamanaidu, (1974) 1 SCC 567 at pp. 578-79: AIR 1974 SC 1069 at pp. 1076-77; Gurbax Singh v. Financial Commr., 1991 Supp (1) SCC 167 at p. 175: AIR 1991 SC 435 at p. 439.

64 Ibid, see also supra, Abdul Waheed Khan v. Bhawani, AIR 1966 SC 1718 at p. 1719; V.L.N.S. Temple v. Induru Pattabhirami, AIR 1967 SC 781 at p. 785: (1967) 1 SCR 280; Mahant Dooj Das v. Udasin Panchayati Bara Akhara, (2008) 12 SCC 181.

65 Kamala Mills Ltd. v. State of Bombay, AIR 1965 SC 1942 at p. 1951: (1966) 1 SCR 64; Katikara Chintamani Dora v. Guntreddi Annamanaidu, supra.

66 Bhatt Coop. Housing Society Ltd. v. D.C. Patel, AIR 1953 SC 16 at p. 19: 1953 SCR 185.

67 For detailed discussion, see infra, Chap. 4.

68 Dhulabhai v. State of M.P., AIR 1969 SC 78: (1968) 3 SCR 662. For detailed discussion, see infra, "Exclusion of jurisdiction of civil court: Principles".

Again, even when the jurisdiction of a civil court is barred, either expressly or by necessary implication, it cannot be said that the jurisdiction is altogether excluded. A court has jurisdiction to examine whether the provisions of the Act and the Rules made thereunder have or have not been complied with, or the order is contrary to law, mala fide, ultra vires, perverse, arbitrary, "purported", violative of the principles of natural justice, or is based on "no evidence" and so on. In all these cases, the order cannot be said to be under the Act but is de hors the Act and the jurisdiction of a civil court is not ousted.69

In the leading decision of Secy. of State v. Mask & Co.70, the Privy Council rightly observed:

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well established that even if jurisdiction is so excluded, the civil courts, have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."71 It is respectfully submitted that the following observations of Subba Rao, J. (as he then was) in the leading case of Firm Seth Radha Kishan v. Administrator, Municipal Committee, Ludhiana72 lay down the correct legal position regarding jurisdiction of civil courts and require to be reproduced:

"Under Section 9 of the Code of Civil Procedure the court shall have jurisdiction to try all suits of civil nature excepting suits of

69 Secy. of State v. Mask & Co., AIR 1940 PC 105: 67 IA 222; Anisminic Ltd. v. Foreign Compensation Commission, (1969) 1 All ER 208: (1969) 2 WLR 163; Dharangadhra Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264:1957 SCR 152; Firm Seth Radha Kishan v. Municipal Committee, Ludhiana, infra; Firm of Illuri Subbayya Chetty & Sons, AIR 1964 SC 322: (1964) 1 SCR 752; Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, Dhamangaon, AIR 1966 SC 249 at p. 261: (1965) 3 SCR 499; Dhulabhai v. State of M.P., AIR 1969 SC 78: (1968) 3 SCR 662; Srinivasa v. State of A.P., (1969) 3 SCC 711: AIR 1971 SC 71; Union of India v. Tarachand Gupta and Bros., (1971) 1 SCC 486: AIR 1971 SC 1558; Premier Automobiles v. Kamlekar Shantaram, (1976) 1 SCC 496: AIR 1975 SC 2238; Bata Shoe Co. Ltd. v. City of Jabalpur Corpn., (1977) 2 SCC 472: AIR 1977 SC 955; Sayed Mohd. Baquir v. State of Gujarat, (1981) 4 SCC 383: AIR 1981 SC 2016; State of T.N. v. Ramalinga Samigal, (1985) 4 SCC 10: AIR 1985 SC 19; CST v. Auraiya Chamber of Commerce, (1986) 3 SCC 50: AIR 1986 SC 1556; Jitendra Nath v. Empire India and Ceylone Tea Co., (1989) 3 SCC 582 at pp. 88-89:1989 SCC (L&S) 552; Gurbax Singh v. Financial Commr., 1991 Supp (1) SCC 167: AIR 1991 SC 435; Shiv Kumar v. MCD, (1993) 3 SCC 161; Krishan Lal v. State of J&K, (1994) 4 SCC 422: (1994) 27 ATC 590.

70 AIR 1940 PC 105: 67 IA 222.

71 Ibid, at p. 110 (AIR) (per Lord Thankerton); see also supra, Tarachand Gupta case; Sayed Mohd. Baquir case, supra; Ramalinga case, supra.

72 AIR 1963 SC 1547: (1964) 2 SCR 273.

which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. A suit in a civil court will always be to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."73 (emphasis supplied)

(8) Exclusion of jurisdiction of civil court: Principles

From the above discussion, it is clear that the jurisdiction of civil courts is all-embracing except to the extent it is excluded by law or by clear intendment arising from such law.

In the classic decision of Dhulabhai v. State of M.P.74, after considering a number of cases, Hidayatullah, C.J. summarised the following principles relating to the exclusion of jurisdiction of civil courts:

(a) Where a statute gives finality to orders of special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure.

(b) Where there is an express bar of jurisdiction of a court, an examination of the scheme of a particular Act to find the adequacy or sufficiency of the remedies provided may be relevant but this is not decisive for sustaining the jurisdiction of a civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of a particular Act to find out the

73 Ibid, at p. 1551 (AIR). See also supra, observations of Shelat, J. in Tarachand Gupta case, and of Lord Reid in Anisminic Ltd. case, supra; Author's Lectures on Administrative Law (2008) Lecture VII.

74 AIR 1969 SC 78: (1968) 3 SCR 662.

intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if a statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(c) Challenge to the provisions of a particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from decisions of tribunals.

(d) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(e) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or is illegally collected, a suit lies.

(f) Questions of the correctness of an assessment, apart from its constitutionality, are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in a particular Act. In either case, the scheme of a particular Act must be examined because it is a relevant enquiry.

(g) An exclusion of jurisdiction of a civil court is not readily to be inferred unless the conditions above set down apply.75

The above principles enunciated are relevant in deciding the correctness or otherwise of assessment orders made under taxing statutes.75

In Premier Automobiles v. Kamlekar Shantaram77, the Supreme Court laid down the following principles as applicable to the jurisdiction of a civil court in relation to industrial disputes:

(h) If a dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in a civil court.

(i) If a dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the

75 Ibid, at pp. 89-90 (AIR): at pp. 682-84 (SCR). For detailed discussion, see, Author's Lectures on Administrative Law (2008) Lecture VII.

76 For jurisdiction of civil court in connection with levy of octroi duty, see Bata Shoe Co. Ltd. v. City of Jabalpur Corpn., (1977) 2 SCC 472: AIR 1977 SC 955.

77 (1976) 1 SCC 496: AIR 1975 SC 2238.

Act, the jurisdiction of a civil court is alternative, leaving it to the election of a suitor or person concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(j) If an industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to a suitor is to get an adjudication under the Act.

(k) If the right which is sought to be enforced is a right created under the Act such as Chap. V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.78

Again, in Rajasthan SRTC v. Krishna Kant79, after considering various leading decisions on the point, the Supreme Court summarised the principles applicable to industrial disputes thus:

(1) Where a dispute arises from the general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in a civil court cannot be said to be not maintainable, even though such a dispute may also constitute an "industrial dispute" within the meaning of Section 2(k) or Section 2-A of the Industrial Disputes Act, 1947.

(2) Where, however, a dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where a dispute involves the recognition, observance or enforcement of rights and obligations created by enactments, like the Industrial Employment (Standing Orders) Act, 1946, which can be called "sister enactments" to the Industrial Disputes Act, and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2-A of the Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to a civil court is open.

(4) It is not correct to say that remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to a forum depends upon a reference being made by the

78 Premier Automobiles v. Kamlekar Shantaram, (1976) 1 SCC 496 at pp. 513-14: AIR 1975 SC 2238 at p. 2251.

79 (1995) 5 SCC 75: AIR 1995 SC 1715: (1995) 31 ATC 110.

appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence is not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is ex facie frivolous, not meriting adjudication.

(5) Consistent with the policy of law aforesaid, we commend to Parliament and State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly i.e., without the requirement of a reference by the Government, in case of industrial disputes covered by Section 2-A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon employers and employees, though they do not amount to "statutory provisions". Any violation of these Standing Orders entitles an employee to appropriate relief, either before forums created by the Industrial Disputes Act or in a civil court where recourse to a civil court is open according to the principles indicated herein.

(7) The policy of law emerging from the Industrial Disputes Act and its sister enactments is to provide an alternative dispute- resolution mechanism to workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.80

In Chandrakant v. Municipal Corpn. of Ahmedabad81, the Supreme Court reiterated the principles laid down in earlier decisions and stated:

"It cannot be disputed that the procedure followed by civil courts are too lengthy and consequently, are not an efficacious forum for resolving the industrial disputes speedily. The power

80 Ibid, at pp. 94-95 (SCC): at pp. 1725-26 (AIR) (per Jeevan Reddy, J.).

81 (2002) 2 SCC 542.

of the Industrial Courts also is wide and such forums are empowered to grant adequate relief as they think just and appropriate, it is in the interest of the workmen that their disputes, including the dispute of illegal termination, are adjudicated upon by an industrial forum."82
(emphasis supplied)

12. GENERAL PRINCIPLES

From various decisions of the Supreme Court, the following general principles relating to jurisdiction of a civil court emerge:

(1) A civil court has jurisdiction to try all suits of a civil nature unless their cognizance is barred either expressly or impliedly.

(2) Consent can neither confer nor take away jurisdiction of a court.

(3) A decree passed by a court without jurisdiction is a nullity and the validity thereof can be challenged at any stage of the proceedings, in execution proceedings or even in collateral proceedings.

(4) There is a distinction between want of jurisdiction and irregular exercise thereof.

(5) Every court has inherent power to decide the question of its own jurisdiction.

(6) Jurisdiction of a court depends upon the averments made in a plaint and not upon the defence in a written statement.

(7) For deciding jurisdiction of a court, the substance of a matter and not its form is important.

(8) Every presumption should be made in favour of jurisdiction of a civil court.

(9) A statute ousting jurisdiction of a court must be strictly construed.

(10) Burden of proof of exclusion of jurisdiction of a court is on the party who asserts it.

(11) Even where jurisdiction of a civil court is barred, it can still decide whether the provisions of an Act have been complied with or whether an order was passed dehors the provisions of law.

82 Ibid, at p. 550 (SCC) (per Pattanaik, J.); see also, Church of North India v. Lavajibhai Ratanjibhai, (2005) 10 SCC 760: AIR 2005 SC 2544; State of Haryana v. Bikar Singh, (2006) 9 SCC 450: AIR 2006 SC 2473; Rajashtan SRTC v. Zakir Hussain, (2005) 7 SCC 447; Chief Engineer, Hydel Project v. Ravinder Nath, (2008) 2 SCC 350.

PART II

2
Res Sub Judice and Res Judicata

SYNOPSIS

1. GENERAL

IN THIS Chapter, I intend to discuss two important doctrines: (i) Doctrine of res sub judice, Section 10; and (ii) Doctrine of res judicata, Section 11.

Section 10 deals with stay of civil suits. It provides that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed.

Section 11, on the other hand, relates to a matter already adjudicated upon. It bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit.

2. RES SUB JUDICE: STAY OF SUIT: SECTION 10

(1) Section 10

Section 10 reads thus:

"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or constituted by the Central Government and having like jurisdiction, or before the Supreme Court."

(2) Nature and scope

Section 10 declares that no court should proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties and the court before which the previously instituted suit is pending is competent to grant the relief sought.1

The rule applies to trial of a suit and not the institution thereof. It also does not preclude a court from passing interim orders, such as, grant of injunction or stay, appointment of receiver,2 etc.

(3) Object

The object of the rule contained in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of law is to confine a plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same court in respect of the same relief.3 The section intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. It also aims

1 Indian Bank v. Maharashtra State Coop. Marketing Federation Ltd., (1998) 5 SCC 69: AIR 1998 SC 1952; Maharashtra State Coop. Marketing Federation Ltd. v. Indian Bank, AIR 1997 Bom 186.

2 Indian Bank v. Maharashtra State Coop. Marketing Federation, supra.

3 Balkishan v. Kishan Lal, (1889) ILR 11 All 148 at p. 155 (FB); Guru Prasad (Dr.) v. Bijoy Kumar Das, AIR 1984 Ori 209 at p. 212; P.V. Shetty v. B.S. Giridhar, (1982) 3 SCC 403: AIR 1982 SC 83; Gupte Cardiac Care Centre and Hospital v. Olympic Pharma Care (P) Ltd., (2004)
6 SCC 756: AIR 2004 SC 2339; National Institute of Medical Health & Neuro Sciences v. C. Parameshwara, (2005) 2 SCC 256: AIR 2005 SC 242.

to avert inconvenience to the parties and gives effect to the rule of res judicata.4

It is to be remembered that the section does not bar the institution of a suit, but only bars a trial, if certain conditions are fulfilled. The subsequent suit, therefore, cannot be dismissed by a court, but is required to be stayed.

(4) Conditions

For the application of this section, the following conditions must be satisfied:

(i) There must be two suits, one previously instituted and the other subsequently instituted.

(ii) The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.

(iii) Both the suits must be between the same parties or their representatives.

(iv) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or before the Supreme Court.

(v) The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.

(vi) Such parties must be litigating under the same title in both the suits.

As soon as the above conditions are satisfied, a court cannot proceed with the subsequently instituted suit since the provisions contained in Section 10 are mandatory,5 and no discretion is left with the court. The order staying proceedings in the subsequent suit can be made at any stage.6

Section 10, however, does not take away power of the court to examine the merits of the matter. If the court is satisfied that subsequent suit can be decided purely on legal point, it is open to the court to decide such suit.7

4 S.P.A. Annamalay Chetty v. B.A. Thornhill, AIR 1931 PC 263; Shri Ram Tiwary v. Bholi Devi, AIR 1994 Pat 76.

5 Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 at p. 536:1962 Supp (1) SCR 450.

6 Life Pharmaceuticals (P) Ltd. v. Bengal Medical Hall, AIR 1971 Cal 345.

7 Pukhraj D. Jain v. Gopalakrishna, (2004) 7 SCC 251: AIR 2004 SC 3504.

(5) Test

The test for applicability of Section 10 is whether the decision in a previously instituted suit would operate as res judicata in the subsequent suit. If it is so, the subsequent suit must be stayed.8

(6) Res sub judice and res judicata9

(7) Suit pending in foreign court

Explanation to Section 10 provides that there is no bar on the power of an Indian court to try a subsequently instituted suit if the previously instituted suit is pending in a foreign court.

(8) Inherent power to stay

Even where the provisions of Section 10 of the Code do not strictly apply, a civil court has inherent power under Section 151 to stay a suit to achieve the ends of justice.10 Similarly, a court has inherent power to consolidate different suits between the same parties in which the matter in issue is substantially the same.11

(9) Consolidation of suits

Since the main purpose of Section 10 is to avoid two conflicting decisions, a court in an appropriate case can pass an order of consolidation of both the suits.12

(10) Contravention: Effect

A decree passed in contravention of Section 10 is not a nullity, and therefore, cannot be disregarded in execution proceedings.13 Again, as stated above, it is only the trial and not the institution of the subsequent suit which is barred under this section. Thus, it lays down a rule of procedure, pure and simple, which can be waived by a party. Hence, if the parties waive their right and expressly ask the court to proceed

8 S.P.A. Annamalay Chetty v. B.A. Thornhill, AIR 1931 PC 263: (1931) 61 Mad LJ 420: 36 CWN 1; Radha Devi v. Deep Narayan, (2003) 11 SCC 759; National Institute of Medical Health v. Parameshwara, supra.

9 See infra, "Res judicata".

10 Jado Rai v. Onkar Prasad, AIR 1975 All 413; P.V. Shetty v. B.S. Giridhar, (1982) 3 SCC 403: AIR 1982 SC 83.

11 P.P. Gupta v. East Asiatic Co., AIR 1960 All 184; Bokaro & Ramgur Ltd. v. State of Bihar, AIR 1973 Pat 340; Guru Prasad Mohanty (Dr.) v. Bijoy Kumar Das, AIR 1984 Ori 209.

12 Indian Bank v. Maharashtra State Coop. Marketing Federation Ltd., (1998) 5 SCC 69: AIR 1998 SC 1952.

13 Pukhraj D. Jain v. G. Gopalakrishna, (2004) 7 SCC 251: AIR 2004 SC 3504; Sheopat Rai v. Warak Chand, AIR 1919 Lah 294; Indian Express Newspapers (Bombay) Ltd. v. Basumati (P) Ltd., AIR 1969 Bom 40; Naurati v. Mehma Singh, AIR 1972 Punj 421; Life Pharmaceuticals (P) Ltd. v. Bengal Medical Hall, AIR 1971 Cal 345.

with the subsequent suit, they cannot afterwards challenge the validity of the subsequent proceedings.14

3. RES JUDICATA: SECTION 11

(1) General

Section 11 of the Code of Civil Procedure embodies the doctrine of res judicata or the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. In the absence of such a rule there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses.15

This doctrine has been accepted in all civilized legal systems. Under the Roman Law, a defendant could successfully contest a suit filed by a plaintiff on the plea of "ex captio res judicata". It was said, "one suit and one decision is enough for any single dispute". In the words of Spencer Bower, res judicata means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto".

The doctrine of res judicata has been explained in the simplest possible manner by Das Gupta, J. in the case of Satyadhyan Ghosal v. Deorjin Debi16 in the following words:

"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 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."17

14 Gangaprashad v. Banaspati, AIR 1937 Nag 132; Munilal v. Sarvajeet, AIR 1984 Raj 22.

15 Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941: (1960) 3 SCR 590; Daryao v. State of U.P., AIR 1961 SC 1457: (1962) 1 SCR 574; Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627: AIR 1989 SC 2240; Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187: AIR 1990 SC 334; LIC v. India Automobiles & Co., (1990) 4 SCC 286: AIR 1991 SC 884; Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193; Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14: AIR 1994 SC 152.

16 AIR 1960 SC 941: (1960) 3 SCR 590.

17 Ibid, at p. 943 (AIR).

(2) Section 11

Section 11 of the Code of Civil Procedure reads thus:

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

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

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

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

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

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

(3) Nature and scope

The doctrine of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than latter, come to an end.18 The principle is also founded on justice, equity and good conscience which require that a party who has once succeeded on an issue should not be harassed by multiplicity of proceedings involving the same issue19 Section 11 of the Code contains in statutory form, with illuminating explanations very salutary principle of public policy.20 It embodies the rule of conclusiveness and operates as a bar to try the same issue once again. It thereby avoids vexatious litigation.21

(4) Object

The doctrine of res judicata is based on three maxims:

(a) nemo debet bis vexari pro una et eadem causa (no man should be vexed twice for the same cause);

(b) interest reipublicae ut sit finis litium (it is in the interest of the State that there should be an end to a litigation); and

(c) res judicata pro veritate occipitur (a judicial decision must be accepted as correct).

As observed by Sir Lawrence Jenkins22, "the rule of res judicata, while founded on account of precedent, is dictated by a wisdom which is for all times".

Thus, the doctrine of res judicata is the combined result of public policy reflected in maxims (b) and (c) and private justice expressed in maxim (a); and they apply to all judicial proceedings whether civil or criminal. But for this rule there would be no end to litigation and no security for any person, the rights of persons would be involved in endless confusion and great injustice done under the cover of law.23 The principle is founded on justice, equity and good conscience.24

18 Lal Chattel v. Radha Krishan, (1977) 2 SCC 88: AIR 1977 SC 789.

19 Ibid, see also infra, "object".

20 Narayan Prabhu Venkateswara v. Narayana Prabhu Krishna, (1977) 2 SCC 181: AIR 1977 SC 1268.

21 Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14: AIR 1994 SC 152; Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119: AIR 1978 SC 1283.

22 Sheoparsan Singh v. Ramnandan Singh, AIR 1916 PC 78: (1915-16) 43 IA 91.

23 Daryao v. State of U.P., AIR 1961 SC 1457 at pp. 1462: (1962) 1 SCR 574; Satyadhyan Ghosal v. Deorjin Debi, supra; Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 1 SCC 408: AIR 1977 SC 429; Radhasoami Satsang v. CIT, (1992) 1 SCC 659: AIR 1992 SC 377; Sulochana Amma v. Narayanan Nair, supra; Swamy Atmananda v. Sri Ramakrishna Tapovanam, (2005)
10 SCC 51: AIR 2005 SC 2392; Kunjan Nair v. Narayanan Nair, (2004) 3 SCC 277: AIR 2004 SC 1761; State of Haryana v. State of Punjab, (2004) 12 SCC 673.

24 Lal Chand v. Radha Krishan, (1977) 2 SCC 88 at p. 98: AIR 1977 SC 789 at pp. 796.

The leading case on the doctrine of res judicata is the Duchess of Kingstone case25, wherein Sir William de Grey made the following remarkable observations: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; firstly, that 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 on 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."26 In Corpus Juris27 also it has been stated, "Res judicata 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; the other, the hardship to the individual that he should not be vexed twice for the same cause."28

(5) Illustrations

Let us consider few illustrations to understand the doctrine of res judicata:

(1) A sues B for damages for breach of contract. The suit is dismissed. A subsequent suit by A against B for damages for breach of the same contract is barred. A's right to claim damages from B for breach of contract having been decided in the previous suit, it becomes res judicata, and cannot therefore be tried in the subsequent suit. B cannot be vexed twice over for the same cause (breach of contract). Moreover, public policy also requires that there should be an end to a litigation and for that reason, the previous decision must be accepted as correct, lest every decision would be challenged on the ground that it was an erroneous decision and there would be no finality.

25 Smith's Leading cases (13th Edn.) at p. 644.

26 Smith's Leading cases (13th Edn.) at p. 645. See also Daryao v. State of U.P., AIR 1961 SC 1457 at pp. 1462: (1962) 1 SCR 574; Gulam Abbas v. State of U.P., (1982) 1 SCC 71 at pp. 90-93: AIR 1981 SC 2198 at pp. 2212-13.

27 Vol. XXXIV, at p. 743.

28 See also Halsbury's Laws of England (3rd Edn.) Vol. 15 at p. 185; Daryao v. State of U.P., AIR 1961 SC 1457 at p. 1462: (1962) 1 SCR 574; Gulam Abbas v. State of U.P., (1982) 1 SCC 71: AIR 1981 SC 2198.

(2) A sues B for possession of certain properties, on the basis of a sale deed in his favour. B impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.

(3) A sues B, C and D and in order to decide the claim of A, the court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as res judicata in any subsequent suit by any of the defendants against the rest.

(4) A files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed. A cannot thereafter file a fresh petition in the Supreme Court under Article 32 of the Constitution nor can institute a suit in a civil court as such petition or suit would be barred by res judicata.

(5) A sues B for possession of certain property alleging that it has come to his share on partition of joint family property. B's contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by A against B for partition of joint family property is not barred.

(6) A, claiming himself to be the owner of the property files a suit for eviction of tenant B and sub-tenant C which is decreed ex parte by a Small Cause Court. C then files a suit in the civil court on the basis of title. A pleaded res judicata in the light of the decree passed in the former suit. The finding regarding ownership of A will not operate as res judicata inasmuch as title to the property was not directly and substantially in issue in the former suit.

(7) A, a partnership firm, filed a suit against B to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership was not registered as required by the provisions of the Indian Partnership Act, 1932. The firm was thereafter registered and a fresh suit was filed against B on the same cause of action. The suit is not barred by res judicata.

(8) A files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed on the ground that

disputed questions of fact are involved in the petition and alternative remedy is available to the petitioner. A suit in a competent civil court after dismissal of the petition is not barred by res judicata.

(6) History

The rule of res judicata has a very ancient history. It was well understood by Hindu lawyers and Mohammedan jurists. It was known to ancient Hindu Law as Purva Nyaya (former judgment). Under the Roman Law, it was recognised that "one suit and one decision was enough for any single dispute". The doctrine was accepted in the European continent and in the Commonwealth countries.29

At times, the rule worked harshly on individuals. For instance, when the former decision was obviously erroneous. But its working was justified on the great principle of public policy, which required that there must be an end to every litigation. In the event of a wrong decision, "the suffering citizen must appeal to the law-giver and not to the lawyer".30

(7) Extent and applicability

The doctrine of res judicata is a fundamental concept based on public policy and private interest. It is conceived in the larger public interest which requires that every litigation must come to an end. It, therefore, applies to civil suits, execution proceedings, arbitration proceedings, taxation matters, industrial adjudication, writ petitions, administrative orders, interim orders, criminal proceedings, etc.31

(8) Res judicata and rule of law

The doctrine of res judicata is of universal application. In the historic decision of Daryao v. State of U.P.32, the Supreme Court has placed the doctrine of res judicata on a still broader foundation. In that case, the petitioners had filed writ petitions in the High Court of Allahabad under Article 226 of the Constitution and they were dismissed. Thereafter, they filed substantive petitions in the Supreme Court under Article 32 of the Constitution for the same relief and on the same grounds. The respondents raised a preliminary objection regarding maintainability of the petition by contending that the prior decision of the High

29 Lachhmi v. Bhulli, AIR 1927 Lah 289: ILR (1927) 8 Lah 384: 104 IC 849 (FB); Soorjomonee Dayee v. Suddanund Mohapatter, (1873) IA Supp 212 at p. 218 (PC).

30 Garland v. Carlisle, 4 Cl & F 693 at p. 705 (HL) (per Coleridge, J.); see also Sheoparsan Singh v. Ramnandan Singh, AIR 1916 PC 78: (1915-16) 43 IA 91.

31 For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. 1 at pp. 112-309.

32 AIR 1961 SC 1457: (1962) 1 SCR 574.

Court would operate as res judicata to a petition under Article 32. The Supreme Court upheld the contention and dismissed the petitions.
Speaking for the Constitution Bench, Gajendragadkar, J. (as he then was) observed:
"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."33
(emphasis supplied)
The court, in this view of the matter, held that the rule of res judicata applies also to a petition filed under Article 32 of the Constitution and if a petition filed by a petitioner in the High Court under Article 226 of the Constitution is dismissed on merits, such decision would operate as res judicata so as to bar a similar petition in the Supreme Court under Article 32 of the Constitution.
(9) Res judicata and res sub judice34
The doctrine of res judicata differs from res sub judice in two aspects:
(i) whereas res judicata applies to a matter adjudicated upon (res judicatum), res sub judice applies to a matter pending trial (sub judice); and
(ii) res judicata bars the trial of a suit or an issue which has been decided in a former suit, res sub judice bars trial of a suit which is pending decision in a previously instituted suit.
(10) Res judicata and estoppel35
The doctrine of res judicata is often treated as a branch of the law of estoppel.36 Res judicata is really estoppel by verdict or estoppel by judgment (record).37 The rule of constructive res judicata is nothing else but

33 Ibid, at p. 1462 (AIR); see also Sarguja Transport Service v. STAT, (1987) 1 SCC 5: AIR 1987 SC 88; Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra, (1990) 2 SCC 715 at p. 741: AIR 1990 SC 1607.
34 For detailed discussion of "res sub judice" see supra, under that head .
35 S. 115 of the Evidence Act, 1872 provides:
"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".
36 Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd., 1947 AC 46 at p. 56 (PC); Guda Vijayalakshmi v. Guda Ramachandra, (1981) 2 SCC 646 at p. 649: AIR 1981 SC 1143 at p. 1144; Daryao v. State of U.P., AIR 1961 SC 1457: (1962) 1 SCR 574; Swamy Atmananda v. Sri Ramakrislma Tapovanam, (2005) 10 SCC 51: AIR 2005 SC 2392.
37 V. Rajeshwari v. T.C. Saravanabava, (2004) 1 SCC 551; Lachhmi v. Bhulli, AIR 1927 Lah 289: ILR (1927) 8 Lah 384:104 IC 849 (FB).

a rule of estoppel.38 Even then, the doctrine of res judicata differs in essential particulars from the doctrine of estoppel.39

(i) Whereas res judicata results from a decision of the court, estoppel flows from the act of parties.

(ii) The rule of res judicata is based on public policy, viz., that there should be an end to litigation. Estoppel, on the other hand, proceeds upon the doctrine of equity, that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of the other's position. In other words, while res judicata bars multiplicity of suits, estoppel prevents multiplicity of representations.

(iii) Res judicata ousts the jurisdiction of a court to try a case and precludes an enquiry in limine (at the threshold); estoppel is only a rule of evidence and shuts the mouth of a party.

(iv) Res judicata prohibits a man averring the same thing twice in successive litigations, while estoppel prevents him from saying one thing at one time and the opposite at another.

(y) The rule of res judicata presumes conclusively the truth of the decision in the former suit, while the rule of estoppel prevents a party from denying what he has once called the truth. In other words, while res judicata binds both the parties to a litigation, estoppel binds only that party who made the previous statement or showed the previous conduct.

(11) Res judicata and stare decisis

"Res judicata" means "a thing adjudicated"; "a case already decided"; or "a matter settled by a decision or judgment".40 "Stare decisis" means "to stand by decided cases", "to uphold precedents", "to maintain former adjudications", or "not to disturb settled law".41 "Those things which have been so often adjudged ought to rest in peace."42

Res judicata and stare decisis are members of the same family. Both relate to adjudication of matters. Both deal with final determination of contested questions and have the binding effect in future litigation.

38 Batul Begam v. Hem Chandar, AIR 1960 All 519 at p. 521; Mohan Ram v. T.L. Sundararamier, AIR 1960 Mad 377 (FB).

39 Woodroffe and Ameer Ali, Law of Evidence in India (1981 Edn.) Vol. 4 at p. 2936. See also Sita Ram v. Amir Begam, ILR (1886) 8 All 324 at p. 332; Casamally v. Currimbhai, (1911) 13 BLR 717 at p. 760. For detailed discussion of the doctrine of estoppel, see, Author's Lectures on Administrative Law (2008) Lecture X.

40 Concise Oxford English Dictionary (2002) at p. 1218; P.R. Aiyar, Advanced Law Lexicon (2005) Vol. IV at pp. 4090-91.

41 Concise Oxford English Dictionary (2002) at p. 1400; P.R. Aiyar, Advanced Law Lexicon, (2005) Vol. IV at pp. 4456.

42 Lord Coke.

Both the doctrines are the result of decisions of a competent court of law and based on public policy.
There is, however, distinction between the two. Whereas res judicata is based upon conclusiveness of judgment and adjudication of prior findings, stare decisis rests on legal principles. Res judicata binds parties and privies, while stare decisis operates between strangers also and binds courts from taking a contrary view on the point of law already decided. Res judicata relates to a specific controversy, stare decisis touches legal principle. Res judicata presupposes judicial finding upon the same facts as involved in subsequent litigation between the same parties. Stare decisis applies to same principle of law to all parties.

(12) Res judicata and splitting of claims43

The doctrine of res judicata also differs from Order 2 Rule 2 of the Code; firstly, the former refers to a plaintiff's duty to bring forward all the grounds of attack in support of his claim, while the latter only requires a plaintiff to claim all reliefs flowing from the same cause of action. Secondly, while the former rule refers to both the parties, plaintiff as well as defendant, and precludes a suit as well as a defence, the latter refers only to a plaintiff and bars a suit.44

(13) Res judicata whether technical

No doubt, the rule of res judicata has some technical aspects. For instance, the rule of constructive res judicata is really technical in nature. Similarly, pecuniary or subjectwise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in subsequent litigation can be said to be technical. But the principle on which the doctrine is founded rests on public policy and public interest.45

43 Or. 2 R. 2 which prohibits splitting of claims reads as under:
"(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) 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) 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".

44 For detailed discussion, see infra, Or. 2 R. 2; see also Inacio Martins v. Narayan Hari Naik, (1993) 3 SCC 123: AIR 1993 SC 1756; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735: AIR 1996 SC 2367.

45 Daryao v. State of U.P., AIR 1961 SC 1457: (1962) 1 SCR 574.

(14) Section 11 whether mandatory

Section 11 is mandatory. The plea of res judicata is a plea of law which touches the jurisdiction of a court to try the proceedings. A finding on that plea would oust the jurisdiction of a court. If the requirements of Section 11 are fulfilled, the doctrine of res judicata will apply and even a concession made by an advocate will not bind a party.46

(15) Section 11 whether exhaustive

It is well established that the doctrine of res judicata codified in Section 11 of the Code of Civil Procedure is not exhaustive47 Section 11 applies to civil suits. But apart from the letter of the law, the doctrine has been extended and applied since long in various other kinds of proceedings and situations by courts in England, India and other countries.48

In the case of Lal Chand v. Radha Krishan49, Chandrachud, J. (as he then was) observed:

"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 principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end."50 (emphasis supplied)

(16) Interpretation

The doctrine of res judicata should be interpreted and applied liberally. Since the rule is founded on high public policy and upon the need of giving finality to judicial decisions, a strict and technical construction

46 Talluri Venkata v. Thadikonda Kotiswara, AIR 1937 PC 1: (1936-37) 641A17; Pandurang Dhondi v. Maruti Hari, AIR 1966 SC 153: (1966) 1 SCR 102.

47 Narayanan Chettiar v. Annamalai Chettiar, AIR 1959 SC 275 at p. 279: 1959 Supp (1) SCR 237; Daryao v. State of U.P., AIR 1961 SC 1457: (1962) 1 SCR 574; Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993 at p. 999: (1964) 5 SCR 946; Gulabchand Chhotalal Parikh v. State of Gujarat, AIR 1965 SC 1153: (1965) 1 SCR 547; Union of India v. Nanak Singh, AIR 1968 SC 1370 at p. 1372: (1968) 2 SCR 887; State of Punjab v. Bua Das Kaushal, (1970) 3 SCC 656 at p. 657: AIR 1971 SC 1676 at p. 1677; Lal Chand v. Radha Krislwn, (1977) 2 SCC 88 at pp. 97-98: AIR 1977 SC 789 at pp. 795-96; State of U.P. v. Nawab Hussain, (1977) 2 SCC 806: AIR 1977 SC 1680; Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119: AIR 1978 SC 1283; Gangabai v. Chhabubai, (1982) 1 SCC 4: AIR 1982 SC 20; Gulam Abbas v. State of U.P., (1982) 1 SCC 71 at pp. 90-93: AIR 1981 SC 2198 at pp. 2212-13; Radhasoami Satsang v. CIT, (1992) 1 SCC 659: AIR 1992 SC 377.

48 Halsbury's Laws of England (3rd Edn.) Vol. 15 at p. 185; Corpus Juris, Vol. 34 at p. 743; Daryao case, supra; Gulam Abbas, supra; C.P. Trust case, supra.

49 (1977) 2 SCC 88: AIR 1977 SC 789.

50 Ibid, at pp. 97-98 (SCC): at pp. 795-96 (AIR).

should not be adopted. In deciding whether the doctrine would apply, its substance and not the form should be considered.51

(17) Waiver

The plea of res judicata is not one which affects the jurisdiction of the court. The doctrine of res judicata belongs to the domain of procedure52 and the party may waive the plea of res judicata.53 Similarly, the court may decline to go into the question of res judicata on the ground that it has not been properly raised in the proceedings or in issues.53 The plea is one which could be waived.

(18) Conditions

It is not every matter decided in a former suit that will operate as res judicata in a subsequent suit. To constitute a matter as res judicata under Section 11, the following conditions must be satisfied:54

(I) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit (Explanation I). (Explanation VII is to be read with this condition.)

(II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. (Explanation VI is to be read with this condition.)

(III) Such parties must have been litigating under the same title in the former suit.

(IV) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.55 (Explanations II and VIII are to be read with this condition.)

51 Sheoparsan Singh v. Ramnandan Singh, AIR 1916 PC 78: (1915-16) 43 IA 91; Lachhmi v. Bhulli, AIR 1927 Lah 289: ILR (1927) 8 Lah 384:104 IC 849 (FB); Daryao v. State of U.P., AIR 1961 SC 1457: (1962) 1 SCR 574.

52 Mathura Prasad v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2375; Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193; Isabella Johnson v. M.A. Susai, (1991) 1 SCC 494: AIR 1991 SC 993.

53 Medapati Surayya v. Tondapu Bala Gangadhara, AIR 1948 PC 3 at p. 7; Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 at p. 1335: (1966) 3 SCR 300; Manicka Nadar v. Sellathamal, 1969 SCD 955 at p. 966: AIR 1969 SC 17; State of Punjab v. Bua Das Kaushal,
(1970) 3 SCC 656 at p. 657-58: AIR 1971 SC 1676 at p. 1677-78; LIC v. India Automobiles & Co., (1990) 4 SCC 286: AIR 1991 SC 884.

54 Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 at p. 1334: (1966) 3 SCR 300; Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 at p. 790: AIR 1976 SC 1569 at p. 1576; Jaswant Singh v. Custodian, (1985) 3 SCC 648 at p. 655-56: AIR 1985 SC 1096 at p. 1101; Saroja v. Chinnusamy, (2007) 8 SCC 329: AIR 2007 SC 3067.

55 By newly added Expln. VIII, this condition is now not necessary.

(V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit. (Explanation V is to be read with this condition.)

I Matter in issue

(i) General

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.

(ii) Meaning

The expression "matter in issue" means the rights litigated between the parties, i.e., the facts on which the right is claimed and the law applicable to the determination of that issue.56 Such issue may be an issue of fact, issue of law or mixed issue of law and fact.

(iii) Classification

Matters in issue may be classified as under:

Matters in issue

Matters directly and substantially in issue Matters collaterally or incidentally in issue

Actually in issue Constructively in issue

(iv) Matter directly and substantially in issue: Explanation III A matter directly and substantially in issue in a former suit will operate as res judicata in a subsequent suit.

"Directly" means directly, at once, immediately, without intervention. The term has been used in contradistinction to "collaterally or incidentally". A fact cannot be said to be directly in issue if the judgment stands whether that fact exists or does not exist. No hard and fast rule can be laid down as to when a matter can be said to be directly in issue and it depends upon the facts and circumstances of each case.57

56 Mathura Prasad v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613 at p. 619: AIR 1971 SC 2355 at p. 2359.

57 Amalgamated Coalfields Ltd. v. janapada Sabha, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172; Isher Singh v. Sarwan Singh, AIR 1965 SC 948 at p. 949; Lachhman v. Saraswati, AIR 1959 Bom 125; Ramadhar Shriwas v. Bhagwandas, (2005) 13 SCC 1.

"Substantially" means essentially materially or in a substantial manner. It is something short of certainty but indeed more than mere suspicion. It means "in effect though not in express terms".58

A matter can be said to be substantially in issue if it is of importance for the decision of a case. No rule of universal application can be laid down as to when a matter can be said to be substantial except when the parties by their conduct treated it as a substantial one.59

Illustrations

1. A sues B for rent due. The defence of B is that no rent is due. Here the claim for rent is the matter in respect of which the relief is claimed. The claim of rent is, therefore, a matter directly and substantially in issue.

2. A sues B for possession of certain properties on the basis of a sale deed in his favour. B impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.

The question whether or not a matter is "directly and substantially in issue" would depend upon whether a decision on such an issue would materially affect the decision of the suit. The question has to be determined with reference to the plaint, written statement, issues and judgment. No rule of universal application can be laid down and the question should be decided on the facts of each case.

When there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues or points will be res judicata. The Supreme Court60 has rightly observed, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decisions on more than one point—each of which by itself would be sufficient for the ultimate decision—the decision on each of these points operates as res judicata between the parties."61

Illustrations

1. A sues B (i) for a declaration of title to certain lands; and (ii) for the rent of those lands. B denies A's title to the lands and also contends that no rent is due. In this case, there are two matters in respect of which relief is claimed, viz. (i) the title to the lands; and (ii) the claim for rent. Both these matters are, therefore, directly and substantially in issue.

2. A sues B for rent for the year 1989-90 alleging that B was liable to pay it. B applied for time to file the written statement, which was refused. The only issue

58 Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at pp. 2248-49; Lonankutty v. Thomman, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649.

59 Ibid, see also Krishna Chendra v. Challa Ramanna, AIR 1932 PC 50.

60 Vithal Yeshwant v. Shikandarkhan, AIR 1963 SC 385: (1963) 2 SCR 285.

61 Ibid, at p. 388 (AIR); see also supra, Pandurang Ramchandra v. Shanti Bai Ramchandra; Ramesh Chandra v. Shiv Charan Dass, 1990 Supp SCC 633: AIR 1991 SC 264; Junior Telecom Officers Forum v. Union of India, 1993 Supp (4) SCC 693: AIR 1993 SC 787.

raised by the court was regarding the amount of rent and the suit was decreed. A files another suit against B for rent for the year 1990-91. B contends that he is not liable to pay rent. The question about B's liability for all years was not alleged and decided in the previous suit and the point was, therefore, not directly and substantially in issue in the previous suit. The defence is, therefore, not barred by res judicata.

(v) Matter actually in issue

A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits.62

(vi) Matter constructively in issue: Explanation IV

A matter can be said to be constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit.63

A matter directly and substantially in issue may again be so either actually or constructively. A matter is actually in issue when it is alleged by one party and denied or admitted by the other (Explanation

III) . It is constructively in issue when it might and ought to have been made a ground of attack or defence in the former suit (Explanation

IV) . Explanation IV to Section 11 by a deeming provision lays down that any matter which might and ought to have been made a ground of defence or attack in the former suit, but which has not been made a ground of attack or defence, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence which were open to him. In other words, all the grounds of attack and defence must be taken in the suit. A party is bound to bring forward his whole case in respect of the matter in issue and cannot abstain from relying or giving up any ground which is in controversy and for consideration before a Court and afterwards make it a cause of action for a fresh suit.64

62 Lonankutty v. Thomman, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649; Mathura Prasad v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2357.

63 See, Expln. IV to Section 11.

64 Nirmal Enem v. Jahan Ara, (1973) 2 SCC 189 at p. 192: AIR 1973 SC 1406 at p. 1409; Jaswant Singh v. Custodian, (1985) 3 SCC 648: AIR 1985 SC 1096; Forward Construction Co. v. Prabhat Mandal (Regd.), (1986) 1 SCC 100: AIR 1986 SC 391; Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra, (1990) 2 SCC 715 at p. 741: AIR 1990 SC 1607; P.K. Vijayan v. Kamalakshi Amma, (1994) 4 SCC 53: AIR 1994 SC 2145; Ramadhar Shrivas v. Bhagwandas, (2005) 13 SCC 1; State of Karnataka v. All India Manufacturers Organisation, (2006) 4 SCC 683: AIR 2006 SC 1846.

(vii) Constructive res judicata

The rule of direct res judicata is limited to a matter actually in issue alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive res judicata engrafted in Explanation IV to Section 11 of the Code is an "artificial form of res judicata", and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. That clearly is opposed to considerations of public policy on which the doctrine of res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by courts would also be materially affected.65 Thus, it helps in raising the bar of res judicata by suitably construing the general principles of subduing a cantankerous litigant. That is why this rule is called constructive res judicata, which, in reality, is an aspect or amplification of the general principles of res judicata.66

As rightly observed by Somervell, L.J., "I think that...it would be accurate to say that res judicata ... 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."67

(emphasis supplied)

In the case of Workmen v. Board of Trustees, Cochin Port Trust,68, the Supreme Court explained the principle of constructive res judicata in the following words:

"If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is

65 Devilal Modi v. STO, AIR 1965 SC 1150: (1965) 1 SCR 686.
66 State of U.P. v. Nawab Hussain, (1977) 2 SCC 806: AIR 1977 SC 1680.
67 Greenhalgh v. Mallard, (1947) 2 All ER 255 at p. 257.
68 (1978) 3 SCC 119: AIR 1978 SC 1283.

deemed to have been constructively in issue and, therefore, is taken as decided."69 (emphasis supplied)

Illustrations

1. A sues B for possession of property on the basis of ownership. The suit is dismissed. A cannot thereafter claim possession of property as mortgagee as that ground ought to have been taken in the previous suit as a ground of attack.
2. A files a suit against B for declaration that he is entitled to certain lands as heir of C. The suit is dismissed. The subsequent suit, claiming the same property on the ground of adverse possession, is barred by constructive res judicata.
3. A files a suit against B to recover money on a pronote. B contends that the promissory note was obtained from him by undue influence. The objection is overruled and suit is decreed. B cannot challenge the promissory note on the ground of coercion or fraud in subsequent suit, inasmuch as he ought to have taken that defence in the former suit.
4. A sues B to recover damages for a breach of contract and obtains a decree in his favour. B cannot afterwards sue A for recession of contract on the ground that it did not fully represent the agreement between the parties, since that ground ought to have been taken by him in the previous suit as a ground of defence.
5. A sues B for possession of certain property alleging that it has come to his share on partition of joint family property. B's contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by A against B for partition of joint family property is not barred.
6. As a mortgagor A sues B for redemption of certain property alleging that he has mortgaged it with possession to B. The mortgage is not proved and the suit is dismissed. A files another suit against B for possession of the same property claiming to be the owner thereof. The suit is not barred.
7. A sues B to recover certain property alleging that B was holding the property under a lease, which had expired. The lease is not proved and the suit is dismissed. A subsequent suit by A against B on the basis of general title is not barred.
8. A sues B for a declaration that he is entitled to certain property as an heir of X. The suit is dismissed. A files another suit for injunction on the ground that he had become an owner of the property by adverse possession. This ground was available to him even at the time of previous suit but was not taken at that time. The subsequent suit is barred.
9. A sues B for a declaration that he is the owner of certain property. The suit is dismissed holding that he is not the owner. At the time of the suit A is in adverse possession of the property but has not perfected his title. After the statutory period, A files another suit on the basis of his title by adverse possession. The suit is not barred.

In State of U.P. v. Nawab Hussain70, A, a sub-inspector of police, was dismissed from service by the D.I.G. He challenged the order of dismissal by filing a writ petition in the High Court on the ground that he was not afforded a reasonable opportunity of being heard before the

69 Ibid, at pp. 124-25 (SCC): at p. 1287 (AIR). See also Ahmedabad Mfg. Co. v. Workmen, (1981) 2 SCC 663: AIR 1981 SC 960; Pondicherry Khadi & Village Industries Board v. P. Kulothangan, (2004) 1 SCC 68: AIR 2003 SC 4701.

70 (1977) 2 SCC 806: AIR 1977 SC 1680.

passing of the order. The contention was, however, negatived and the petition was dismissed. He then filed a suit and raised an additional ground that since he was appointed by the I.G.P., the D.I.G. had no power to dismiss him. The State contended that the suit was barred by constructive res judicata. The trial court, the first appellate court as well as the High Court held that the suit was not barred by res judicata. Allowing the appeal filed by the State, the Supreme Court held that the suit was barred by constructive res judicata as the plea was within the knowledge of the plaintiff and could well have been taken in the earlier writ petition. The same principle applies to pleas which were taken but not pressed at the time of hearing.71

Explaining the doctrine in the decision of Forward Construction Co. v. Prabhat Mandal (Regd,)72, the Supreme Court observed:

"An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructive in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."73

(emphasis supplied)

In the leading case of Devilal Modi v. STO74, A challenged the validity of an order of assessment under Article 226. The petition was dismissed on merits. An appeal against that order was also dismissed by the Supreme Court on merits. A again filed another writ petition in the same High Court against the same order of assessment by taking some additional grounds. The High Court dismissed the petition on merits. On appeal, the Supreme Court held that the petition was barred by the principle of constructive res judicata.

Speaking for the court, Gajendragadkar, C.J. observed, "[though the courts dealing with the question of the infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of res judicata altogether in dealing with

71 Nirmal Enem v. Jahan Ara, (1973) 2 SCC 189 at p. 192: AIR 1973 SC 1406 at p. 1409.
72 (1986) 1 SCC 100: AIR 1986 SC 391.
73 Ibid, at p. 112 (SCC): at pp. 397-98 (AIR).
74 AIR 1965 SC 1150: (1965) 1 SCR 686.

writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgment pronounced by this Supreme Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration."75

Dealing with the possibility of abuse of process of law, the learned Chief Justice made the following remarkable observations which are worth quoting:

"[In the present case the appellants sought to raise additional points when he brought his appeal before this Court by special leave; that is to say, he did not take all the points in the writ petition and thought of taking new points in appeal. When leave was refused to him by this Court to take those points in appeal, he filed a new petition in the High Court and took those points, and finding that the High Court decided against him on the merits of those points, he has come to this Court; but that is not all.

At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive res judicata is not applied to such proceedings a party can file as many petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected."76

(emphasis supplied)

(viii) Might and ought

The primary object of Explanation IV is to cut short the litigation by compelling the parties to the suit to rely upon all grounds of attack or defence which are available to them. If the plaintiff or defendant fails to take up such ground which he "might" and "ought" to have taken, it would be treated to have been raised and decided.77

75 Ibid, at p. 1153 (AIR).

76 Ibid, at p. 1153 (AIR); see also, the following observations of Lord Shaw in Hoystead v. Commr. of Taxation, 1926 AC 155: 1925 All ER Rep 56 at p. 62 (PC) "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted." (emphasis supplied)

77 Nirmal Enem v. Jahan Ara, (1973) 2 SCC 189: AIR 1973 SC 1406; Devilal v. STO, AIR 1965 SC 1150; Gulabchand Chhotalal Parikh v. State of Gujarat, AIR 1965 SC 1153: (1965) 1 SCR 547; State of U.P. v. Nawab Hussain, (1977) 2 SCC 806: AIR 1977 SC 1680; Workmen

The expression "might" and "ought" are of wide import. The word "might" presupposes the party affected had knowledge of the ground of attack or defence at the time of the previous suit. "Ought" compels the party to take such ground. The word "and" between the terms "might" and "ought" must be read as conjunctive (and) and not disjunctive (or). And unless it is proved that the matter might and ought to have been raised in the previous litigation, there is no constructive res judicata.78
The question whether a matter "might" have been made a ground of attack or defence in a former suit rarely presents any difficulty. Whether it "ought" to have been made a ground of attack or defence depends upon the facts of each case. No rigid rule can be laid down in this regard. One of the tests, however, is to see whether by raising the question the decree which was passed in a previous suit should have been defeated, varied or in any way affected. If the question is of such a nature, it must be deemed to be a question which ought to have been raised in the former suit.79

(ix) Matter collaterally or incidentally in issue

The words "directly and substantially in issue" have been used in Section 11 in contradistinction to the words "collaterally or incidentally in issue". Decisions on matters collateral or incidental to the main issues in a case will not operate as res judicata. A collateral or incidental issue means an issue which is ancillary to the direct and substantive issue. It refers to a matter in respect of which no relief is claimed and yet it is put in issue to enable a court to adjudicate upon the matter which is directly and substantially in issue. The expression "collaterally or incidentally in issue" implies that there is another matter which is "directly and substantially in issue".

Illustration

A sues B for the rent due. B pleads abatement of rent on the ground that the actual area of the land is less than that mentioned in the lease deed. The court, however, finds the area greater than that shown in the lease deed. The finding as to the excess area, being ancillary and incidentally to the direct and substantial issue, is not res judicata.

v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119: AIR 1978 SC 1283; P.K. Vijayan v. Kamalakshi Amma, (1994) 4 SCC 53: AIR 1994 SC 2145.

78 Ibid, see also Govt. of the Province of Bombay v. Pestonji Ardeshir Wadia, AIR 1949 PC 143: (1948-49) 76 IA 85; Ramesh Chand v. Board of Revenue, AIR 1973 All 120 (FB); Durga Parshad v. Custodian of Evacuee Property, AIR 1960 Punj 341: (1960) 2 Punj 159 (FB).

79 Mulla, Civil Procedure Code (1995) Vol. 1 at pp. 118-19; Kameswar Pershad v. Rajkumari Ruttun, (1891-92) 19 IA 234: ILR (1893-94) 20 Cal 79 at p. 85 (PC); Shrimut Rajab v. Katama, (1866) 11 IA 50.

Thus, in Gangabai v. Chhabubai80, a regular civil suit was filed by A against B for a declaration that she was the owner of the property and the so-called sale deed said to have been executed by her in favour of B was not real and genuine, and also for possession of property on the ground of title. B contended that he had become the owner of the property and the decree for arrears of rent had been previously passed by the Court of Small Causes in his favour, negativing the contention of A that she was the owner. She had been held to be the tenant. The subsequent suit, it was contended, was, therefore, barred by the doctrine of res judicata.
Negativing the contention, the Supreme Court observed:
"It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes, res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata "81 (emphasis supplied)
Accordingly, the Supreme Court held that the finding rendered by the Court of Small Causes in the suit filed by B that the document executed by A was a sale deed cannot operate as res judicata in the subsequent suit (suit filed by A against B on the basis of title).
(x) "Matter directly and substantially in issue″ and "matter collaterally or incidentally in issue": Distinction In order to operate res judicata, a matter must have been directly and substantially in issue in a former suit and not merely collaterally or incidentally in issue therein. It is, therefore, necessary to draw a distinction between a matter "directly and substantially in issue" and a matter "collaterally or incidentally in issue".
A matter is "directly and substantially in issue" if it is necessary to decide it in order to adjudicate the principal issue and if the judgment is based upon that decision.82

80 (1982) 1 SCC 4: AIR 1982 SC 20.
81 Gangabai v. Chhabubai, (1982) 1 SCC 4: AIR 1982 SC 20; see also supra, LIC v. India Automobiles & Co., supra; Rameshwar Dayal v. Banda, (1993) 1 SCC 531.
82 Amalgamated Coalfields Ltd. v. Janapada Sabha, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172.

A matter is "collaterally or incidentally in issue" if it is necessary to decide it in order to grant relief to a plaintiff or to a defendant and the decision on such issue either way does not affect the final judgment.83

Whether a matter was directly and substantially in issue or merely collaterally or incidentally in issue has to be determined with reference to plaint, written statement, issues and judgment in the suit. Such question must be decided on the facts of each case and no "cut and dried" test can be laid down.84

(xi) Findings on several issues

Where there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues will operate as res judicata.

The Supreme Court85 has stated, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decision on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as res judicata between the parties".

(xii) Findings on matter not in issue

If a finding is recorded by a court in a former suit on a question not in issue between the parties, it will not operate as res judicata. The same result will follow if the matter is not dealt with by the court or merely an opinion has been expressed over a question which did not directly arise in the suit.86

(xiii) "Suit": Meaning

The expression "suit" has not been defined in the Code, but it is a proceeding which is commenced by presentation of a plaint.87 In Hansraj Gupta v. Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.8S, Their Lordships of the Privy Council have defined the expression thus, "The word 'suit' ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint."

83 Ibid, see also Isher Singh v. Sarwan Singh, AIR 1965 SC 948 at p. 950.

84 Ishar Singh v. Sarwan Singh, supra.

85 Vithal Yeshwant v. Shikandarkhan, AIR 1963 SC 385: (1963) 2 SCR 285; Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627: AIR 1989 SC 2240; Junior Telecom Officers Forum v. Union of India, 1993 Supp (4) SCC 693: AIR 1993 SC 787.

86 Bejoy Gopal v. Pratul Chandra, AIR 1953 SC 153: 1953 SCR 930; Ragho Prasad v. Shri Krishna, AIR 1969 SC 316: (1969) 1 SCR 834; Ram Nandan Prasad Narayan Singh v. Kapildeo Ramjee, AIR 1951 SC 155:1951 SCR 138.

87 S. 26.

88 AIR 1933 PC 63 at p. 64: (1932-33) 60 IA 13.

In Pandumng Ramchandra v. Shantibai Ramchandra89, the Supreme Court has stated, "In its comprehensive sense the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between the parties in a court of justice the proceeding by which the decision of the court is sought may be a suit." Formerly, looking to the legislative background of Section 11, the expression "suit" was construed literally and grammatically including the whole of the suit and not a part thereof or a material issue arising therein. But by the Amendment Act of 1976, a more extensive meaning is given to the connotation "suit" and now the mode of a proceeding is not material. At the same time, however, if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11. Again, the word "suit" in Section 11 means proceedings in a court of first instance as distinguished from proceedings in an appellate court, though the general principles of res judicata apply to appellate proceedings also.90

(xiv) Former suit: Explanation I

Section 11 provides that no court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided. Explanation I to Section 11 provides that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto91 It is not the date on which the suit is filed that matters but the date on which the suit is decided; so that even if a suit was filed later, it will be a former suit within the meaning of Explanation I if it has been decided earlier92

(xv) "Issue": Meaning

Section 11 bars trial of any suit as well as an issue which had been decided in a former suit. Issues are of three kinds: (z) Issues of fact;

(ii) Issues of law; and (iii) Mixed issues of law and fact. A decision on an issue of fact, however erroneous it may be, constitutes res judicata between the parties to the previous suit, and cannot be reagitated in

89 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at p. 2248; Kailash Nath v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd., (2003) 4 SCC 305: AIR 2003 SC 1886.

90 Lachhmi v. Bhulli, AIR 1927 Lah 289: ILR (1927) 8 Lah 384:104 IC 849 (FB).

91 Lonankutty v. Thomman, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649; Venkateshwara v. Narayana Prabhu, (1977) 2 SCC 181 at p. 188: AIR 1977 SC 1268 at p. 1273.

92 Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 at p. 1334: (1966) 3 SCR 300; R. Viswanathan v. Rukn-ul-Mulk Syed Abdul, AIR 1963 SC 1 at p. 19: (1963) 3 SCR 22.

collateral proceedings.93 A mixed issue of law and fact also, for the same reasons, operates as res judicata94 But there were conflicting views on the question as to how far a decision on a question of law would operate as res judicata.95

But the conflict was set at rest by the powerful pronouncement of the Supreme Court in the case of Mathura Prasad v. Dossibai N.B. Jeejeebhoy96, wherein after considering the case-law on the point, the court held that generally a decision of a competent court even on a point of law operates as res judicata.97 However, a pure question of law unrelated to facts which gives rise to a right does not operate as res judicata. Thus, when the cause of action is different, or when the law has since the earlier decision been altered by a competent authority, or when the decision relates to the jurisdiction of a Court to try the earlier proceeding, or where the earlier decision declared valid a transaction which is prohibited by law, the decision does not operate as res judicata in a subsequent proceeding.

A reference may be made to Avtar Singh v. Jagjit Singh98, wherein a peculiar problem arose. In a suit filed by A in a civil court, a preliminary contention regarding jurisdiction of the Court was taken by B. The objection was upheld and the plaint was returned to the plaintiff for presentation to the Revenue Court. When A approached the Revenue Court, it returned the petition holding that the Revenue Court had no jurisdiction. Once again, A filed a civil suit in a civil court. It was contended by B that the suit was barred by res judicata. The Court, though it sympathised with the dilemma wherein the plaintiff was placed and was driven from pillar to post, dismissed the suit upholding the contention of the defendant. The Court stated, "If defendant does not appear and the Court on its own returns the plaint on the ground of lack of jurisdiction the order in a subsequent suit may not operate as res judicata but if the defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as res judicata in a subsequent suit although the reasons for its decisions may not be so."99

93 Mathura Prasad v. Dossibai N.B. Jeejeebhoy, infra. See also Rajendra Jha v. Labour Court, 1984 Supp SCC 520 at pp. 526-27: AIR 1984 SC 1696 at p. 1699-1700.

94 Mathura Prasad v. Dossibai N.B. Jeejeebhoy, infra; Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193; Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187: AIR 1990 SC 334.

95 Ibid, see also Mohanlal Goenka v. Benoy Krishna, AIR 1953 SC 65 at p. 72-73: 1953 SCR 377; State of W.B. v. Hemant Kumar, AIR 1966 SC 1061 at p. 1066:1963 Supp (2) SCR 542; Avtar Singh v. Jagjit Singh, (1979) 4 SCC 83.

96 (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2357-58.

97 Ibid, at p. 617 (SCC): at p. 2337 (AIR).

98 (1979) 4 SCC 83: AIR 1979 SC 1911.

99 Ibid, at p. 84 (SCC): at p. 1912 (AIR).

It is submitted that the view taken by the Supreme Court in Avtar Singh98 is erroneous and does not lay down correct law. As stated above, a pure question of law unrelated to the facts and touching the jurisdiction of a court, does not operate as res judicata between the same parties in a subsequent suit. Avtar Singh98 was decided by a Division Bench of two judges. Unfortunately, Mathura Prasad96 which was decided earlier and that too by a Division Bench of three judges was not brought to the notice of the Court. Thus, Avtar Singh98 was decided per incurium and cannot be said to be good law.100

It is submitted that the view taken by the Supreme Court in Mathura Prasad v. Dossibai N.B. Jeejeebhoy101 is correct. The following observations of Shah, J. (as he then was) lay down the correct principle of law and are, therefore, worth quoting:

"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."102 (emphasis supplied)

100 Sushil Kumar v. Gobind Ram, (1990) 1 SCC 193 at pp. 205-06; Isabella Johnson v. M.A. Susai, (1991) 1 SCC 494 at p. 496: AIR 1991 SC 993 at p. 995.

101 (1970) 1 SCC 613. AIR 1971 sc 2355.

102 Mathura Prasad v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613 at p. 629: AIR 1971 SC 2355 at p. 2359; see also, observations of Rankin, C.J. in Tarini Charan v. Kedar Nath, AIR 1928 Cal 777: ILR 56 Cal 723; Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; Jaisingh v. Mamanchand, (1980) 3 SCC 162 at p. 167-69: AIR 1980 SC 1201; Rajendra Jha case, supra-, Kirit Kumar v. Union of India, (1981) 2 SCC 436: AIR 1981SC 1621; Sonepat Coop. Sugar Mills Ltd. v. Ajit Singh, (2005) 3 SCC 232: AIR 2005 SC 1050.

II Same parties

(i) General

The second condition of res judicata is that the former suit must have been a suit between the same parties or between the parties under whom they or any of them claim. This condition recognises the general principle of law that judgments and decrees bind the parties and privies.103 Therefore, when the parties in the subsequent suit are different from the former suit, there is no res judicata.

(ii) Illustrations

1. A sues B for rent. B contends that A is not the landlord, and the suit is dismissed. A subsequent suit either by A or by X claiming through A is barred by res judicata.

2. A sues B for rent. B contends that C and not A is the landlord. A fails to prove his title and the suit is dismissed. A then sues B and C for a declaration of his title to the property. The suit is not barred as the parties in both the suits are not the same.

(iii) Party: Meaning

A "party" is a person whose name appears on the record at the time of the decision. Thus, a person who has intervened in the suit is a party, but a party to the suit whose name is struck off, or who is discharged from the suit or who dies pending the suit but whose name continues on record erroneously is not a party. A party may be a plaintiff or a defendant.

(iv) Res judicata between co-defendants

As a matter may be res judicata between a plaintiff and a defendant, similarly, it may be res judicata between co-defendants and co-plaintiffs also. An adjudication will operate as res judicata between co-defendants if the following conditions are satisfied:

(1) There must be a conflict of interest between co-defendants;

(2) It must be necessary to decide that conflict in order to give relief to the plaintiff;

(3) The question between co-defendants must have been finally decided; and

(4) The co-defendants were necessary or proper parties in the former suit.

If these conditions are satisfied, the adjudication will operate as res judicata between co-defendants.104

103 "Res inter alios acta alteri nocere non debet" (Things done between strangers ought not to injure anyone).

104 Munni Bibi v. Tirloki Nath, AIR 1931 PC 114: (1930-31) 58 IA 158; Iftikhar Ahmed v. Syed Meharban Ali, (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751; Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332: (1966) 3 SCR 300; State of Gujarat v. Meghji Pethraj

Illustration
A sues B, C and D and in order to decide the claim of A, the Court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as res judicata in any subsequent suit by any of the defendants against the rest.
The test for res judicata between co-defendants has been laid down in the case of Cottingham v. Earl of Shrewsbury105 in the following words: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."106 In Mahboob Sahab v. Syed Ismail107, the Supreme Court added a word of caution while applying the doctrine of res judicata between co-defendants by stating, "The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened."108 (emphasis supplied)

(v) Res judicata between co-plaintiffs

Just as a matter may be res judicata between co-defendants, so also it may be res judicata between co-plaintiffs. If there is a conflict of interest between plaintiffs and it is necessary to resolve the same by a court in order to give relief to a defendant, and the matter is in fact decided, it will operate as res judicata between co-plaintiffs in the subsequent suit.109

Shah Charitable Trust, (1994) 3 SCC 552; Mahboob Sahab v. Syed Ismail, (1995) 3 SCC 693: AIR 1995 SC 1205; Makhija Construction & Engg. (P) Ltd. v. Indore Development Authority, (2005) 6 SCC 304: AIR 2005 SC 2499; Amarendra Komalam v. Usha Sinha, (2005) 11 SCC 251: AIR 2005 SC 2758.

105 (1843) 3 Hare 627; see also supra, Mahboob Sahab.

106 Ibid, at p. 638. See also Munni Bibi v. Tirloki Nath, AIR 1931 PC 114 at p. 117: (1930- 31) 58 IA 158; Kshiroda v. Debendra Nath, AIR 1957 Cal 200.

107 (1995) 3 SCC 693: AIR 1995 SC 1205.

108 Ibid, at p. 699 (SCC): at p. 1209 (AIR) (per K. Ramaswamy, J.); See also Saroja v. Chinnusamy, (2007) 8 SCC 329: AIR 2007 SC 3067.

109 Iftikhar Ahmed v. Syed Meharban Ali, (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751.

(vi) Pro forma defendant

A defendant to a suit against whom no relief is claimed is called a pro forma defendant. A person may be added as a pro forma defendant in a suit merely because his presence is necessary for a complete and final decision of the questions involved in the suit.110 In such a case, since no relief is sought against him, a finding does not operate as res judicata in a subsequent suit against him.111 On the other hand, the fact that the party is described as a pro forma defendant or that no relief is claimed against him is, by itself, not sufficient to avoid the bar of res judicata if other conditions laid down in the section are satisfied.112

Illustrations

1. A sues B for possession of property contending that he is a tenant of C. C is joined as proforma defendant and no relief is claimed against him. The suit is dismissed as the Court finds B to be the owner. C then sues B for possession on the basis of title. B's contention that the issue regarding ownership of property is res judicata must fail as the issue was decided in the former suit between A and B and not between C and B as C was only a proforma defendant.

2. A sues B for rent claiming to be a sole shebait. B contends that X was also a co-shebait and the suit filed by A alone was, therefore, not maintainable. X was joined as proforma defendant and no relief was claimed against him. A finding by the Court that A was the sole shebait would operate as res judicata in a subsequent suit between X and A on the question of co-shebaitship as the decision in the previous suit was necessary for granting relief in favour of A.

(vii) Interveners

An "intervener" is one "who intervenes in a suit in which he was not originally a party",113 "an affected party who, with the court's permission, participates in a law suit after its inception by either joining with the plaintiff or uniting with the defendant."114

A person may intervene in a suit either on his own behalf or on behalf of the parties with the leave of the court. Such intervener is considered to be a party to the suit once he is permitted to intervene no matter at what stage of the suit he intervenes. The decision in the suit then will operate as res judicata in a subsequent suit by or against such person (intervener) on the point already decided.115

110 Or. 1 R. 10(2).

111 Rahimbhoy v. Charles Agnew Turner, ILR (1893) 17 Bom 341 at p. 348 (PC); Gita Ram v. Prithvi Singh, AIR 1956 Cal 129 (FB); Pallapothu Narasimha v. Kidanbi Radhakrishnamacharyulu, AIR 1978 AP 319 at p. 332 (FB).

112 Munni Bibi v. Tirloki Nath, AIR 1931 PC 114 at p. 117: (1930-31) 58 IA 158; Maung Sein v. Ma Pan Nyun, AIR 1932 PC 161 at p. 164: (1931-32) 59 IA 247; Kshiroda v. Debendra Nath, AIR 1957 Cal 200.

113 Concise Oxford English Dictionary (2002) at p. 741.

114 P.R. Aiyar, Advanced Law Lexicon (2005) Vol. II at p. 2434.

115 Raj Lakshmi v. Banamali Sen, AIR 1953 SC 33:1953 SCR 154; For detailed discussion see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. V, Chap. 2.

(viii) Minors

When a suit is filed against a minor who is duly represented by a guardian or next friend and a decree is passed in such suit, the decree binds the minor. But if the decree is obtained against a minor not represented by a guardian or there is fraud, collusion or gross negligence of the guardian, a decree passed in the suit will not operate as res judicata against him (minor) in a subsequent suit.116

(ix) Parties under whom they or any of them claim

As stated above, the doctrine of res judicata operates not only against parties but their privies also, i.e., persons claiming under parties to the decision. The object underlying the doctrine of res judicata is that if a proceeding originally instituted is proper, the decision given therein is binding on all persons on whom a right or interest may devolve.

"Parties under whom they or any of them claim" comprise two classes of persons:

(i) Parties actually present in the former suit;

(ii) Parties claiming under the parties to the suit (privies); and

(iii) Persons represented by a party in the former suit (Explanation VI).

Illustration

A sues B for a declaration of title to the property and obtains a decree. Thereafter A sues C for possession of that property. C contends that B is the owner and that he is in possession as B's tenant. The defence is barred inasmuch as C claims through B.

(x) Representative suit: Explanation VI117

Explanation VI to Section 11 deals with representative suits, i.e., suits instituted by or against a person in his representative, as distinguished from individual capacity. This Explanation 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, and all persons interested in such right shall, for the purposes of Section 11, be deemed to claim under the persons so litigating.118 Explanation VI, thus illustrates one aspect of constructive res judicata. Thus, where a representative suit is brought under Section 92 of the Code 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

116 Gunjeshwar Kunwar v. Durga Prashad, AIR 1917 PC 146; M.K. Muhamed Pillai v. Pariyathu Pillai, AIR 1956 TC 27 (FB); Kamakshya Narain v. Baldeo Sahai, AIR 1950 Pat 97 (FB); Rattan Chand v. Ram Kishan Murarji, AIR 1928 All 447; Narayanan Nambooripad v. Gopalan Nair, AIR 1960 Ker 367.

117 For detailed discussion of representative suits, see infra, Chap. 5.

118 Ahmad Adam Sait v. M.E. Makhri, AIR 1964 SC 107 at pp. 113-14: (1964) 2 SCR 647; see also Raje Anandrao v. Shamrao, AIR 1961 SC 1206 at p. 1211: (1961) 3 SCR 930 at p. 940.

said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the former suit.

The underlying principle is that if the very issue is litigated in the former suit and is decided, there is no good reason why the others making the same claim cannot be held to be claiming a right "in common for themselves and others" under Explanation VI. If that view is not taken, it would necessarily mean that there would be two inconsistent decrees and one of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied.119

(xi) Conditions

The following conditions must be satisfied before a decision may operate as res judicata under Explanation VI:

(i) There must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit;

(ii) the parties not expressly named in the suit must be interested in such right;

(iii) the litigation must have been conducted bona fide and on behalf of all parties interested; and

(iv) if the suit is under Order 1 Rule 8, all conditions laid down therein must have been strictly complied with.

It is only when the above conditions are satisfied that a decision may operate as res judicata in the subsequent suit.120 Thus, where a party claims a right for himself alone which happens to be common to him and others, it cannot be said that he was litigating on behalf of others and Explanation VI does not apply.121 Similarly, if the earlier proceeding was not a bona fide public interest litigation, the subsequent proceeding would not be barred. The possibility of litigation to foreclose any further inquiry into a matter in which an enquiry is necessary in the interest of public cannot be overlooked.122 (emphasis supplied)

(xii) Public interest litigation

If the object of Explanation VI of Section 11 is considered, there is no good reason why it cannot apply to a bona fide public interest litigation. If the previous litigation was a bona fide public interest litigation

119 Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu, (1977) 2 SCC 181 at pp. 188-89: AIR 1977 SC 1268 at p. 1274.

120 Forward Construction Co. v. Prabhat Mandal (Reed.), (1986) 1 SCC 100: AIR 1986 SC 391.

121 Sadagopa Chariar v. Krishnamoorthy Rao, ILR (1907) 30 Mad 185 at p. 190 (PC).

122 Forward Construction Co. case, supra, at pp. 112-13 (SCC): at p. 398 (AIR). For "Public Interest Litigation", see, Author's Lectures on Administrative Law (2008) Lecture X.

in respect of a right which was common and was agitated in common with others, the decision in previous litigation would operate as res judicata in a subsequent litigation. But if the earlier proceeding was not a bona fide public interest litigation, the subsequent proceeding would not be barred.123

III Same Title

(i) General

The third condition of res judicata is that the parties to the subsequent suit must have litigated under the same title as in the former suit.

(ii) Meaning

Same title means same capacity.124 Title refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of another or as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. Litigating under the same title means that the demand should be of the same quality in the second suit as was in the first suit. It has nothing to do with the cause of action on which he sues or is sued.

(iii) Illustrations

1 A sues B for title to the property as an heir of C under the customary law. The suit is dismissed. The subsequent suit for title to the property as an heir of C under the personal law is barred.

2 A sues B for possession of property as an owner basing his claim on title. The suit is dismissed. A subsequent suit for possession of property on the ground of adverse possession is barred.

3 A sues B for possession of property as an owner basing his claim on title. The suit is dismissed. A subsequent suit by A against B for possession of the same property as mortgagor is not barred.

4 A sues for possession of math property as an heir of Mahant. The suit is dismissed. A subsequent suit by A against B as the manager of the math is not barred.

123 For detailed discussion of "Public Interest Litigation" see, C.K. Thakker, Administrative Law (1996) at pp. 587-607; V.G. Ramachandran, Law of Writs (2006) Vol. I, Pt. II, Chap. 13.

124 Per Broomfield, J. in Mahadevappa Somappa v. Dharmappa Sanna, AIR 1942 Bom 322 at p. 326: 44 Bom LR 710.

(iv) Test

The test for res judicata is the identity of title in the two litigations and not the identity of the subject-matter involved in the two cases.125 The crucial test for determining whether the parties are litigating in a suit under the same title as in the previous suit is of the capacity in which they sued or were sued. The term "same title" has nothing to do either with the cause of action or with the subject-matter of two suits. Where the right claimed in both the suits is the same, the subsequent suit will be barred even though the right in the subsequent suit is sought to be established on a ground different from the one in the former suit.126

IV Competent court

(i) General

The fourth condition of res judicata is that the court which decided the former suit must have been a court competent to try the subsequent suit.127 Thus, the decision in a previous suit by a court, not competent to try the subsequent suit, will not operate as res judicata.128

(ii) Object

The principle behind this condition is sound one, namely, that the decision of the court of limited jurisdiction ought not to be final and binding on a court of unlimited jurisdiction.129

(iii) Competent court: Meaning: Explanation VIII

The expression "competent to try" means "competent to try the subsequent suit if brought at the time the first suit was brought".130 In other words, the relevant point of time for deciding the question of competence of the court is the date when the former suit was brought and not the date when the subsequent suit was filed.131

125 Ram Gobinda v. Bhaktabala, (1971) 1 SCC 387 at p. 394: AIR 1971 SC 664 at p. 670; Kushal Pal v. Mohan Lal, (1976) 1 SCC 449 at pp. 456-57: AIR 1976 SC 688 at p. 693.

126 Sunderabai v. Devaji Shankar Deshpande, AIR 1954 SC 82 at p. 84; Union of India v. Pramod Gupta, (2005) 12 SCC 1.

127 Raj Lakshmi v. Banamali Sen, AIR 1953 SC 33 at p. 40: 1953 SCR 154; Jeevantha v. Hanumantha, AIR 1954 SC 9 at p. 10; Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 at p. 1335: (1966) 3 SCR 300.

128 Pandurang Mahadeo v. Annaji Balwant, (1971) 3 SCC 530: AIR 1971 SC 2228; Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; Raj Lakshmi v. Banamali Sen, AIR 1953 SC 33:1953 SCR 154.

129 Law Commission's 54th Report at p. 21.

130 Devendra Kumar v. Pramuda Kanta, AIR 1933 Cal 879: (1993) 37 CWN 810.

131 Jeevantha v. Hanumantha, AIR 1954 SC 9; Pandurang Mahadeo v. Annaji Balwant, (1971) 3 SCC 530: AIR 1971 SC 2228; Sheodan Singh v. Daryao Kumvar, AIR 1966 SC 1332: (1966) 3 SCR 300.

(iv) Types of courts

In order that a decision in a former suit may operate as res judicata, the court which decided that suit must have been either:

(a) a court of exclusive jurisdiction; or

(b) a court of limited jurisdiction; or

(c) a court of concurrent jurisdiction.

(A) Court of exclusive jurisdiction

A plea of res judicata can successfully be taken in respect of judgments of courts of exclusive jurisdiction, like Revenue Courts, Land Acquisition Courts, Administration Courts, etc. If a matter directly and substantially in issue in a former suit has been adjudicated upon by a court of exclusive jurisdiction, such adjudication will bar the trial of the same matter in a subsequent suit in an ordinary civil court.132

(B) Court of limited jurisdiction

A decision on an issue heard and finally decided by a court of limited jurisdiction will also operate as res judicata in a subsequent suit irrespective of the fact that such court of limited jurisdiction was not competent to try the subsequent suit.133

The expression "court of limited jurisdiction" has been interpreted differently by different High Courts. In Nabin Majhi v. Tela Majhi134, the High Court of Calcutta held that courts of limited jurisdiction are courts other than ordinary civil courts, such as Revenue Courts, Land Acquisition Courts, Insolvency Courts, etc. A court of limited pecuniary jurisdiction cannot be said to be a court of limited jurisdiction. Reading Explanation VIII along with Section 11, it is clear that if the former court is unable to try the subsequent suit as beyond its pecuniary jurisdiction, the decision of the former court will not operate as res judicata in the subsequent suit.

On the other hand, in P.V.N. Devoki Amma v. P.V.N.Kunhi Raman135, the High Court of Kerala did not agree with the Calcutta view in Nabin Majhi case134 and observed that the term "a court of limited jurisdiction" is wide enough to include a court whose jurisdiction is subject to a pecuniary jurisdiction and it will not be right to interpret the said expression as connoting only courts other than ordinary civil courts. Such a narrow and restricted interpretation is not warranted by the words used by Parliament. (emphasis supplied)

132 Raj Lakshmi v. Banamali Sen, AIR 1953 SC 33 at p. 40:1953 SCR 154; Bhagwan Dayal v. Reoti Devi, AIR 1962 SC 287 at pp. 293-94: (1962) 3 SCR 440.

133 P.V.N. Devoki Amma v. P.V.N. Kunhi Raman, AIR 1980 Ker 230; Biro v. Banta Singh, AIR 1980 Punj 164.

134 AIR 1978 Cal 440: 82 CWN 1097: (1978) 2 Cal LJ 150; see also Promode Ranjan v. Nirapada Mondal, AIR 1980 Cal 181: 82 CWN 1097.

135 AIR 1980 Ker 230 (233): 1980 Ker LT 690.

It is submitted that the view taken by the High Court of Kerala in Devoki Amma135 is correct and preferable to the one taken by the High Court of Calcutta in Nabin Majhi134. The point is, however, concluded by a decision of the Supreme Court in Sulochana Amma v. Narayanan Nair136.

(C) Court of concurrent jurisdiction

Where the court which decided the former suit was a court of concurrent jurisdiction having competence to try the subsequent suit, the decision given by it would operate as res judicata in a subsequent suit.137 Concurrent jurisdiction means concurrent as regards the pecuniary limit as well as the subject-matter of the suit. "Competency" in Section 11 has no reference to territorial jurisdiction of the court.138

As seen above, the ambit and scope of Explanation VIII has been interpreted differently by different High Courts. In Nabin Majhi v. Tela Majhi139, it was contended that a court of Munsif by reason of its limited pecuniary jurisdiction can be said to be a court of limited jurisdiction and hence, its decision would operate as res judicata in a subsequent suit instituted in the court of a subordinate judge.

Negativing the contention and interpreting Explanation VIII in the light of the substantive provision (Section 11), the Court observed: "[O]ne of the conditions for the applicability of Section 11 is that the Court in which the former suit was instituted must be competent to try the subsequent suit. If the former Court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction, the decision of the former court will not be res judicata in the subsequent suit. If the legislature had really intended to remove the condition retaining to the competency of the former Court, in that case it would have removed the same from the section itself.

In the face of the provision of Section 11, retaining the said condition for the applicability of res judicata, that the former Court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of Explanation VIII as suggested on behalf of the appellant."140

(emphasis supplied)

The High Court of Kerala, however, took a contrary view in P.V.N. Devoki Amma v. P.V.N. Kunhi Raman141. Disagreeing with the ratio laid down in Nabin Majhi and keeping in mind the object of enacting Explanation VIII, the Court concluded:

136 (1994) 2 SCC 14: AIR 1994 SC 152.
137 Pandurang Mahadeo v. Annaji Balwant, (1971) 3 SCC 530: AIR 1971 SC 2228.
138 Maqbul v. Amir Hasan, AIR 1916 PC 136.
139 AIR 1978 Cal 440: 82 CWN 1097: (1978) 2 CLJ 150.
140 Ibid, at p. 442 (AIR).
141 AIR 1980 Ker 230:1980 Ker LT 690.

"In our opinion, the expression 'a Court of limited jurisdiction' is wide enough to include a Court whose jurisdiction is subject to a pecuniary limitation and it will not be right to interpret the said expression as connoting only Courts other than ordinary civil courts. Such a narrow and restricted interpretation is not warranted by the words used by Parliament. The Statement of Objects and Reasons for the Bill which was subsequently enacted as Amending Act 104 of 1976 and the report of the Joint Select Committee, which effected some substantial changes in the Bill as originally drafted, make it abundantly clear that the intention underlying the introduction of Explanation VIII was that the decisions of the Courts of limited jurisdiction should operate as res judicata in a subsequent suit although the Court of limited jurisdiction may not be competent to try such subsequent suit... . "In our opinion the object and purpose underlying the introduction of Explanation VIII was much wider, namely, to render the principle of res judicata fully effective so that issues heard and finally decided between the parties to an action by any Court competent to decide such issues should not be allowed to be reagitated by such parties or persons claming through them in a subsequent litigation,"142 (emphasis supplied)

It is submitted that the above observations in Devoki Amma lay down the correct proposition of law. The underlying object of the amendment and insertion of Explanation VIII is to avoid multiplicity of suits. It is, no doubt, true that Parliament has not deleted from Section 11 the words "in a court competent to try such subsequent suit or the suit in which such issue has subsequently been raised", but the section and the explanation must be read harmoniously If it is not so read, the primary object of enacting Explanation VIII would be defeated, inasmuch as a party by adding some property or increasing the value thereof from time to time may go on instituting suits after suits, deliberately and successfully avoiding the decision against him to operate as res judicata. It would encourage endless litigation.

It is further submitted that it would have been better had Parliament, in view of insertion of Explanation VIII by the Amendment Act of 1976, deleted the words "a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised". But it is settled law that an explanation to a section in a given case, instead of serving the traditional purpose of explaining a section, may work as an independent provision. Ultimately it is the intention of the legislature which is paramount and the mere use of a label cannot control or deflect such intention.

142 AIR 1980 Ker 230 at p. 233:1980 Ker LT 690.

Moreover, such a construction would result in an anomalous situation. If a matter is decided by a court of limited jurisdiction, Explanation VIII would apply and such decision would operate as res judicata in a subsequent suit. But if it is decided by a court of limited pecuniary jurisdiction, the decision would not attract Section 11. This is really absurd. Further, such an interpretation would be against the basic principle underlying the doctrine of res judicata which is reflected in the well-known maxim that "larger public interest requires that all litigation must, sooner than later, come to an end".

Finally, it may result in conflicting decisions by the same officer. For instance, a decree passed by a Rent Controller will operate as res judicata but a decree passed by a Civil judge or a Munsif will not be barred by that doctrine though the same officer might have decided both the cases.

A special reference may be made to a decision of the Supreme Court in Sulochana Amma v. Narayanan Nair143. In that case, A by a deed of settlement gave life estate to B, and the remainder to C. After the death of A, B alienated the property to D. C filed a suit against B in the Munsif's court restraining B from alienating the property and committing acts of waste. During the pendency of the suit, D sold the property to E. C's suit against B was decreed and it was held that B had no right to alienate property and permanent injunction was also granted. B's appeal was also dismissed. D, who was not a party to the earlier suit was committing acts of waste. C, therefore, filed another suit against B and D for permanent injunction. That suit was also decreed. But the question of D's title was left open. C filed a third suit against E in the court of the Subordinate judge for declaration of his title which was decreed. It was confirmed up to the High Court. E approached the Supreme Court.

Considering the purpose of the amendment and insertion of Explanation VIII, the Supreme Court stated, "No doubt main body of Section 11 was not amended, yet the expression 'the court of limited jurisdiction' in Explanation VIII is wide enough to include a court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try

143 (1994) 2 SCC 14: AIR 1994 SC 152.

the subsequent suit... . The technical aspect, for instance, pecuniary or subject-wise competence of the earlier forum to adjudicate the subject- matter or to grant reliefs sought in the subsequent litigation, should be immaterial when the general doctrine of res judicata is to be invoked. Explanation VIII, inserted by the Amending Act of 1976, was intended to serve this purpose and to clarify this purpose and to clarify this position/'144
(emphasis supplied)
Overruling the "very narrow view" of the High Court of Calcutta145 and approving the "broader view" of the High Courts of Kerala,146 Orissa147 and Madras,148 the Court went on to observe:
"[If the scope of Explanation VIII is confined to the order and decree of an insolvency court, the scope of enlarging Explanation VIII would be defeated and the decree of civil courts of limited pecuniary jurisdiction shall stand excluded, while that of the former would be attracted. Such an anomalous situation must be avoided. The Tribunal whose decisions were not operating as res judicata, would be brought within the ambit of Section 11, while the decree of the civil court of limited pecuniary jurisdiction which is accustomed to the doctrine of res judicata, shall stand excluded from its operation. Take for instance, now the decree of a Rent Controller shall operate as res judicata, but a decree of a District Munsif (Civil judge), Junior Division, according to the stand of the appellant, will not operate as res judicata, though the same officer might have decided both the cases. To keep the litigation unending, successive suits could be filed in the first instance in the court of limited pecuniary jurisdiction and later in a court of higher jurisdiction, and the same issue shall be subject of trial again, leading to conflict of decisions. It is obvious from the objects underlying Explanation VIII, that by operation of the non-obstante clause finality is attached to a decree of civil court of limited pecuniary jurisdiction also to put an end to the vexatious litigation and to conclusiveness to the issue tried by a competent court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded from raising once over the same issue for trial."149 (emphasis supplied)

144 Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14: AIR 1994 SC 152 at pp. 155-56.
145 Nabin Majhi v. Tela Majhi, AIR 1978 Cal 440; Promode Ranjan v. Nirapada Mondal, AIR 1980 Cal 181: 82 CWN 1097.
146 P.V.N. Devoki Amma v. P.V.N. Kunhi Raman, AIR 1980 Ker 230.
147 Kumarmonisa v. Himachal Sahu, AIR 1981 Ori 177.
148 C. Arumugathan v. S. Muthusami, (1991) 2 Mad LJ 538.
149 Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14: AIR 1994 SC 152 at p. 156.

In Church of South India Trust Assn. v. Telugu Church Council150, it was contended that lack of territorial jurisdiction goes to the root of the competence of a court trying a suit and a decision rendered by a court lacking territorial jurisdiction would not operate as res judicata in a subsequent suit.
Negativing the contention and referring to leading decisions on the point, the Supreme Court stated, "We are, therefore, of the opinion that Section 11 of the present Code (excluding Explanation VIII) envisages that the judgment in a former suit would operate as a res judicata, if the court which decided the said suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject-matter to try the subsequent suit and that it is not necessary that the said court should have had territorial jurisdiction to decide the subsequent suit."151

(v) Test

The test in such case is whether the second suit could have been decided by the first court? If the answer to the question is in affirmative, the decision will operate as res judicata. But if the reply is in the negative, res judicata has no application.

(vi) Right of appeal: Explanation II

(A) Position prior to Explanation II—Under the Code of 1882, it was held by the High Courts of Bombay, Madras and Punjab that a prior decision in which no second appeal lay, such as suits of a nature cognizable by a Court of Small Causes when the amount of subject-matter does not exceed five hundred rupees, could not operate as res judicata in a subsequent suit in which such appeal was maintainable. The High Court of Calcutta, on the other hand, had taken a contrary view and held that such decision would operate as res judicata, notwithstanding that no second appeal was allowed by law in the former suit. Explanation II as inserted in the present Code affirms the Calcutta view and clarifies that the competence of a court does not depend on the right of appeal from a decision from such Court.152 The fact that no second appeal lay in the previous suit is no longer a valid ground for holding that the decision in the previous suit would not operate as res judicata.

(B) Position after Explanation II—Explanation II to Section 11 makes it clear that for the purpose of res judicata, the competence of the court shall be determined irrespective of any provision as to a right of appeal from the decision of such court. No doubt, one of the tests for application of the doctrine of res judicata is to ascertain whether a party aggrieved could challenge the finding by filing an appeal. But the

150 (1996) 2 SCC 520: AIR 1996 SC 987.
151 Ibid, at p. 535 (SCC): 995 (AIR).
152 Narayan Prabhu Venkateswara v. Narayana Prabhu Krishna, (1977) 2 SCC 181: AIR 1977 SC 1268; Lonankutty v. Thomman, (1976) 3 SCC 528: AIR 1976 SC 1645.

question whether there is a bar of res judicata does not depend on the existence of a right of appeal but on the question whether the same issue, under the circumstances mentioned in Section 11 of the Code, has been heard and finally decided.153 Though the Law Commission recommended to confer a right of appeal to a successful party against whom a finding has been recorded, the recommendation has not been accepted and a party cannot file an appeal against a finding recorded against him by a court if the decree is in his favour.154

V Heard and finally decided

(i) General

The fifth and the final condition of res judicata is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by a court in the former suit.155 In the words of Lord Romilly156, "Res judicata by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly."

The section requires that there should be a final decision on which the court' must have exercised its judicial mind.157 In other words, the expression "heard and finally decided" means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided,158 (emphasis supplied)

(ii) Nature and scope

A matter can be said to have been heard and finally decided notwithstanding that the former suit was disposed of (i) ex parte; or (ii) by failure to produce evidence (Order 17 Rule 3); or (iii) by a decree on an award; or (iv) by oath tendered under the Indian Oaths Act, 1873. But

153 Ramesh Chandra v. Shiv Charan Dass, 1990 Supp SCC 633 at p. 635: AIR 1991 SC 264 at p. 265; Premier Tyres Ltd. v. Kerala SRTC, 1993 Supp (2) SCC 146: AIR 1993 SC 1202.

154 Law Commission's 54th Report, at pp. 26-27.

155 Kewal Singh v. Lajwanti, (1980) 1 SCC 290 at p. 296: AIR 1980 SC 161 at p. 164; Ram Gobinda v. Bhaktabala, (1971) 1 SCC 387 at p. 395: AIR 1971 SC 664 at p. 671; Kushal Pal v. Mohan Lal, (1976) 1 SCC 449 at p. 456-57: AIR 1976 SC 688 at p. 693; Narayan Prabhu case, supra; Gurbax Rai v. Punjab National Bank, (1984) 3 SCC 96: AIR 1984 SC 1012 at p. 1014; Ferro Alloys Co. Ltd. v. Union of India, (1999) 4 SCC 149 at p. 161: AIR 1999 SC 1236 at p. 1243.

156 Jenkins v. Robertson, (1867) LR 1 Sc & Div 117, HL.

157 Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627 at p. 640: AIR 1989 SC 2240 at p. 2249.

158 Kushal Pal v. Mohan Lal, (1976) 1 SCC 449 at pp. 456-57: AIR 1976 SC 688 at p. 693.

if the suit is dismissed on a technical ground, such as non-joinder of necessary party, it would not operate as res judicata.159

(iii) Decision on merits

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits.160 Thus, if the former suit was dismissed by a court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or misjoinder of parties, or on the ground that the suit was not properly framed, or that it was premature, or that there was a technical defect, the decision not being on merits, would not operate as res judicata in a subsequent suit.161

Illustration

A, a partnership firm, filed a suit against B to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership firm was not registered as required by the provisions of the Indian Partnership Act, 1932. Thereafter, the firm was registered and the subsequent suit was filed on the same cause of action. The suit is not barred by res judicata.

(iv) Necessity of decision

In order to operate as res judicata, a finding of a court must have been necessary for the determination of a suit. If a finding is not necessary, it will not operate as res judicata. "It is fairly settled that the finding on an issue in the earlier suit to operate as res judicata should not have been only directly and substantially in issue but it should have been necessary to be decided as well."162 What operates as res judicata is the ratio of what is fundamental to the decision. It cannot, however, be ramified or expanded by logical extension.163 And a finding on an issue cannot be said to be necessary to the decision of a suit unless the decision was based upon such finding.164 Again, a decision cannot be said to have been based upon a finding unless an appeal can lie against

159 State of Maharashtra v. National Construction Co., (1996) 1 SCC 735: AIR 1996 SC 2367.

160 Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 at p. 1336: (1966) 3 SCR 300; Tilokchand H.B. Motichand v. H.B. Munshi, (1969) 1 SCC 110 at p. 121: AIR 1970 SC 898 at p. 906 (per Bachawat, J.).

161 Shivashankar Prasad v. Baikunth Nath, (1969) 1 SCC 718 at p. 721: AIR 1969 SC 971 at pp. 973-74; Pujari Bai v. Madan Gopal, (1989) 3 SCC 433: AIR 1989 SC 1764 at pp. 768-69; Pandurang Ramchandra v. Shanti Bai Ramchandra, supra; Krishan Lal v. State of J&K, (1994) 4 SCC 422; State of Maharashtra v. National Construction Co., supra.

162 Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286 at p. 336: AIR 1995 SC 2001 at p. 2034.

163 Pandurang Ramchandra v. Shantibai Ramchandra, 1989 Supp (2) SCC 627 at p. 640: AIR 1989 SC 2240 at p. 2249; Ramesh Chandra v. Shiv Charan Dass, 1990 Supp SCC 633 at p. 635: AIR 1991 SC 264 at p. 265.

164 Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: AIR 1974 SC 1126; Shankarlal v. Hiralal, AIR 1950 PC 80; Hayatuddin v. Abdul Gani, AIR 1976 Bom 23 at p. 25.

such finding. The underlying principle is that "everything that should have the authority of res judicata is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of res judicata".165 It is the right of appeal which indicates whether the finding was necessary or merely incidental.166

(v) Finding on more than one issue

When a finding is recorded by a court on more than one issue, the legal position is as under:

(A) When suit is dismissed—If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as res judicata against him in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the plaintiff may operate as res judicata against him in a subsequent suit, for he can appeal from a finding on such issue, the decree being against him.

(B) When suit is decreed—If the plaintiff's suit is wholly decreed, no issue decided against him can operate as res judicata for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the defendant is res judicata for he can appeal from a finding on such issue, the decree being against him.

(C) Appeal against finding—No appeal lies against a mere finding, for the simple reason that the Code does not provide for filing of any such appeal.167 It may, however, be stated that a person aggrieved by a finding in the judgment may file cross-objections, even though the decree might have been passed in his favour.168

(vi) Right of appeal

A decision cannot be said to have been based upon a finding unless an appeal lies against such finding. As a general rule, "everything that should have authority of res judicata is, and ought to be, subject to appeal, and reciprocally, an appeal is not competent on any point not having the authority of res judicata.169 It is the right of appeal which indicates whether the finding was necessary or merely incidental.170 The position is, however, substantially changed by the Amendment Act of 1976.

165 Narain Das v. Faiz Shah, (1889) PR No. 157 (FB).

166 This position is also, now, substantially changed by the Amendment Act of 1976. See, Mulla, Code of Civil Procedure (1995) Vol. 1 at pp. 171-74.

167 Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: AIR 1974 SC 1126.

168 Explanation to R. 22, Or. 41.

169 Sobhag Singh v. Jai Singh, AIR 1968 SC 1328 at p. 1332: (1968) 3 SCR 848; Tara Singh v. Shakuntala, AIR 1974 Raj 21.

170 For detailed discussion see supra, "Condition IV".

(vii) Relief claimed but not granted: Explanation V

Explanation V to Section 11 provides that if a relief is claimed in a suit, but is not expressly granted in the decree, it will be deemed to have been refused and the matter in respect of which the relief is claimed will be res judicata.171 But this explanation applies only when the relief claimed is (i) substantial relief; and (ii) the court is bound to grant it.

(19) Execution proceedings: Explanation VII

Prior to the addition of Explanation VII to Section 11 by the Amendment Act of 1976 in the Code of Civil Procedure, 1908, the provisions thereof did not, in terms apply to execution proceedings, but the general principles of res judicata were held to be applicable even to execution proceedings.172

Section 11 has now been amended by Act 104 of 1976. Explanation VII specifically provides that the provisions of Section 11 will directly apply to execution proceedings also.

(20) Industrial adjudication

Though Section 11 of the Code speaks about civil suits only, the general principles underlying the doctrine of res judicata apply even to an industrial adjudication.173 Thus, an award pronounced by the Industrial Tribunal operates as res judicata between the same parties and the Payment of Wages Authority has no jurisdiction to entertain the said claim again. Similarly, if in an earlier case, the Labour Court had decided that A was not a "workman" under the Industrial Disputes Act, 1947, the said finding operates as res judicata in subsequent proceedings also. And there are good reasons why this principle should be extended and applied to industrial adjudication also. Legislation regulating the relation between capital and labour has two objects in view. It seeks to ensure to the workmen, who have not the capacity

171 Mysore SRTC v. Babajan Conductor, (1977) 2 SCC 355 at p. 360: AIR 1977 SC 1112 at p. 1116.

172 Mohanlal Goenka v. Benoy Krishna, AIR 1953 SC 65 at pp. 72-73: 1953 SCR 377; Jai Narain v. Kedar Nath, AIR 1956 SC 359:1956 SCR 62; Maqbool Alam v. Khodaija, AIR 1966 SC 1194: (1966) 3 SCR 479; Kani Ram v. Kazani, (1972) 2 SCC 192: AIR 1972 SC 1427; Prem Lata v. Lakshman Prasad, (1970) 3 SCC 440: AIR 1970 SC 1525.

173 Burn & Co. v. Employees, AIR 1957 SC 38 at p. 43: 1956 SCR 781; Bombay Gas Co. Ltd. v. Shridhar Bhau Parab, AIR 1961 SC 1196 at p. 1197-98: (1961) 2 LLJ 629; Bombay Gas Co. Ltd. v. Jagannath Pandurang, (1975) 4 SCC 690; Punjab Coop. Bank Ltd. v. R. S. Bhatia, (1975) 4 SCC 696 at p. 698: AIR 1975 SC 1898 at p. 1899; Workmen v. Straw Board Mfg. Co. Ltd., (1974) 4 SCC 681 at pp. 692-93: AIR 1974 SC 1132 at p. 1140-41; Workmen v. Hindustan Lever Ltd., (1984) 1 SCC 728 at p. 744-48: AIR 1984 SC 516 at p. 526-28; Bharat Barrel & Drum Mfg. Co. (P) Ltd. v. Employees Union, (1987) 2 SCC 591: AIR 1987 SC 1415; Ghanshyam Jaiswal Dr. v. Kamal Singh, (1996) 3 SCC 54; Singhai Lal Chand v. Rashtriya Swayamsewak Sangh, (1996) 3 SCC 149: AIR 1996 SC 1211; Pondicherry Khadi & Village Industries Board v. P. Kulothangan, (2004) 1 SCC 68: AIR 2003 SC 4701.