Asgar vs Mohan Varma . on 5 February, 2019

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Bench: Hemant Gupta, Dhananjaya Y Chandrachud

REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1500 OF 2019
(@SLP(C) No. 1216 OF 2016)

ASGAR & ORS. Appellant(s

VERSUS

MOHAN VARMA & ORS. RESPONDENT(s)

JUDGMENT

Dr Dhananjaya Y Chandrachud, J.

1 Leave granted.

December 2015. Dismissing a petition instituted by the appellants under Article 227 of the Constitution, the High Court held that the claim set up by the appellants before the executing court for the value of the improvements alleged to have been made by them on the land in dispute under the Kerala Compensation for Tenants Improvements Act 19581 was barred by the principle of

constructive res judicata. The High Court upheld the finding of the executing court that the appellants are not entitled to claim compensation under Section 51 of the Transfer of Property Act 18822.

3 The genesis of the dispute needs to be explained. The property encompassing an extent of 914 acres originally belonged to Vengunadu Kovilakam of Kollengode. True to the bounties of nature, it comprised of coffee, cardamom, orange and pepper plantations. On 25 November 1897, 909 acres of the property came to be leased out to William Espants Watts Esquire for a period of 75 years. By a subsequent transfer, the leasehold rights were transferred to and vested in Anglo American Direct Tea Trading Corporation Limited ("Anglo American Corporation"). On 17 October 1931, an area admeasuring 5 acres of what is described as the bungalow site was leased out in favour of Anglo American Corporation for a period of 43 years. In 1945, Anglo American Corporation assigned its rights over the property to Amalgamated Coffee Estate Limited.

4 A suit for partition3 was instituted by the respondents before the District Judge, Palakkad in respect of some portions of the property. The petitioners and their predecessors-in-interest were not parties. A preliminary decree for partition was 1 "The Act of 1958" 2 The TP Act passed by the District Judge, Palakkad on 30 November 1965. 5 On 7 August 1969, Amalgamated Coffee Estate Limited assigned its rights over 410 acres of the land to Mathew T Marattukulam, 329 acres in favour of Mrs Annakutty Mathew and 175 acres in favour of Philomina Thomas. 6 The lease deed of 1897 expired by efflux of time in 1972. In spite of the fact that the tenure of lease had ended, the above three persons assigned their rights in respect of the property on 28 August 1978 in favour of M/s K J Plantations. On 23 June 1990, acting in pursuance of a Power of Attorney alleged to have been executed by K J Plantations in favour of M S M Haneefa, the latter executed eight sale deeds in favour of the petitioners and M/s South Coast Spices Export Limited. In 1991, M/s K J Plantations instituted a suit 4 before the Subordinate Judge, Palakkad seeking inter alia the setting aside of the Power of Attorney executed in favour of M S M Haneefa and the eight sale deeds.

7 On 27 May 1995, the Subordinate Judge, Palakkad ordered the property to be divided into a hundred equal shares of which forty were to be allotted to M/s K J Plantations and sixty to the other assignees. An area admeasuring 274.20 acres had been assigned to the petitioners.

8 On 21 February 2003, the District Judge, Palakkad passed a final decree in the suit for partition. The respondents instituted Execution Petition No. 7 of 2002 in OS No. 1 of 1964 on 17 November 2008 for delivery of possession of Schedule 'B' property. When the Amin came to effect delivery, the appellants and other similarly situated persons raised an obstruction.

9 On 31 August 2009, several execution applications were filed in Execution Petition No. 7 of 2008. Among them were execution applications 33 of 2009 (filed by National Spices Company), 38 of 2009 (filed by the petitioners) and 41 of 2009 (filed by K J Plantations) under Order XXI Rule 99 of the Code of Civil Procedure 1908 5. In their applications, the applicants inter alia sought a declaration that they were entitled to possession of the property as lessees and were not liable to be dispossessed.

10 The District Judge, Palakkad allowed execution applications 33, 38 and 41 of 2009 by a judgment dated 6 January 2010. The District Judge held that the appellants had established that they had a subsisting interest and were in possession of the property as a consequence of which the respondents were not entitled to delivery of possession. In view of the order of the District Court, the respondents, as decree holders, were held not to be entitled to the delivery of actual physical possession of the property and their remedy would be to file a suit impleading the appellants as parties.

11 Aggrieved by the order of the District Judge, Palakkad, the respondents moved the High Court of Kerala in a proceeding described as Execution First Appeal 5 The CPC No. 12 of 2010. By its judgment dated 29 June 2012, the High Court allowed the appeal and, while upholding the submissions of the respondents, dismissed the claim petitions filed by the appellants.

12 On 25 July 2014, a Special Leave Petition filed under Article 136 of the Constitution was dismissed by this Court in the following terms:

> "Heard learned senior counsel and learned counsel for the parties.
>
> Special leave petitions are dismissed.
>
> No order needs to be passed in Interlocutory Application No. 5 of 2014 made by the applicants - Ravi Varma Thampan and Sarada Thampatty - for impleadment in S.L.P. (Civil) No. 27268 of 2012 in view of dismissal of special leave petition and application is disposed of as such.

In so far as question of compensation of improvements made by the petitioners is concerned, petitioners are free to pursue appropriate remedy for redressal of their grievance in accordance with law." 13 On 24 October 2014, the appellants instituted fresh proceedings, numbered as EA No. 414 of 2014 in EP No. 7 of 2008 seeking inter alia a direction for the payment to them of the value of improvements over the property, before an order for delivery of possession was made. The respondents, in reply opposing the application, contended that the claim was barred by the principle of constructive res judicata under Explanation IV of Section 11 of the CPC. 14 By a judgment and order dated 26 June 2015, the First Additional District Judge dismissed the application filed by the appellants on the ground that they were not transferees of the property and were hence disentitled to seek the value of the improvements alleged to have been made by them, under Section 51 of the TP Act. During the course of the proceedings before the ADJ, it was only the claim under Section 51 which was pressed. The claim under the Act of 1958 was not advanced. The ADJ rejected the submission of the respondents that the claim in execution was barred by the principle of constructive res judicata. However, on merits the ADJ came to the conclusion that the claim was not maintainable under Section 51 of the TP Act.

15 A Writ Petition under Article 227 of the Constitution was instituted before the High Court of Kerala on 3 September 2015 6. By its judgment and order dated 11 December 2015, the High Court dismissed the writ petition, holding inter alia that:

(i) The claims advanced by the appellants for the value of the improvements alleged to have been made on the property were barred by the principle of constructive res judicata; and

(ii) The appellants, not being transferees, were in any event not entitled to raise the claim under Section 51 of the TP Act.

16 Assailing the judgment of the High Court, Mr V Giri, learned Senior Counsel urged that:

(i) Neither the District Court nor the High Court have enquired into the merits of the claim advanced by the appellants under Section 4(1) of the Act of 1958;

6 Writ Petition (c) No. 2125 of 2015

(ii) By the judgment of a Division Bench of the High Court in the earlier proceed-

ings, it was clarified that the court was not going into the entitlement of the ap- pellants under Section 4(1) of the Act 1958 since "it is not a question which arises from the order on the claim petitions". The High Court clarified that it was only holding that the claim of the appellants to possess leasehold rights was without merit;

(iii) When the case travelled to this Court, the appellants were granted liberty to pursue an appropriate remedy for the redressal of their grievance in regard to the payment of compensation for the improvements made by them, in accor- dance with law;

(iv) Once the High Court had declined to enquire into the claim of compensation under the Act of 1958 and this Court had specifically kept open the right of re- course to remedies under law, the principle of constructive res judicata would have no application;

(v) In Explanation IV to Section 11 of the CPC, the expression "might and ought" has to be conjunctively construed. Hence, merely because the claim for com- pensation under the Act of 1958 could have been raised in the earlier pro- ceedings in the execution application, that does not debar the appellants from filing a fresh application;

(vi) The test should be whether allowing the claim to be raised could be construed as an abuse of the process and it is only when the claim is of a nature that might have been urged and ought to have been urged in the earlier proceed- ings, that the bar of constructive res judicata would be attracted;

(vii) The concession made by Counsel in the earlier proceedings asserting only the claim under Section 51 of the TP Act, would not operate as an estoppel against the appellants from raising the claim for improvements under Section 4 of the Act of 1958;

(viii) The second application moved by the appellants was of a nature which they would have raised if the respondents had filed an application under Order XXI Rule 97 of the CPC. Since the

respondents did not file any application under Order XXI Rule 97, but it was the appellants who had filed an application un- der Order XXI Rule 99, the bar of constructive res judicata is not attracted; and

(ix) The claim of the appellants at the present stage is not in the character of lessees (since their claim as lessees was rejected earlier) but as a judgment- debtor who is entitled to retain possession until the value of the improvements made by them on the land is paid under Section 4 of the Act of 1958. The ju- ridical character in which the claim is asserted under Section 4 is hence dis- tinct from their earlier claim as lessees entitled to possession of the land. 17 Opposing these submissions, Mr Gourab Banerji, learned Senior Counsel submitted that:

> (i) Execution Application No. 38 of 2009 was in essence not an application under Order XXI Rule 99 but under Order XXI Rule 97 of the CPC;
>
> (ii) Order XXI Rule 97 has been broadly interpreted by this Court to allow even a third party to move the executing court before dispossession in pursuance of a decree takes place;
>
> (iii) The provisions of Rules 97 to 103 of Order XXI constitute a complete code.

They provide the sole remedy for parties and for strangers to a proceeding which has ended in a decree of the civil court;

(iv) The adjudication which followed upon the earlier proceedings was in the na-

ture of a decree under Order XXI Rule 103. All claims that the appellants seek to urge presently could have been and ought to have been raised in the ear- lier proceedings. The appellants, having failed to do so, the bar of constructive res judicata is squarely attracted;

(v) The claim under the Act of 1958 ought to have been raised in the earlier pro-

ceedings because of the provisions of Section 5 of the Act of 1958. Section 5 postulates that every such claim has to be raised and adjudicated upon be- fore the decree is passed. Hence the defence of being entitled to possession, unless the value of the improvements is paid, should have been raised in the earlier proceedings;

(vi) The language of Order XXI Rule 101 is peremptory. The order by the High Court constitutes a decree under Order XXI Rule 103;

(vii) The question of compensation under the Act of 1958 is intrinsically connected to the claim of the appellants to retain possession until the value of the im- provements alleged to have been made is paid. In the previous round of pro- ceedings, the prayer was for the retention of possession and hence the claim could have been raised and ought to have been addressed when the decree was passed; and

(viii) The second application before the ADJ was under Section 151 of the CPC. A conscious decision was taken by counsel representing the appellants to only urge the claim under Section 51 of the TP Act. Once that claim was rejected, it is not open to the appellants to press the claim under the Act of 1958 in a fresh round of proceedings. If the issue was raised earlier, the respondents would have been entitled to maintain a claim for a set-off under the Act of 1958. Once the issue of possession stands concluded, it is not open to the appellants to protect their possession, albeit on the basis of a claim for com- pensation under the Act of 1958.

18 The rival submissions now fall for consideration.

19 We must begin our analysis of the controversy in this appeal with a reference to the decision rendered on 29 June 2012 by a Division Bench of the Kerala High Court. The First Appeal in execution before the Kerala High Court arose from a judgment of the District Judge in execution proceedings holding that the appellants had established a subsisting interest, entitling them to continue in possession of the property. The appellants made the claim under a purported assignment after the expiration of the original deed of lease in 1972. Justice K M Joseph (as the learned Judge then was), speaking for the Division Bench held that a tenant "at sufferance" is only entitled to protection against unlawful eviction. As assignees, the tenants at sufferance were not entitled to any estate or property and the right to remain in possession could not have been assigned. Consequently, the Division Bench of the High Court held:

> "56. We need not consider the case that the transfers are fraudulent. We take the view that there was no estate or property which could have been transferred either by the assignors in Ext. A6 or subsequent assignors on the said basis. Possession by itself may be treated as being changed hands unaccompanied by any legal right." Concluding its discussion, the High Court observed that:
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> "59. The upshot of the above discussion is that we are inclined to reverse the findings and the decision rendered by the court below. We hold that the respondents cannot claim as tenants by holding over. Nor can they claim any right as tenants at sufferance. The result is that while they may have possession, it is unaccompanied by any right..."

20 Now in this background, it is necessary to advert to the reliefs that were sought by the appellants in Execution Application 38 of 2009 instituted by them in Execution Petition 7 of 2008. The reliefs which they sought were in the following terms:

> "A) Establishing and declaring the claim of the petitioners for possession as lessees over 274.20 acres of property included in the schedule hereunder and also included in the schedule to the execution petition;
>
> B) Declaring the respondents 1 to 6 are not entitled to dispossess the petitioners from the properties in their possession and take actual delivery of the same;"

21 Clearly, what the appellants sought was a declaration that their possession was entitled to protection in their character as lessees over 274.20 acres of the land. No claim was set up in the execution application on the basis of the provisions contained in Section 4(1) of the Act of 1958. When the proceedings were before the High Court, the appellants sought to urge that "it may be borne in mind" that they would be entitled to compensation under the Act of 1958. Besides, they also invoked Section 51 of the TP Act. The respondents objected on the ground, as the High Court recorded, "that such a case is not there in the claims and they cannot raise such a claim". Adverting to the submission of the appellants that they had a claim under the Act of 1958, the High Court observed that:

> "62. We feel that we need not go into this question, as it is not a question which arises from the order on the claim petitions.
>
> In fact, whether the respondents /claimants can raise the said issue, are all matters which we will not pronounce on..."

22 The above observations of the High Court indicate that the reason why it did not go into the question was because it did not arise from the order on the claim petitions. In fact, the High Court also observed that it would not pronounce judgment on whether the appellants were entitled to raise the issue. While dismissing the Special Leave Petition against the judgment of the High Court, this Court in its order dated 25 July 2014 observed that "insofar as the question of compensation for improvements made by the appellants is concerned, the appellants were free to pursue an appropriate remedy for the redressal of their grievances in accordance with law." These observations as contained in the order of this Court cannot be construed to mean that the respondents would be deprived of their right to set up a plea of constructive res judicata if the appellants were to raise such a claim. The appellants were, as this Court observed, free to pursue the "appropriate remedy for redressal of their grievances in accordance with law." This must necessarily be construed to mean that all defences of the respondents upon the invocation of a remedy by the appellants were kept open for decision. The liberty granted by this Court was not one-sided. It encompasses both the ability of the appellants to take recourse and of the respondents to raise necessary defences to the invocation of the remedy. Therefore, we do not find any merit in the submission urged on behalf of the appellants that the earlier judgment of the Kerala High Court and the order of this Court preclude the respondents from raising the bar of constructive res judicata. 23 Having cleared this ground, we now proceed to analyse the provisions contained in the Act of 1958. The Act, as its long title indicates, has been enacted "to make provisions for payment of compensation for improvements made by the tenants in the State of Kerala". Section 2(b) defines the expression "improvement" in the following terms:

> "(b) "improvement" means any work or product of a work which adds to the value of the holding, is suitable to it and consistent with the purpose for which the holding is let, mortgaged or occupied, but does not include such clearances, embankments, leveling, enclosures, temporary wells and water-channels as are made by the tenant in the ordinary course of cultivation and without any special expenditure or any other benefit accruing to land from the ordinary operations of husbandry:" Section 2(d)

defines the expression “tenant” as follows:

“(d) "tenant" with its grammatical variations and cognate expressions includes-

(i) a person who, as lessee, sub-lessee, mortgagee or sub-

mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee of land, is in possession thereof;

(ii) a person who with the bona fide intention of attorning and paying a reasonable rent to the person entitled to cultivate or let waste-land, but without the permission of such person, brings such land, under cultivation and is in occupation thereof as cultivator; and

(iii) a person who comes into possession of land belonging to another person and makes improvement thereon in the bona fide belief that he is entitled to make such improvements.” 24 The expression “tenant” in Section 2(d) is defined in a broad sense. It includes for instance, a person who in good faith, believing himself to be a lessee, sub-lessee or mortgagee of land, is in possession. Similarly, it includes a person who without the permission of a person entitled to cultivate or let waste-land brings the land under cultivation and is in occupation under the bona fide intention of attorning to and paying a reasonable rent to the person entitled to cultivate. The definition includes a person who comes into possession of land belonging to another and makes improvements in the bona fide belief that he is entitled to make those improvements. Similarly, Section 3 defines certain work or the products of work which shall be presumed to be improvements for the purposes of the Act. Section 3 is in the following terms:

> “3. What are presumed to be improvements.- Until the contrary is shown, the following works or the products of such works shall be presumed to be improvements for the purposes of this Act:-
>
> (a) the erection of dwelling houses, buildings appurtenant there to and farm buildings;
>
> (b) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes;
>
> (c) the preparation of land for irrigation;
>
> (d) the conversion of one-crop into two-crop land;
>
> (e) the drainage, reclamation from reverse or other waters or protection from floods or from erosion or other damage by water, of land used for agricultural purposes, or of waste-land which is culturable;

(f) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;

(g) the renewal or reconstruction of any of the foregoing works or alterations therein or additions thereto; and

(h) the planting or protection and maintenance of fruit trees, timber trees and other useful trees and, plants."

25 Sections 4 and 5 have a material bearing on the present controversy and are hence extracted below:

"4. Tenant entitled to compensation for improvements.-(1) Every tenant shall, on eviction, be entitled to compensation for improvements which were made by him, his predecessor- in-interest or by any person not in occupation at the time of the eviction who derived title from either of them and for which compensation had not already been paid, and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy of the payment or tender of the mortgage money or premium, if any, be entitled to remain in possession until eviction in execution of a decree or order of court:

Provided that nothing herein contained shall be construed as affecting the provisions of the Kerala Land Conservancy Act, 1957:

Provided further that this section shall not apply to tenants holding lands under the Government, (2) A tenant so continuing in possession shall, during such continuance, hold as a tenant subject to the terms of his lease or mortgage, if any.

5. Decree in eviction to be conditional on payment of compensation.- (1) In a suit for eviction instituted against a tenant in which the plaintiff succeeds and the defendant establishes a claim for compensation due under section 4 for improvements, the court shall ascertain as provided in section 7 to 16, the amount of the compensation and shall pass a decree declaring the amount so found due and ordering that on payment by the plaintiff into the court of the amount so found due and also the mortgage money or the premium, as the case may be, the defendant shall put the plaintiff into possession of the land with the improvements thereon. (2) If in such suit the court finds any sum of money due by the defendant to the plaintiff for rent, or otherwise in respect of the tenancy, the court shall set off such sum against the sum found due under sub section (1), and shall pass a decree declaring as the amount payable to him on eviction the amount, if any, remaining due to the defendant after such set- off:

Provided that the court shall not set off any sum of money due for rent as aforesaid, if such sum is not legally recoverable.

> (3) The amount of compensation for improvements made sub-sequent to the date up to which compensation for improvements has been adjudged in the decree and the revaluation of an improvement, for which compensation has been so adjudged, when and in so far as such re-valuation may be necessary with reference to the condition of such improvement at the time of eviction as well as any sum of money accruing due to the plaintiff subsequent to the said date for rent, or otherwise in respect of the tenancy, shall be determined by order of the court executing the decree and the decree shall be varied in accordance with such order. (4) Every matter arising under subsection (3) shall be deemed to be a question relating to the execution of a decree within the meaning of sub-section (1) of section 47 of the Code of Civil Procedure, 1908." 26 Sub-section 1 of Section 4 stipulates that every tenant shall, on eviction, be entitled to compensation for improvements which were made by him, or his predecessor-in-interest or by any person who though not in occupation at the time of eviction, has derived title from either of them. Under sub-section 1, such a person is entitled, notwithstanding the determination of the tenancy, to remain in possession until eviction in execution of a decree or order of a court. Sub-section 1 of Section 5 indicates that in a suit for eviction instituted against a tenant in which the plaintiff succeeds and the defendant establishes a claim for compensation, the court is required to ascertain the amount of compensation (under Sections 7 to 16). The court will then pass a decree declaring the amount found due and that on payment by the plaintiff into the court of the amount found due, the defendant shall place the plaintiff in possession of the land with the improvements thereon. The provisions contained in sub-section 1 of Section 5 indicate that a determination of the amount of compensation which is payable to the tenant precedes the passing of the ultimate decree and the plaintiff would be entitled to be placed into possession conditional on the deposit in court of compensation found due. Sub-section 2 of Section 5 enables the plaintiff to seek a set off on account of money due by the defendant for rent against the amount which is found due to the defendant by way of compensation.

Sub-section 3 of Section 5 provides for an eventuality where improvements have been made subsequent to the date upto which compensation for improvements has been adjudged in the decree. On account of such improvements after the passing of the decree, the amount due will be determined by the court executing the decree upon which the decree shall be varied in accordance with such order. 27 The provisions contained in the Act of 1958 came up for consideration before a two judge Bench of this Court in Shamma Bhatt v T Ramakrishna Bhatt7. Justice V Khalid, speaking for this Court held:

> "8...Section 5 comes into operation only when a defendant against whom a suit for eviction is instituted establishes a claim for compensation under the Act. The judgment of the High Court rendered in 1969 has clearly held that the value of improvement awarded was not under Section 4 of the Act but was an amount agreed by the plaintiff. The appellants cannot succeed and have not succeeded in satisfying us that they ever made a claim for compensation under Section 4 of the Act and succeeded in such a claim. Therefore their further claim for getting the improvements

revalued cannot be accepted."8

28 In the present case, what the appellants now seek to assert is that in pursuance of the provisions of Section 4(1), they are entitled to remain in possession until their claim for compensation for the improvements made on the land is adjudicated upon. As we have found earlier, the claim which the appellants asserted in Execution Application 38 of 2009 was specifically for declaring that they 7 (1987) 2 SCC 416 8 Id at page 422 were entitled to remain in possession as lessees and that the respondents were not entitled to dispossess them from the property in their possession. Though they sought to assert that claim in their character as lessees, the issue which requires consideration is whether the claim to compensation under Section 4(1) of the Act of 1958 could have been asserted in the earlier proceedings and should have been asserted then.

29 The substantive part of Section 11 of the CPC together with Explanation IV provide thus:

> "11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
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> 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." Under Section 11, a matter which has been directly and substantially in issue in a former suit between the same parties or between parties litigating under the same title cannot be raised before a court subsequently, where the issue has been heard and finally decided by a competent court. Explanation IV enacts a deeming fiction.
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> As a result of the fiction, a matter which "might and ought" to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such a suit. In other words, Explanation IV is attracted when twin conditions are satisfied: the matter should be of a nature which might and ought to have been made a ground of defence or attack in a former suit.
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> Justice S Rangarajan (as the learned Judge then was) sitting as a Single Judge of the Delhi High Court in Delhi Cloth & General Mills Co. Ltd v Municipal Corporation of Delhi9 noticed this feature :
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> "35...The words employed — might and ought — are cumulative; they are not in the alternative. It is a well-established rule that any plea which if taken would have been inconsistent with or destructive of the title in the earlier suit is not a matter which ought to be raised therein because even though it might also have been raised in the alternative. This aspect was explained by the Judicial Committee of the Privy Council

> in Kameswar Pershad v. Rajkumari Ruttan Koer (I.L.R. 20 Calcutta 79 at p. 85). The possibility of merely raising it as a ground of attack or defence, at least in the alternative, is alone not sufficient; the test is one which is more compulsive, namely, that the said plea "ought" to have been taken as a ground of attack or defence. These features would of course depend upon the particular facts of each case."10 The words "might and ought" are used in a conjunctive sense. They denote that a matter must be of such a nature as could have been raised as a ground of defence or attack and should have been raised in the earlier suit.

30 The "might and ought" requirement was construed by the Privy Council in a judgment of 1892 in Kameswar Pershad v Rajkumari Ruttun Koer11. Lord Morris, speaking for the Privy Council, held thus:

> "That it "might" have been, made a ground of attack is clear. That it "ought" to have been, appears to their Lordships to depend upon the particular fact of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Pun Bahadoor, and it appears to their Lordships that the matter "ought" to have been made a ground of attack in the former 9 ILR (1975) II Delhi 174 10 Id at page 194 11 1892 SCC OnLine PC 16 suit, and therefore that it should be "deemed to have been a matter directly and substantially in issue" in the former suit, and is res judicata."12 The classical dictum on the subject finds formulation in the judgment of Wigram, V C in Henderson v Henderson13 :
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> "...I believe, I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time..." In Greenhalgh v Mallard14, Lord Justice Somervell, speaking for the Court of Appeal, held :
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> "...I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect

of them".

12 Id at page 238 13 67 E.R. 313 14 (1947) 2 All ER 255 In Johnson v Gore Wood & Co (a firm)15, Lord Bingham while adverting to the dictum in Henderson, noted that the underlying public interest in res judicata (as indeed in cause of action estoppel and issue estoppel) has a common element:

"...The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits- based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a 15 [2001] 2 WLR 72 party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." Lord Millett held thus:

"...It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the

> Protection of Human Rights and Fundamental Freedoms (Rome, 4th. November 1950). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression..."

31 Mr Giri urged, relying upon the above decision of the House of Lords that in construing the expression "might and ought", it is necessary for the court to bear in mind the fundamental distinction between res judicata and constructive res judicata. He urged that whereas the former encompasses a matter which was directly and substantially in issue in a previous suit between the same parties and has been adjudicated upon, the latter brings in a deeming fiction according to which a matter which might and ought to have been advanced in a previous suit would be deemed to be directly and substantially in issue. He therefore urges that a degree of circumspection must be exercised in the application of the principle of constructive res judicata.

32 We are not inclined to decide this question on a priori consideration, for the simple reason that under the CPC, both res judicata (in the substantive part of Section 11) and constructive res judicata (in Explanation IV) are embodied as statutory principles of the law governing civil procedure. The fundamental policy of the law is that there must be finality to litigation. Multiplicity of litigation enures to the benefit, unfortunately for the decree holder, of those who seek to delay the fruits of a decree reaching those to whom the decree is meant. Constructive res judicata, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding as to whether a matter might have been urged in the earlier proceedings, the court must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the earlier proceedings, the court will have due regard to the ambit of the earlier proceedings and the nexus which the matter bears to the nature of the controversy. In holding that a matter ought to have been taken as a ground of attack or defence in the earlier proceedings, the court is indicating that the matter is of such a nature and character and bears such a connection with the controversy in the earlier case that the failure to raise it in that proceeding would debar the party from agitating it in the future.

33 In State of U P v Nawab Hussain16, a three judge Bench of this Court noted that the two principles of res judicata and constructive res judicata seek to achieve the common objective of assuring finality to litigation. Justice P N Shinghal observed:

> "3. The principle of estoppel per rem judicatam is a rule of evidence. As has been stated in Marginson v. Blackburn Borough Council [(1939) 2 KB 426 at p. 437], it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It

therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

4. But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell, L.J., has answered it as follows in Greenhalgh v. Mallard [(1947) All ER 255 at p. 257] :

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not 16 (1977) 2 SCC 806 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." This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."17 A Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v State of Maharashtra18 referred to the decision of a three judge bench of this Court in Forward Construction Co. v Prabhat Mandal (Regd.), Andheri19 and noted the following position in law:

"20...an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence..."20 (emphasis supplied)

34 In determining as to whether the bar of constructive res judicata stands attracted, it is necessary to advert to the earlier application which was filed by the appellants in the execution proceedings. The appellants styled the application as 17 Id at pages 809-810 18 (1990) 2 SCC 715 19 (1986) 1 SCC

100 20 Id at page 112 one under Order XXI Rule 99 of the CPC but that, in our view, is not determinative of the true nature of the application. Order XXI Rule 97 provides as follows:

> "97. Resistance or obstruction to possession of immovable property.—(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. [(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]" Order XXI Rule 99 provides thus:
>
> "[99. Dispossession by decree-holder or purchaser.—(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.
>
> (2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]" 35 In Brahmdeo Chaudhary v Rishikesh Prasad Jaiswal21, this Court held that the view taken by the High Court that the only remedy available to a stranger to a decree who claims an independent right, title or interest in the property is to pursue the remedy under Order XXI Rule 99, was unsustainable. The court held that a stranger to a decree is entitled to agitate his/her grievance and claim for adjudication for an independent right, title and interest in the decretal property, even after being dispossessed in accordance with Order XXI Rule 99. Order XXI Rule 97 deals with

21 (1997) 3 SCC 694 the stage which is prior to the actual delivery of possession and the grievance of the obstructionist can be adjudicated upon before the actual delivery of possession to the decree holder. In other words, both sets of remedies are available to a stranger to the decree. Justice S B Majmudar, speaking for the Court held:

> "9…the High Court has totally ignored the scheme of Order 21, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree- holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go

> overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the executing court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order 21, Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves."22

22 Id at page 702 36 Under Order XXI Rule 10123, all questions including questions relating to right, title and interest in the property arising between parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives shall be determined by the court and not by a separate suit. In Shreenath v Rajesh24, Justice A P Misra, speaking for a two judge Bench of this Court, while interpreting the expression "any person" in Rule 97, held thus :

> "10...We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger." 25

37 These principles have been reiterated in Har Vilas v Mahendra Nath26, in which it has been held that the provisions of Order XXI Rule 99 will not defeat the right of a third person claiming to be in possession of the property forming the subject matter of a decree in his own right to get his objection decided under Rule 97, at a stage prior to dispossession.

38 In a succinct elucidation of the law in Nusserwanji E Poonegar v Mrs 23 Order XXI Rule 101 provides thus :

> Question to be determined.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application, and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. Order XXI Rule 103 provides thus :

> Orders to be treated as decrees.- Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

24 (1998) 4 SCC 543 25 Id at page 549 26 (2011) 15 SCC 377 Shirinbai F Bbesania27, Justice R A Jahagirdar as a Single Judge of the Bombay High Court interpreted Rule 101 of Order XXI:

> "10. From the rule extracted above, it is easily seen that the language of the rule is peremptory and the powers given to the executing Court under the said rule are plenary. The powers given to the executing Court under Rule 101 are not qualified or hedged by any restrictions. On the other hand it shows that the executing Court is required to adjudicate upon all questions mentioned in the said rule as if it had jurisdiction to deal with every question that may so arise. By a legal fiction, an executing Court which may otherwise have no jurisdiction is invested with the jurisdiction to try all questions under the aforesaid rule."28 39 In view of the settled position in law, as it emerges from the above decisions, it is evident that the appellants were entitled, though they were strangers to the decree, to get their claim to remain in possession of the property independent of the decree, adjudicated in the course of the execution proceedings. The appellants in fact set up such a claim. They sought a declaration of their entitlement to remain in possession in the character of lessees. Under Order XXI Rule 97, they were entitled to set up an independent claim even prior to their dispossession. Under Order XXI Rule 101, all questions have to be adjudicated upon by the court dealing with the

27 AIR 1984 Bom 357 28 Id at page 359 application and not by a separate suit. Upon the determination of the questions referred to in Rule 101, Order XXI Rule 98 empowers the court to issue necessary orders. The consequence of the adjudication is a decree under Rule 103. 40 The claim which the appellants have now sought to assert for compensation under Section 4(1) of the Act of 1958 is intrinsically related to the claim which they asserted in the earlier round of proceedings to remain in possession. Indeed as we have seen, the appellants seek to resist the execution of the decree on the ground that they are entitled to continue in possession until their claim for compensation is determined upon adjudication and paid. Such a claim falls within the purview of Explanation IV to Section 11 of the CPC. Such a claim could certainly have been made in the earlier round of proceedings. Moreover, the claim ought to have been made in the earlier round of proceedings. The provisions of Order XXI Rules 97 to 103 constitute a complete code and provide the sole remedy both to parties to a suit and to a stranger to a decree. All questions pertaining to the right, title and interest which the appellants claimed had to be urged in the earlier Execution Application and adjudicated therein. To take any other view would only lead to a multiplicity of proceedings and interminably delay the fruits of the decree being realized by the decree holder.

41 This view which we have adopted following the consistent line of precedent on Rules 97 to 103 of Order XXI is buttressed by the provisions of the Act of 1958. A claim under Section 4 (1) has to be addressed to the court which passes a decree for eviction. In the present case, the appellants are strangers to the decree. They were required to get that claim adjudicated in the course of their

Execution Application which was referable to the provisions of Order XXI Rule 97. Having failed to assert the claim at that stage, the deeming fiction contained in Explanation IV to Section 11 is clearly attracted. An issue which the appellants might and ought to have asserted in the earlier round of proceedings is deemed to have been directly and substantially in issue. The High Court was, in this view of the matter, entirely justified in coming to the conclusion that the failure of the appellants to raise a claim would result in the application of the principle of constructive res judicata both having regard to the provisions of Sections 4 and 5 of the Act of 1958 and to the provisions of Order XXI Rules 97 to 101 of the CPC.

42 For the above reasons, we find no merit in the appeal. The appeal shall stand dismissed. Pending applications, if any, are disposed of. There shall be no order as to costs.

……J [Dr DHANANJAYA Y CHANDRACHUD]
……J [HEMANT GUPTA] New Delhi;

February 05, 2019.