Canara Bank vs N.G. Subbaraya Setty on 20 April, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3395, 2018 (16) SCC 228, AIR 2018 SC (CIV) 2609, (2018) 2 RECCIVR 962, (2018) 5 MAD LW 376, (2018) 141 REVDEC 367, (2019) 1 WLC(SC)CVL 106, (2018) 6 SCALE 213, (2018) 3 PAT LJR 122, (2018) 3 JLJR 115, (2018) 2 BANKCAS 513, (2018) 129 ALL LR 488, (2018) 5 ALL WC 5278, (2018) 4 BOM CR 1, (2018) 3 CIVILCOURTC 425, (2018) 187 ALLINDCAS 238 (SC), (2018) 5 CAL HN 187, (2018) 3 ALL RENTCAS 488, (2018) 3 ICC 508, 2018 (4) KCCR SN 473 (SC), 2018 (4) AKR 359

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Bench: R.F. Nariman, Adarsh Kumar Goel

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4233 OF 2018
(ARISING OUT OF SLP (C) NO.25649 OF 2017)

CANARA BANK …APPELLANT

VERSUS

N.G. SUBBARAYA SETTY & ANR. ...RESPONDENTS

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. Roma locuta est; causa finita est. Rome has spoken, the cause is ended. Rome spoke through her laws. One of the pillars of Roman law is contained in the maxim res judicata pro veritate accipitur (a thing adjudicated is received as the truth). This maxim of Roman law is based upon two other fundamental maxims of Roman law, namely, interest reipublicae ut sit finis litium (it concerns the State that there be an end to law suits) and nemo debet bis vexari pro una at eadem causa (no man should be vexed twice over for the same cause). Indeed, that this maxim is almost universal in all ancient laws, including ancient Hindu texts, was discussed by Sir Lawrence Jenkins in Sheoparsan

Singh v. Ramnandan Singh, AIR 1916 PC 78 at 80-81 as follows:

> "There has been much discussion at the Bar as to the application of the plea of res judicata as a bar to this suit. In the view their Lordships take, the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them, their Lordships desire to emphasise that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. "It has been well said," declared Lord Coke, "interest reipublicae ut sit finis litium, otherwise great oppression might be done under colour and pretence of law": (6 Coke, 9a). Though, the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: "If a person though defeated at law sue again he should be answered, 'You were defeated formerly'. This is called the plea of former judgment." (See "The Mitakshara (Vyavahara)" Bk. II, ch. i, edited by J.R. Gharpure, p. 14, and "The Mayuka," Ch. I., sec.
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> 1, p. 11 of Mandlik's edition.) And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

3. This Court in Daryao and others v. State of U.P. and others, (1962) 1 SCR 574 at 583-584, put it very well when it said:

> "In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William De Grey (afterwards Lord Walsingham) in the leading Duchess of Kingston's case [2 Smith Lead. Cas. 13th Ed. pp. 644, 645]. Said William De Grey, (afterwards Lord Walsingham) "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation [Halsbury's Laws of England, 3rd Ed., Vol. 15, para. 357, p. 185]". Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (p. 187, paragraph 362). "Res judicata", it is observed in

> Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — interest republicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause — nemo debet bis vexari pro eadem causa" [Corpus Juris, Vol. 34, p. 743]. In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel. "Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law" [Ibid p. 745]. Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted."

4. The link between the doctrine of res judicata and the prevention of abuse of process is very felicitously stated in Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd. [2013] 4 All ER 715 (at 730-731) as follows:

> "The principle in Henderson v Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the Yat Tung case [1975] AC 581. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, Johnson v Gore-Wood & Co [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiffs claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in Vervaeke (formerly Messina) v Smith [1983] 1 AC 145, 157 that the principle in Henderson v Henderson was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p. 31 as follows: "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. 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"."

5. Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the Court takes place. However, there are certain notable exceptions to the application of the doctrine.

One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. This case is concerned with the application of the last mentioned exception to the rule of res judicata. The brief facts necessary to appreciate the applicability of the said exception to the doctrine of res judicata are as follows. In the present case, respondent No.1 availed a credit facility from the petitioner bank sometime in 2001. Respondent No.2, his son, stood as a guarantor for repayment of the said facility. As respondent No.1 defaulted in repayment of a sum of Rs.53,49,970.22, the petitioner bank filed O.A. No. 440 of 2002 before the DRT Bangalore, against respondent Nos.1 and 2. Respondent No.1, in order to repay the dues of the bank, signed an assignment deed dated 8.10.2003 with the Chief Manager, Basavanagudi Branch, Bangalore for assignment of the trademark "EENADU" in respect of agarbathies (incense sticks) on certain terms and conditions. Clauses 1 to 7 of the aforesaid assignment are set out hereunder:

> "NOW THIS DEED OF ASSIGNMENT OF TRADE MARK "EENADU" WITNESSETH AS FOLLOWS:
>
> 1. The Assignor hereby grant, transfer and assign upon the Assignee upon the terms and conditions mentioned hereunder, the exclusive use and all benefits of the aforesaid trade mark "Eenadu" in relation to the agarbathies (incense sticks) for a period TEN years from the date of this Agreement i.e. 1.10.03 to 30.9.13.
>
> 2. The Assignee shall pay the sum of Rs.

76,000.00 (Rupees seventy six thousand only) per month payable for the period of first six years: i.e. from 1.10.03 to 30.9.09:

> (i) Rs. 40,000.00 shall be credited to the loan amount of the Assignor every month and (ii) the balance of Rs.36,000.00 (Rupees thirty six thousand only) to be paid to the Assignor/permitted to be drawn by him until the expiry of first six years i.e. 1.10.03 to 30.9.09;

and

3. The Assignee shall pay the sum of Rs.83,600.00 (Rupees Eighty three thousand six hundred only) per month payable for the period of next four years i.e. from 1.10.09 to 30.9.13.

> (i) Rs. 40,000 shall be credited to the loan account of the Assignor every month and (ii) the balance of Rs.43,600.00 (Rupees forty three thousand six hundred only) to be paid to the Assignor/permitted to be drawn by him until the expiry of next four years i.e. from 1.10.09 to 30.9.13.

4. The aforesaid payments shall be unconditionally made by the Assignee continuously and uninterruptedly for the aforesaid period of TEN years.

5. The Assignee shall have the right to use the trade mark "Eenadu" on its own and shall also be entitled to grant permission to third party/parties to use the same, subject to the said parties agreeing to maintain the good quality and reputation of the trade mark "Eenadu" during the period of validity of assignment (the above said ten years i.e. 1.10.03 to 30.9.13).

6. The Assignee shall be entitled to collect "Royalty" from the permitted users during the period of validity of assignment (the above said ten years).

7. The period of assignment granted under this deed shall come to an end on the expiry of the period of ten years from the date of this agreement i.e. on 30.9.13 and the agreement shall stand terminated without any notice in relation thereto and the licences, permissions, etc. granted by the Assignee to the third parties in respect of the trade mark of the Assignor "Eenadu" shall also come to an end simultaneously, without such notice."

6. By a letter dated 27.1.2004, the Chief Manager wrote to respondent No.1 stating that:

> "We have been informed by our higher authorities that as per the Banking Company's Regulation Act, 1949, the bank cannot be "patent right holder".
>
> Hence, please note that we are not interested in holding the patent right of Eenadu and as such by this letter, we are cancelling the above assignment deed dated 8-10-2003."

7. On 15.4.2004, respondent No.1 filed O.S. No.2832 of 2004 against the bank challenging the cancellation of the said assignment deed and for recovery of Rs.2,16,000/- with interest thereon for the period 1.10.2003 to 31.3.2004. On 17.9.2004, the petitioner bank filed O.S. No.7018 of 2004 for a declaration that the assignment deed entered into between it and respondent No.1 is vitiated by mistake, undue influence and fraud and that, therefore, the said deed is unenforceable in the eye of law.

8. Meanwhile, the Chief Manager who signed the assignment deed on behalf of the bank, namely, one N.V. Narayana Rao, was dismissed from service pursuant to disciplinary proceedings taken against him on 26.5.2005.

9. The two suits as aforestated were consolidated and disposed of by a common judgment. Issues were framed separately in both suits and it was found that the assignment deed was not vitiated by fraud, misrepresentation or undue influence. Consequently, the bank had no right to cancel or rescind the aforesaid assignment deed. Respondent No.1's claim for a money decree for Rs.2,16,000/- was dismissed. It was also held that the Civil Court had jurisdiction to entertain the suits, despite the pendency of DRT proceedings. The bank's suit came to be dismissed. The ultimate order passed in the two suits is as follows:

> "O.S. 2832/2004 is hereby decreed in part, granting a relief in favour of the plaintiff as against the 1st defendant/bank, declaring that the unilateral cancellation of the

assignment agreement dated 8.10.2003 by the 1st defendant bank vide letter No. LPD/SSI/1034/2004 dated 27.1.2004, is illegal and unsustainable.

The further prayer of the plaintiff seeking money decree against the 1st plaintiff bank, directing to pay him Rs.2,16,000.00 together with interest at 18% p.a. is hereby rejected.

O.S. 7018/2004 is hereby dismissed, thereby the prayer of the plaintiff/bank to declare that the assignment agreement dated 8.10.2003 entered into between the bank and the 1st defendant, as vitiated by virtue of undue influence, fraud and misrepresentation, practiced by the 1st defendant on the bank, is hereby rejected."

10. Respondent No.1 filed a review petition, being miscellaneous petition No.324 of 2013, seeking review of the aforesaid judgment to the extent that his prayer for payment of Rs.2,16,000/- was rejected. On 16.3.2015, this petition was allowed, and O.S. No.2832 of 2004 filed by respondent No.1 was fully decreed against the bank, including the prayer for payment. Against the aforesaid review judgment dated 16.3.2015, an appeal was filed by the bank on 4.1.2016 with an application for condoning the delay of 175 days. We are informed that this appeal is still pending. Meanwhile, respondent No.1, on the basis of the assignment deed, filed another suit, being O.S. No.495 of 2008, against the bank for recovery of a sum of Rs.17,89,915/- with interest for the period 1.4.2004 to 30.4.2007. By a judgment dated 30.10.2015, this suit was decreed on the footing that the earlier judgment dated 27.4.2013, not having been appealed against, was res judicata between the parties. An appeal filed against this judgment met with the same fate in that, by the impugned judgment dated 31.7.2017, the High Court of Karnataka dismissed the appeal filed by the bank on the self-same ground of res judicata. It may be noted that on 14.7.2017, the hearing of the appeal, which culminated in the impugned judgment, was concluded and judgment was reserved. It was only after this that the petitioner bank, for the first time on 26.7.2017, filed a review petition against the judgment dated 27.4.2013 with a condonation of delay application of 1548 days. This review petition is also stated to be pending.

11. Shri Dhruv Mehta, learned senior advocate appearing on behalf of the petitioner bank, has argued that no issue was struck as to res judicata as the same had not specifically been pleaded in the plaint of the suit of 2008. Indeed, the judgment dated 27.4.2013 came long after the pleading in the second suit, and no amendment of the plaint was sought so as to incorporate the plea of res judicata. No issue having been raised, it was impermissible, according to the learned senior advocate, to have gone into this plea at all. It was also argued that on the assumption that the said plea could be gone into, there were two statutory bars to relief, namely, Section 45 of the Trade Marks Act, 1999 and Sections 6 and 8 read with Section 46(4) of the Banking Regulation Act, 1949. The first statutory bar made it clear that unless the assignment deed was registered, it could not be received in evidence by any Court. Sections 6 and 8 of the Banking Regulation Act interdicted the bank from doing any business other than banking business and that, therefore, the assignment deed which enabled the bank to trade in goods and to earn royalty from an assignment of the trademark would be hit by the aforestated provisions and, therefore, would be void in law. For this purpose, he relied strongly upon the judgment of this Court in Mathura Prasad Bajoo Jaiswal & Ors v. Dossibai N. B. Jeejeebhoy, (1970) 1 SCC 613, and various other judgments which have followed the law laid

down by the aforesaid judgment. According to him, therefore, these two statutory prohibitions being pure questions of law, which are unrelated to facts which give rise to a right, cannot be res judicata between the parties. According to the learned senior advocate, both points had been raised before the Courts below with no success. Indeed, the very letter dated 27.1.2004 cancelling the assignment deed would itself show that the plea of the assignment deed being contrary to the Banking Regulation Act was the very reason for cancelling the aforesaid deed. He also referred to and relied upon the fact that the Bank Manager responsible for signing the said deed had been dismissed from service by an order dated 26.5.2005. Shri Mehta also strongly relied upon a judgment dated 29.1.2011, by the Sessions Court in Bangalore, by which the Chief Manager, one A. Sheshagiri Rao, who was made accused No.1 in a special criminal case filed by the CBI and respondent Nos. 1 and 2, who were made accused nos. 2 and 3 respectively, were each sentenced to 6 months, three years and two years respectively by the learned Sessions Judge, having been convicted under Sections 120B and 420 of the Indian Penal Code. Accused No.1 was also convicted of an offence under Section 13 of the Prevention of Corruption Act, 1988. According to the learned senior advocate, therefore, the doctrine of res judicata cannot be stretched to allow perpetuation of a fraud committed upon the bank.

12. Shri Shanthakumar Mahale, learned advocate appearing for respondent nos. 1 and 2, on the other hand, defended the judgments of the Courts below. According to the learned counsel, the judgment dated 27.4.2013 was delivered long after the Chief Manager was dismissed and after the Sessions Judge's judgment dated 29.1.2011 convicting respondent Nos. 1 and 2. This judgment specifically held that there was no fraud played, that the bank itself sought the assignment from respondent Nos. 1 and 2, and that since there was no misrepresentation, undue influence etc., the assignment deed was valid in law, the cancellation of the said deed being illegal. This judgment is final between the parties and has never been challenged, except by way of a review which was filed belatedly after hearing both parties in the appeal. The said review petition, which is obviously an abuse of process with huge delay, could not possibly render the res sub judice so as to affect the judgments of the Courts below. According to the learned counsel, neither Section 45 of the Trade Marks Act nor Sections 6 and 8 of the Banking Regulation Act are capable of only one obvious interpretation so that, on their application, the assignment deed becomes illegal in law.

13. We had appointed Shri K.V. Viswanathan, learned senior counsel, as Amicus Curiae to guide us in this matter. He has referred to a large number of judgments and has rendered invaluable assistance to this Court in order that we arrive at a proper and just conclusion in this matter. He has argued that the review petition that is filed belatedly against the judgment dated 27.4.2013, being grossly belated with no chance of success, would not take away the res judicata effect of the judgment dated 27.4.2013. According to the learned senior counsel, the case law makes it clear that if an appeal is filed within limitation, the res never becomes judicata. In fact, until the limitation for filing an appeal is over, the res remains sub judice. It is only also when the limitation period is over that the res can be considered to be judicata. Depending upon the length of time for which delay is sought to be condoned, the Court can either proceed with the matter and consider the case on the footing of res judicata or stay further proceedings in order to await the outcome of the proceedings in the appeal in the other case. The test, according to the learned senior counsel, is whether the delay in filing the appeal can be considered by the Court to be without sufficient cause and,

therefore, an abuse of process. It is also important to find out whether third party rights have arisen in the meanwhile. He has cited a large number of judgments before us, including the position in the U.K. and U.S. Interestingly, he cited judgments to show that in the United States, res judicata attaches the moment a judgment is pronounced, despite the fact that an appeal may be filed against the said judgment.

14. We may first deal with the preliminary point urged by Shri Mehta. He pressed into service the judgment in V. Rajeshwari v. T.C. Saravanabava, (2004) 1 SCC 551 for the proposition that a plea of res judicata not properly raised in the pleadings or put in issue at the stage of trial could not be permitted to be taken. A closer look at the said judgment shows that the judgment dealt with such a plea not being permitted to be raised for the first time at the stage of appeal. In the present case, though an issue as to res judicata was not struck between the parties, both parties argued the matter based upon the pleadings and the judgment contained in the two suits of 2004. It is only after full arguments on both sides that the trial Court in the judgment dated 30.10.2015 accepted the respondent's plea of res judicata. Even before the appellate Court, the point of res judicata was argued by both parties without adverting to the aforesaid objection. It is obvious, therefore, that this ground raised for the first time before this Court, cannot non-suit the respondents.

15. The doctrine of res judicata is contained in Section 11 of the Code of Civil Procedure, 1908, which, though not exhaustive of all the facets of the doctrine, delineates what exactly the doctrine of res judicata is in the Indian context. Section 11 reads as under:

> "11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
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> 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.
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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.
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> Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

> Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
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> Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.
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> Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

16. This Court in Sheodan Singh v. Daryao Kunwar, (1966) 3 SCR 300 (at 304-305) has stated with some felicity the conditions that need to be satisfied in order to constitute a matter as res judicata. This Court held:

> "A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—
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> (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 in the former suit;
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> (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
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> (iii) The parties must have litigated under the same title in the former suit;
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> (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; and
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> (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

Further Explanation I shows that 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 if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied."

17. As to what happens when an appeal is filed against a judgment in the first proceeding, a Full Bench of the Allahabad High Court in Balkishan v. Kishan Lal, (1888) ILR 11 All 148 (at 159-161), is most instructive. Mahmood, J., speaking for the Full Bench, referred to Explanation IV to Section 13 of the Code of Civil Procedure, as it then stood. The learned Judge referred to the said explanation in the following terms:

> "The latter part of the Explanation IV of that section has been framed in somewhat unspecific language, and runs as follows:
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> "A decision liable to appeal may be final within the meaning of this section until the appeal is made." The language of the section is silent as to what happens when an appeal has been preferred; and no doubt much depends upon the interpretation of two vague words "may" and "until" as they occur in the sentence which I have just quoted. I may perhaps say that more has been aimed at by that sentence than the few words of which that sentence consists could convey. What has been left unsettled by that sentence is the difficulty pointed out by a juristic Judge of such eminence as Mr. Justice Holloway of Madras in Sri Raja Kakarlapudi Suriyanarayanarazu Garu v. Chellamkuri Chellamma [5 M.H.C.R. 176] when that learned Judge said:
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> "In the lower Court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was pending. This is not in accordance with English law, as the judgment on the rejoinder in Doe v. Wright [10 A. & E. 763] shows. It would, however, be perfectly sound doctrine in the view of other jurists (Unger Oct. Priv. Recht, II, 603, Sav. Syst., 297, Seq. Waihier, II, 549). As an Englishman I should be sorry to invite a comparison between the reasons given by these great jurists for their and those embodied in the English cases for the contrary doctrine." xxx xxx xxx I hold that the views thus expressed by Pothier and, as Mr. Justice Holloway has indicated, adopted by other continental jurists as to the doctrine of res judicata, are consistent with the interpretation which I place upon Explanation IV of s. 13 of the Code of Civil Procedure in relation to the authority of judgments still liable to appeal. Such judgments are not definitive adjudications. They are only provisional, and not being final cannot operate as res judicata. Such indeed seems to be the view adopted by the learned Judges of the Bombay High Court when they said, in Nilvaru v. Nilvaru [ILR 6 Bom. 110.], "We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be res judicata and becomes res sub judice." In this case, therefore, both the Courts below were wrong in law in holding that the previous judgment of the 10th March, 1886, which at the date of the institution of this suit was still liable to appeal, and which at the date of the decision of this suit by the first Court, as also at the date of the decision by the lower appellate Court, was the subject of a second appeal pending in this Court (S.A. No. 973 of 1886) could operate as res judicata in favour of the plaintiff in regard to his title as to the malikana."

18. The Privy Council, in an early judgment in S.P.A. Annamalay Chetty v. B.A. Thornhill AIR 1931 PC 263 (at 264), was faced with the question as to whether the filing of an appeal would by itself take away the res judicata effect or whether a matter heard and finally decided by the first Court was res judicata until it was set aside on appeal. The Privy Council held:

> "Section 207 of the Civil Procedure Code, 1889, provides as follows:
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> "All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall be non-suited." The appellant maintained that, under this provision, no decree, from which an appeal lies and has in fact been taken, is final between the parties so as to form res judicata, while the respondent contended that such a decree was final between the parties and formed res adjudicata until it was set aside on appeal. In their Lordships' opinion the former view is the correct one, and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res adjudicata as between the same parties. The opinion of the learned Judges of the Supreme Court clearly inclined to the same view, and their Lordships have a difficulty in appreciating why the learned Judges found it unnecessary to decide this point, for this view still leaves it open to the Court to see that the appellant does not get decree twice over for the same sum, and it is inconsistent with the other ground expressed by them for their decision that the appellant's cause of action had been merged into the decree in Action No. 4122, since, according to this view, that decree was not final. Their Lordships regret that the second action was not adjourned pending the decision of the appeal in the first action, as that would have simplified procedure and saved expense."

19. Our law, therefore, is different from the American law – a decree from which an appeal lies and has in fact been filed would render the res sub judice and not judicata. This judgment of the Privy Council has been repeatedly followed by the High Courts in this country. See, Parshotam Parbhudas v. Bai Moti AIR 1963 Gujarat 30 at para 8, Bhavani Amma v. Narayana Acharya AIR 1963 Mysore 120 at para 2, Satyanarayan Prosad Gooptu v. Diana Engineering Company AIR 1952 Calcutta 124 at para 10 and Venkateswarlu v. Venkata Narasimham AIR 1957 Andhra Pradesh 557 at para 3.

20. In Chengalavala Gurraju v. Madapathy Venkateswara Row Pantulu Garu AIR 1917 Madras 597 at 599-600, a Division Bench of the Madras High Court referred to and relied upon Balkishan (supra). The Court then held:

> "Explanation 4 to Section 13 of the Civil Procedure Code of 1882 which enacted that a decision liable to appeal may be final within the meaning of the Section until the appeal is made has been omitted in the present Code (of 1908) and the omission (which was in all probability made in view of the decision in Bal Kishan v. Kishan Lal (1889) 11 All 148) removes any doubts or difficulties in dealing with the question and it is not necessary to speculate on the class of cases to which this explanation can be applied if a judgment liable to appeal is only held to be provisional and not operative

> as res judicata. In dealing with Section 52 of the Transfer of Property Act it has been held that a person who purchases property between the date of the disposal of the suit and the filing of the appeal would be bound by the rule of lis pendens:
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> Gobind Chunder Roy v. Guru Churn Kurmokar (1888) 15 Cal. 94, Dinonath Ghose v. Shama Bibi (1901) 28 Cal. 23, Sukhdeo Prasad v.

Jamna (1901) 23 All 60, Settappa Gounden v. Muthia Gounden (1908) 31 Mad. 268. If the appeal is only a continuation of the original proceedings and the suit is, for the purpose of Section 52 of the Transfer of Property Act, regarded as pending between the date of the decree and that of the filing of an appeal, it is difficult to see why the same rule should not apply when dealing with Section 11 of the Civil Procedure Code.

xxx xxx xxx As regards appeals filed out of time and after independent rights between the parties have ripened, it is unlikely that courts would excuse the delay, if during the interval other rights come into existence, which would render it inequitable that questions disposed of should be re-opened at the instance of a party who seeks the indulgence of the court: Esdaile v. Payne (1889) 40 Ch. D. 520. Following the decision in Bal Kishen v. Kishen Lal, we are of opinion that the Sub-Collector was wrong in holding that the decision passed by him in Suits Nos. 466 of 1909 and 276 of 1910 had the force of res judicata during the interval between the date of his decree and the time allowed by law for filing the appeal."

21. This judgment was followed in Baijnath Karnani v. Vallabhdas Damani, AIR 1933 Madras 511 at 514.

22. The conspectus of the above authorities shows that until the limitation period for filing of an appeal is over, the res remains sub judice. After the limitation period is over, the res decided by the first Court would then become judicata. However, questions arise as to what is to be done in matters where the hearing in the second case is shortly after the limitation period for filing an appeal in the first case has ended. At least two judgments, one of the Privy Council and one of the Bombay High Court, have referred to the fact that, in appropriate cases, the hearing in the second case may be adjourned or may be stayed in order to await the outcome of the appeal in the first case. See, Chandra Singh Dudhoria v. Midnapore Zemindary Co. Ltd. (1941) 69 IA 51 (PC) at 58-59 and Indra Singh and Sons Ltd. v. Shiavax. C. Cambata, ILR 1948 Bom 346 at 352.

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23. If the period of limitation for filing an appeal has not yet expired or has just expired, the Court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the Court hearing the second proceeding would be justified in treating the first

proceeding as res judicata. No hard and fast rule can be applied. The entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding. Many factors have to be considered before exercising this discretion – for example, the fact that the appeal against the first judgment is grossly belated; or that the said appeal would, in the ordinary course, be heard after many years in the first proceeding; or, the fact that third party rights have intervened, thereby making it unlikely that delay would be condoned in the appeal in the first proceeding. As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a Court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial Court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the Court's time and dragging the parties into a second round of litigation on the merits of the case.

24. In the present case, a belated review petition was filed after arguments were heard and judgment reserved by the appellate Court. Would this Court have to await the outcome of the said review petition before deciding whether the judgment dated 27.4.2013 is res judicata? Obviously not. It is clear that a review petition filed long after the judgment dated 27.4.2013, with a condonation application for a delay of over four years, could not possibly be held to be anything but an abuse of the process of the Court. This being so, we proceed to examine whether the judgment dated 27.4.2013 can be considered to be res judicata in the second proceeding in this case, namely the suit of 2008 filed by respondent No.1. We now come to the argument of Shri Dhruv Mehta based on the application of the principles contained in Mathura Prasad (supra).

25. In Mathura Prasad (supra), a question arose as to whether an erroneous judgment on the jurisdiction of the Small Causes Court in relation to a proceeding arising out of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would be res judicata. The view expressed by the High Court was overruled by this Court in 1962, by which time the trial Judge and the High Court of Bombay rejected an application filed by the appellant for an order determining standard rent of the premises. This Court laid down:

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

res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

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7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties: Tarini Charan Bhattacharjee's case. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

8. In a case relating to levy of tax a decision valuing property or determining liability to tax in a different taxable period or event is binding only in that period or event, and is not binding in the subsequent years, and therefore the rule of res judicata has no application: See Broken Hill Proprietary Company Ltd. v. Municipal Council of Broken Hill [(1926) AC 94].

9. A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. Rankin, C.J., observed in Tarini Charan Bhattacharjee's case:

"The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question

would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the Code of Civil Procedure means the right litigated between the parties i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land." [Emphasis Supplied] (at pages 617-619)

26. Ultimately, the Court held that since the decision of the Civil Judge that he had no jurisdiction to entertain the application of standard rent, in view of the judgment of the Supreme Court, was plainly erroneous, the decision in the previous proceedings cannot be regarded as conclusive. The appeals were, therefore, allowed and the orders passed by the High Court and the Court of Small Causes were set aside and the proceedings were remanded to the Court of first instance.

27. This judgment has been followed in a number of cases. In Sushil Kumar Mehta v. Gobind Ram Bohra (1990) 1 SCC 193, the aforesaid judgment was referred to in paragraphs 20 and 21 and followed, holding that where there is an inherent lack of jurisdiction, which depends upon a wrong decision, the earlier wrong decision cannot be res judicata. Similarly, in Isabella Johnson (Smt.) v. M.A. Susai (1991) 1 SCC 494, this Court, after setting out the law contained in Mathura Prasad (supra), stated that a Court which has no jurisdiction in law cannot be conferred with jurisdiction by applying the principle of res judicata, as it is well settled that there is no estoppel on a pure question of law which relates to jurisdiction.

28. An instructive Full Bench decision of the Punjab and Haryana High Court was cited before us by Shri Viswanathan, State of Punjab v. Nand Kishore, AIR 1974 Punjab & Haryana 303 at 308-309, which further explained the ratio of Mathura Prasad (supra). What troubled the Full Bench, after referring to Mathura Prasad (supra), was as to whether an issue of law decided inter parties could be held to be res judicata in a subsequent proceeding between the same parties. After referring to

Mohanlal Goenka v. Benoy Krishna Mukherjee, (1953) SCR 377, which held that even an erroneous decision on a question of law operates as res judicata between parties, and various other Supreme Court judgments, the Full Bench of the Punjab and Haryana High Court, by a majority decision, went on to hold:

> "17. What exactly then is the ratio decidendi in Mathura Prasad's case? It is manifest that the sole issue in the appeal was as to the jurisdiction of the Court of Small Causes for determining the standard rent of premises constructed in pursuance of a building lease of an open site. Therefore, the authority is a precedent primarily on the limited issue of the jurisdiction of a Court. What directly arose for determination therein and what has been specifically laid down by their Lordships is that a patently erroneous decision (directly contrary to a Supreme Court judgment) in a previous proceeding in regard to the jurisdiction of a Court could not becomes res judicata between the parties. The weighty reason for so holding was that such a result would create a special rule of law applicable to the parties in relation to the jurisdiction of the Court in violation of rule of law declared by the legislature. It is manifest that this enunciation was an engrafted exception to the general principle noticed in the judgment itself, i.e., a question of law including the interpretation of a statute would be res judicata between the same parties where the cause of action is the same.
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> I am inclined to the view that it is unprofitable and indeed unwarranted to extract an observation and a sentence here and there from the judgment and to build upon it on the ground that certain results logically follow therefrom. Such a use of precedent was disapproved by the Earl of Halsbury L. C. in Quinn v. Leathem 1901 AC 405. Approving that view and quoting extensively therefrom their Lordships of the Supreme Court in State of Orissa v. Sudhansu Sekhar Misra AIR 1968 SC 647 have categorically observed as follows:
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> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."
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> 18. In strictness, therefore, the ratio decidendi of Mathura Prasad's case is confined to the issue of jurisdiction of the Court but is equally well-settled that the obiter dicta of their Lordships is entitled to the greatest respect and weight and is indeed binding if it can be found that they intended to lay down a principle of law. The issue, therefore, is as to what else, apart from the ratio, was sought to be laid down by the Supreme Court in this case. The very closely guarded language used by their Lordships in the body of the judgment leads me to conclude that they wished to confine their observations within the narrowest limits. The expression used (which is sought to be extended on behalf of the respondent) is "a pure question of law unrelated to the right of the parties to a previous suit." It is very significant that their Lordships, with their meticulous precision of language, have no where laid down in the judgment that a pure question of law can never be res judicata between the

parties. Indeed it has been said to the contrary in terms. The emphasis, therefore, in the expression abovesaid is on the fact that such a pure question of law must be unrelated to the rights of the parties. It stands noticed that a decision by a Court on a question of law cannot be absolutely dissociated from the decision on the facts on which the right is founded. Consequently what was exactly to be connoted by the expression "a pure question of law unrelated to the rights of the parties" was itself expounded upon by their Lordships. Without intending to be exhaustive, the Court has indicated specifically the exceptional cases in which special considerations apply for excluding them from the ambit of the general principle of res judicata. The principle of law which their Lordships herein have reiterated is that a pure question of law including the interpretation of a statute will be res judicata in a subsequent proceeding between the same parties. To this salutary rule, four specific exceptions are indicated. Firstly, the obvious one, that when the cause of action is different, the rule of res judicata would not be attracted. Secondly, where the law has, since the earlier decision, been altered by a competent authority. Thirdly, where the earlier decision between the parties related to the jurisdiction of the Court to try the earlier proceedings, the same would not be allowed to assume the status of a special rule of law applicable to the parties and therefore, the matter would not be res judicata. Fourthly, where the earlier decision declared valid a transaction which is patently prohibited by law, that is to say, it sanctifies a glaring illegality." On facts, the majority judgment of the Full Bench held that the earlier decision inter parties was res judicata as it was on a question of law which was not unrelated to the rights of the parties. Sharma, J. dissented with this view, and held that the decision rendered in the earlier case was erroneous and related to the jurisdiction of the Court. Since a wrong decision on a point of jurisdiction could not operate as res judicata, the learned Judge dissented.

29. An appeal from the Division Bench judgment pursuant to the Full Bench decision resulted in the decision in Nand Kishore v. State of Punjab, (1995) 6 SCC 614. A brief resume of the facts show that the appellant had been compulsorily retired, having completed only ten years' qualifying service in pursuance of Rule 5.32(b) of the Punjab Civil Services Rules, Volume II. A writ petition that was moved by the appellant against the compulsory retirement order was dismissed on 2.2.1962. The appellant had not questioned the validity of Rule 5.32(b) in the aforesaid writ petition. However, in Moti Ram Deka v. General Manager, N.E. Frontier Railways, (1964) 5 SCR 683, this Court held that if the compulsory retirement rule permitted an authority to retire a public servant at a very early stage of his career, such rule might be constitutionally invalid.

The appellant, spurred by the decision in Moti Ram Deka (supra), filed a suit in 1964 for a declaration that Rule 5.32 of the aforesaid rules was constitutionally invalid. A pari materia rule to that of Rule 5.32 was struck down by this Court in Gurdev Singh Sidhu v. State of Punjab, (1964) 7 SCR 587. However, since a writ petition had been filed by the appellant earlier, the State of Punjab, in its written statement to the suit filed by the appellant, took up the plea of constructive res

judicata. This plea found favour with the Full Bench of the High Court on 8.5.1974, following which a Division Bench allowed the appeal of the State of Punjab on 13.8.1974. It is from this judgment that an appeal landed up before this Court, as is stated hereinabove. This Court, on 6.12.1990, advised the appellant to file a special leave petition from the order of the High Court dismissing his writ petition dated 5.2.1962, with an appropriate application for condonation of delay. The delay was condoned by this Court in the interest of justice in the special circumstances of this case under Article 142, and the said belated appeal was allowed following Gurdev Singh (supra) and striking down the order of compulsory retirement of the appellant. Despite having so decided, this Court went into the doctrine of constructive res judicata and decided that the constitutionality of a provision of law stands on a different footing from other questions of law. As there is a presumption of constitutionality of all statutes, the "might and ought" rule of constructive res judicata cannot be applied. Instead what was applied by this Court was that part of the decision in Mathura Prasad (supra) which stated that when the law has, since the earlier decision in the appellant's writ petition, been altered by a competent authority, res judicata cannot apply. The Full Bench of the Punjab High Court was expressly overruled on the point that a "competent authority" can also be a Court. Hence, a changed declaration of law would also fall within an earlier decision being altered by a competent authority. This Court, therefore, held that since this Court itself had altered the law when it declared the pari materia rule as unconstitutional, the doctrine of res judicata could not apply.

30. In Allahabad Development Authority v. Nasiruzzaman (1996) 6 SCC 424, this Court held that when the previous decision was found to be erroneous on its face, such judgment cannot operate as res judicata, as to give effect to such judgment would be to counter a statutory prohibition. On the facts of that case, it was held that in a land acquisition case, after vesting has taken place in favour of the State, obviously, the lapse of a notification under Section 6 of the Land Acquisition Act, 1894 could not possibly arise.

31. In Shakuntla Devi v. Kamla (2005) 5 SCC 390, this Court held that in view of the changed position in law consequent to a contrary interpretation put on Section 14 of the Hindu Succession Act, 1956 by V.Tulasamma vs. V.Sesha Reddy (1977) 3 SCC 99, the earlier decree based on judgments that were overruled cannot operate as res judicata. This is in consonance with the law laid down by this Court in Nand Kishore (supra).

32. Since Mathura Prasad (supra) followed the Full Bench judgment of the Calcutta High Court in Tarini Charan Bhattacharjee and others v. Kedar Nath Haldar, AIR 1928 Calcutta 777 (at 781-782), it is important to set out what the Full Bench said in answer to the question posed by it – namely, whether an erroneous decision on a pure question of law operates as res judicata in a subsequent suit where the same question is raised. The answer given by the Full Bench is in four propositions set out hereinbelow:

> "(1) The question whether the decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances, the Court shall not try a suit or issue, but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances, it must necessarily be wrong for a

> Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not accordingly, as it conceives the previous decision to be right or wrong. To say as a result of such disorderly procedure that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that, therefore, it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.
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> (2) In India, at all events, a party who takes a plea of res judicata has to show that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and also that it has been heard and finally decided. This phrase "matter directly and substantially in issue" has to be given a sensible and businesslike meaning, particularly in view of Ex. 4,Section 11, Civil P.C., which contains the expression "grounds of defence or attack".

Section 11 of the Code says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. As a rule parties do not join issue upon academic or abstract questions but upon matters of importance to themselves. The section requires that the doctrine be restricted to matters in issue and of these to matters which are directly as well as substantially in issue.

(3) Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The Court and the public have an interest. When plea of res judicata is raised with reference to such matters, it is at least a question whether special considerations do not apply.

(4) In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision can be attacked on a particular point. On the other hand it is plain from the terms of Section 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

33. Given the conspectus of authorities that have been referred to by us hereinabove, the law on the subject may be stated as follows:

> (1) The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or

proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

(2) To this general proposition of law, there are certain exceptions when it comes to issues of law:

(i) Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a Court competent to try such suit. When read with Explanation (I) to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in Courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a Court cannot clothe that Court with jurisdiction where it has none. Obviously, a Civil Court cannot send a person to jail for an offence committed under the Indian Penal Code. If it does so, such a judgment would not bind a Magistrate and/or Sessions Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Penal Code. Equally, a Civil Court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special Court with jurisdiction to decide such suits.

As an example, under Section 28 of the Bombay Rent Act, 1947, the Small Causes Court has exclusive jurisdiction to hear and decide proceedings between a landlord and a tenant in respect of rights which arise out of the Bombay Rent Act, and no other Court has jurisdiction to embark upon the same. In this case, even though the Civil Court, in the absence of the statutory bar created by the Rent Act, would have jurisdiction to decide such suits, it is the statutory bar created by the Rent Act that must be given effect to as a matter of public policy. (See, Natraj Studios (P) Ltd. v. Navrang Studios & Anr., (1981) 2 SCR 466 at

482). An erroneous decision clothing the Civil Court with jurisdiction to embark upon a suit filed by a landlord against a tenant, in respect of rights claimed under the Bombay Rent Act, would, therefore, not operate as res judicata in a subsequent suit filed before the Small Causes Court between the same parties in respect of the same matter directly and substantially in issue in the former suit.

(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous

suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in Natraj Studios (supra), it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.

(iii) Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different.

34. On the facts of this case, Shri Mehta referred us to the statutory prohibition contained in the Trade Marks Act and the Banking Regulation Act. The relevant provisions are Section 45 of the Trade Marks Act and Sections 6 and 8 of the Banking Regulation Act read with Section 46(4) thereto. The aforesaid statutory provisions are set out hereinbelow:

> "TRADE MARKS ACT, 1999
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> 45. Registration of assignments and transmissions (1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall, on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods or services in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register.

Provided that where the validity of an assignment or transmission is in dispute between the parties, the Registrar may refuse to register the assignment or transmission until the rights of the parties have been determined by a competent court.

(2) Except for the purpose of an application before the Registrar under sub-section (1) or an appeal from an order thereon, or an application under section 57 or an appeal from an order thereon, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section (1), shall not be admitted in evidence by the Registrar or the Appellate Board or any court in proof of title to the trade mark by assignment or transmission unless the Registrar or the Appellate Board or the Court, as the case may be, otherwise directs. xxx xxx xxx BANKING REGULATION ACT, 1949

6. Forms of business in which banking companies may engage (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:

(a) the borrowing, raising, or taking up of money;

the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundies, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a Managing Agent or Secretary and Treasurer of a company;

(c) contracting for public and private loans and negotiating and issuing the same;

(d) the effecting, insuring, guaranteeing, underwriting, participating in Managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) Managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;

(k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).

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8. Prohibition of trading Notwithstanding anything contained in section 6 or in any contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in clause (i) of sub-section (1) of section 6:

> PROVIDED that this section shall not apply to any such business as is specified in pursuance of clause (o) of sub-section (1) of section 6. Explanation- For the purposes of this section, “goods” means every kind of movable property, other than actionable claims, stocks, shares, money, bullion and specie, and all instruments referred to in clause (a) of sub-section (1) of section 6.
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> xxx xxx xxx
>
> 46. Penalties (1) – (3) xxx xxx xxx (4) If any other provision of this Act is contravened or if any default is made in-

(i) complying with any requirement of this Act or of any order, rule or direction made or condition imposed there under, or

(ii) carrying out the terms of, or the obligations under, a scheme sanctioned under sub-section (7) of section 45, by any person, such person shall be punishable with fine which may extend to one crore rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where a contravention or default is a continuing one, with a further fine which may extend to one lakh rupees for every day, during which the contravention or default continues."

35. Insofar as Section 45 of the Trade Marks Act is concerned, it is clear that this plea was raised throughout both the proceedings. Insofar as the suits of 2004 were concerned, the judgment dated 27.4.2013 expressly recorded the aforesaid plea taken on behalf of the bank, but turned it down in paragraphs 44 and 56 as follows:

> "44. The bank has also taken further steps by virtue of the assignment deed dated 8.10.2003 obtained by them from N.G. Subbaraya Setty and filed an application to the Trademark Registry as per Ex.D2, seeking for registration of the assignment of the trademark obtained by them from N. Subbaraya Setty, the registered owner of the trademark, and the bank has also paid Rs.5,000-00 towards the registration fee. But the Trademark Registry returned the said application contending that, deficit registration fee is payable by the assignee and the assignor/registered owner of the trademark has to file an affidavit confirming the assignment of the trademark in favour of the bank. Subsequently, it appears no further steps have been taken by the bank to comply with the objections raised by the Trademark Registry, and hence the said assignment of the trademark in favour of the bank, could not be registered with the Trademark Registry.
>
> xxx xxx xxx
>
> 56. So far as issue no.1 and 2 raised in O.S. No.7018/2004 is concerned, since the plaintiff bank, has miserably failed to establish the allegations of misrepresentation, fraud and undue influence alleged to have been played, by N.G. Subbaraya Setty on the bank, the plaintiff bank cannot escape from the legal consequences of assignment deed obtained by them dated 8.10.2003 and it cannot be held that the assignment deed obtained, by the bank from N.G. Subbaraya Setty is unenforceable.

Therefore, I answer both the issues 1 and 2 raised in O.S. 7018/2004 in the negative." (Issue No.2 in O.S. No.7018 of 2004 read as follows: Whether plaintiff proves that the deed of assignment of trademark, entered into between plaintiff and 1 st defendant is not enforceable in law?)

36. Equally, insofar as the trial Court judgment in the second suit of 2008 is concerned, the said plea was expressly raised and turned down in the following manner:

> "...The defendant No.1 himself has produced the original Assignment Deed and in this case defendant No.1 himself has taken up the contention that said Assignment Deed is not registered as per Trade Mark Act and as such, the said document cannot be considered. There are certain procedures that within 5 days the Assignor file an affidavit to the Trade Mark Authority in respect of change of user of the Trade Mark and defendant No.1 himself has moved application by paying Rs.5,000/- D.D. for registering the document. Inspite of that, the Trade Mark Authorities have not registered the Trade Mark and as such, the learned counsel for defendant No.1 vehemently argued that the said Trade Mark "Eenadu" is not registered in accordance with law and as such, same cannot be considered for any of the purposes. Further, it is contended that the Assignment Deed is not registered in accordance with laws. But when the Assignment Deed has been relied upon in the earlier judgments and parties have accepted the execution of the document, then defendant No.1 cannot again contend that said Assignment Deed is not registered and cannot be considered for any of the purposes, does not hold good. It is nothing but res judicata as contended by the plaintiff in the decisions cited above."

37. The impugned judgment dated 31.7.2017 also records the aforesaid submission and turns it down stating:

> "...Indisputably, the grounds regarding insufficiently stamped assignment deed and non-registration of the trade mark were argued by the Bank which were considered and addressed by the trial Court in O.S. No.2832/2004 and O.S. No.7018/2004. In such circumstances, raising the very same grounds in the second round of proceedings, the issue in which the matter directly and substantially has been heard and finally decided in a former suit between the same parties, litigating under the same title amounts to res judicata. Defendant No.1-Bank is precluded from raising the same objection in the present proceedings which is finally decided holding the assignment deed as legal and binding on the defendant No.1-Bank..."

38. We are of the opinion that both the trial Court and the first appellate Court were entirely wrong in treating the statutory prohibition contained in Section 45(2) of the Trade Marks Act as res judicata. It is obvious that neither Court has bothered to advert to Section 45 and/or interpret the same. The second proceeding contained in O.S. No.495 of 2008 prayed for payment of a sum of Rs.17,89,915/- along with interest thereon for the period 1.4.2004 to 30.4.2007. Paragraph 8 of the plaint in the said suit reads as under:

> "8. The plaintiff has already filed a suit in O.S. No.2832/2004 against the 1st defendant for the recovery of the amount payable by it under the said Assignment Deed till the end of 31.3.2004. The cause of action for the present suit claim had not arisen by then as the amount had not become payable by then i.e. for the period 1.4.2004 to 30.4.2007."

39. Clearly, therefore, the subsequent suit of 2008 raises an issue which is different from that contained in the earlier suit filed by the same party in 2004. Also, the earlier decision in the judgment dated 27.4.2013 has declared valid a transaction which is prohibited by law. A cursory reading of Section 45(2) of the Trade Marks Act makes it clear that the assignment deed, if unregistered, cannot be admitted in evidence by any Court in proof of title to the trademark by the assignment, unless the Court itself directs otherwise. It is clear, therefore, that any reliance upon the assignment deed dated 8.10.2003 by the earlier judgment cannot be sanctified by the plea of res judicata, when reliance upon the assignment deed is prohibited by law.

40. Equally, a reference to Sections 6, 8 and 46(4) of the Banking Regulation Act would also make it clear that a bank cannot use the trademark "Eenadu" to sell agarbathies. This would be directly interdicted by Section 8, which clearly provides that notwithstanding anything contained in Section 6 or in any contract, no banking company shall directly or indirectly deal in the selling of goods, except in connection with the realisation of security given to or held by it. Also, granting permission to third parties to use the trademark "Eenadu" and earn royalty upon the same would clearly be outside Section 6(1) and would be interdicted by Section 6(2) which states that no bank shall engage in any form of business other than those referred to in sub-section (1).

41. Shri Shanthakumar Mahale, however, exhorted us to read Sections 6(1)(f) and (g) as permitting the sale of goods under the trademark and/or earning royalty from a sub-assignment thereto. We are of the view that the trademark cannot be said to be property which has come into the possession of the bank in satisfaction or part satisfaction of any of the claims of the bank. We are further of the view that the trademarks are not part of any security for loans or advances that have been made to the first respondent, or connected with the same. It is thus clear that the assignment deed dated 8.10.2003 is clearly hit by Section 6(2) and Section 8 read with the penalty provision contained in Section 46(4) of the Banking Regulation Act.

42. The appeal is allowed and the judgment of the trial Court and the first appellate Court are set aside. Consequently, O.S. No.495 of 2008 filed by respondent No.1 will stand dismissed.

.....J. (Adarsh Kumar Goel) .....J. (R.F. Nariman) New Delhi;

April 20, 2018.