Gulabchand Chhotalal Parikh

Vs

State of Bombay (now Gujarat)

Civil Appeal No. 670 of 1963

(A. K. Sarkar, K. Subha Rao, Raghuvar Dayal, N. Rajgopala Ayyangar, J. R. Mudholkar JJ)

14.12.1964

JUDGMENT

RAGHUBAR DAYAL, J. -

This appeal, by special leave, raises the question whether a decision of the High Court on merits on a certain matter after contest in a writ petition under Art. 226 of the Constitution operates as res judicata in a regular suit with respect to the same matter between the same parties.

The facts leading to the appeal are these. The appellant stood surety for a number of contractors who had taken contracts in 1947 for felling timber trees and removing in various forests in the erstwhile State of Baria. The contracts were taken as a result of auctions which took place under the 'Conditions of Auction Sale of Forests in the Baria State in the Samvat year 2002' corresponding to 1945-46 A.D., though in the plaint these conditions were referred to as Forest Auction Rules. On April 7, 1948, the appellant presented an application to the Baria State stating therein that certain brokers owed money to the various contractors mentioned in the application and praying that they be restrained to pay the amount due to the contractors until further orders and that those brokers and contractors be also retrained from directly removing the contractors' jungle goods stored in the godowns at Piplod, Baria and Limkheda without the permission of the State Government. It was further mentioned in the application that if those contractors would arrive at an arrangement with him and carry out the vahivat, he would do the needful in that behalf. On this application, it appears, the State Government issued notices to the contractors stating therein that the surety, i.e., the appellant, had moved, under cl. 8 of the Conditions of the Auction Sale of jungle goods for attachment of their goods that be lying in the godowns at Baria, Piplod and Limkheda in the State and the debts or other movable or immovable property belonging to them and for delivering the same to him and directed contractors not to sell, mortgage, gift away or otherwise dispose of whatever movable or immovable property they had in the State without the permission of the State.

Subsequently, the State of Baria merged with the State of Bombay on June 10, 1948. Thereafter, the contractors were allowed by the Government to remove the materials on certain conditions.

The appellant presented a writ petition under Art. 226 of the Constitution to the High Court of Bombay. That petition is not printed in the appeal record. It was Civil Application No. 261 of 1952. It, along with two other applications, C.As. Nos. 260 and 376 of 1952, was disposed of by a common judgment in C.A. 260 of 1952 which is Exhibit P. 194. The parties agree that what was alleged and what was prayed for by the appellant in his petition could be gathered from the order Exhibit P. 194. The reply filed by the parties in that petition is Exhibit P. 196 and gives the case of the opposite party with respect to the allegations of the appellant in his petition. It however appears

from the order of the High Court on that writ petition that the reliefs claimed were a direction to the respondents i.e., the State of Bombay and the Mamlatdar of Baria Taluka to raise the attachment levied on Municipal Nos. 728 and 642 of Deogad Baria, the issue of the a writ of mandamus or directions under Art. 226 of the Constitution prohibiting them from selling those Municipal numbers and from proceeding with the auction sale of properties on February 15, 1952 or on any others date. The appellant had alleged in that petition that the attached properties of the contractors were allowed to be sold by the contractors without the knowledge and consent of the appellant, that the sale was unauthorised and contrary to the terms of the attachment levied by the State and that therefore it had put an end to the liability of the appellants under their surety bonds.

It was urged for the appellant at the hearing of that petition that since the State allowed the contractors to sell their own properties the appellant had been discharged from his suretyship in respect of the said contractors and that the State could no longer claim to recover from him the balance due from the said contractors. The writ application was presented because, in default of the contracts to pay the balance amount due from them the Forest Officers of the Government of Bombay had moved the Revenue Officers to recover the said amount of from the appellant who was the surety as an arrear of land revenue. The revenue authorities took steps to attach the immovable properties of the appellant and that let the appellant to present that petition.

The contentions for the State of Bombay and the Mamlatdar in the writ proceedings were :

1. The petition was misconceived as not maintainable and there was no case for the issue of a writ of mandamus because the proper course for the appellant was to redress his so-called grievance by proceeding according to the ordinary law through the Municipal Courts.

2. There were no Baria State Forest Auction Rules, What the Baria State Authorities laid down were the conditions of such auction sales and the appellant's reference to those conditions as rules was not correct.

3. The said contractors had to furnish a surety who also had to execute a separate and independent agreement with the State in the form approved by it. The appellant stood surety for the contractors and executed the executed the necessary agreements.

4. The said agreements stipulated three important conditions : (i) that the surety will pay the instalment amount as stipulated; (ii) that if the instalments were not paid on due dates, he will pay interest at one pie per rupee per day and (iii) that if he fails to pay the instalment amounts and the interest, the State will be at liberty to recover the same from any of his properties and from his successors and assignees.

5. Condition No. 8 of the conditions for auction sales of forests was :

"So long as the contractor has not paid the deposit or the confirmed sale price in full into the Treasury or to the Surety, the Surety shall, at any time present an application to the Treasury Officer for the recovery of an amount required to discharge his liability in connection with the confirmed sale price or of the amount paid by him without filing a suit for the same in a civil Court. In that case the property, effects and debts of the contractor that may be within the territory of the State shall, as in the case of land revenue, be attached and auctioned at the costs and risk of the contractor

and out of the sale proceeds realised at the auction, the amount due to the surety or an amount equivalent to the amount required to discharge his liability shall be paid to the Surety."

6. The appellant had not applied for attachment and sale of all the properties and outstandings of the contractors but had requested the State to see that the brokers did not pay their dues to the contractors that the materials in the depots were not directly disposed of by the contractors and that the contractors carried on the business after settling with the petitioner.

7. The State issued the necessary injunction orders of attachment, even though the appellant's request dated April 7, was not at all consistent with the provisions of sale condition No. 8.

8. In order to obviate the complete hold up of the timber trade, a system was devised whereby the contractors were allowed to dispose of the stock of timber, if the sureties consented to its removal and the contractors guaranteed to pay the price realised to the sureties concerned.

9. According to the record, the appellant had requested the State of release the goods of certain contractors by his letters dated May 19, and 22, of 1948. This scheme adopted by the State of Baria was solely motivated in view of the inevitable delay on account of the sureties first releasing the amount and then depositing the amount in the Government treasury and the appellant was aware of that slight modification in the procedure.

10. At a meeting convened by the Divisional Forest Officer, Panchmahals, Godhra, on August 1, 1948, the appellant was present and it was decided that the contractors be permitted to remove the material on payment of the price of the materials sold.

11. It was denied that as a result of the alleged action of the Forest Officers, the petitioner's security was considerably disminished and the eventual remedy of the petitioner against the contractors was very much impaired and the petitioner was discharged from his suretyship in respect of the said contracts.

The High Court dismissed the writ petition on July 22, 1952 holding that there was no substance in the contention that the petitioners had been discharged from their liability as sureties. The sole basis on which the contention was raised was that the contractors were permitted by the State to sell their properties which were under attachment contrary to the terms of the attachment, in view of the sales being held without the knowledge and consent of the appellant. The High Court held that it was a wrong assumption of the appellant that the attached goods were not to be sold without his knowledge and consent. The prayer made by the appellant in his application dated April 7, 1948 did not include a prayer to the effect that the attached goods be not sold without his knowledge and consent. The High Court therefore held that the plea that the sales absolved the appellant from his liability as surety could not be accepted.

We are no more concerned with the other point raised by the writ petition to the effect that the revenue authorities were not entitled to recover the amount due from the appellant under the summary procedure prescribed by the Land Revenue Code. The High Court did not accept this contention.

On August 29, 1952, the appellant instituted the suit which has given rise to this appeal. It was alleged that the Baria State had its own laws and rules and regulations, that the contractors of that State were bound to act according to them, that the Baria State had rules known as Forest Auction

Rules for the auction of timber of the forests and auctions were held according to those rules and that the people acted on the understanding that the auctions and the surety bonds were in pursuance of the said Rules. Auctions were held in September-October 1947. The appellant stood surety with respect to the 11 contracts mentioned in para 2 of the plaint. The alleged rude No. 8 (condition No. 8 of the Forest Auction Conditions) was quoted in the plaint. The appellant executed all the surety bonds on the understanding that the Baria State Forest Auction Rules were the basis of the auction sales and that the surety bonds were in accordance with those rules. Due to certain reasons mentioned in para 5 of the plaint, the appellant, on or about April 13, 1948, applied to the Baria State praying for the assets and properties of the contractors to be taken in attachment and sold and for facilities being made available to him to fulfil his liabilities under the surety-bonds. The Baria State authorities attached the assets and properties of the Contractors as prayed. It may be mentioned here that in his deposition the appellant admitted the application, Exhibit 195, dated April 7, 1948 to be the application he had presented for the aforesaid purpose.

It was further alleged in the plaint that subsequent to the merger of the Baria State with the Bombay State on October 6, 1948, the Bombay State Forest Authorities, without asking the plaintiff or without his consent, allowed the said contractors to remove and sell their respective teak and sundry goods which were taken in attachment and thus behaving in contravention of the attachment made in his interest and put an end to his security and that according to law the plaintiff thus became discharged of liability as surety for the said contractors. Another reason for his alleged discharge from liability was alleged to be that even fresh sureties had been obtained from some contractors. It was also mentioned in the plaint that the appellant had to make a petition to the High Court in order to prevent his property from being sold and that he had been informed that the said petition had been dismissed on the ground that he could lawfully get his reliefs in the Civil Court.

On the above facts the appellant prayed inter alia as follows :

> "1. It may be declared that I have become discharged from all liability as surety for the contractors mentioned in para 2 of this plaint and a decree may be passed against the defendant No. 2 and defendant No. 1 herein and their servants, officers and agents, in the form of a permanent injunction prohibiting them for all times from attaching my property, selling or causing it to be sold.
>
> 2. A permanent injunction may be issued to the defendant No. 1 herein and their servants, agents and officers that defendants, under the facts mentioned in this plaint shall not, unless in execution of a decree in their favour obtained from a proper and authorised court, attach any property of this plaintiff and sell it in the revenue manner or caused it to be sold."

The State of Bombay contested the suit mostly repeated what they had urged in their reply affidavit filed in the proceedings on the writ application. It did not admit that the writ application filed by the plaintiff was dismissed by the High Court because another remedy was open and stated that his contentions were not upheld.

Several issues were framed. Issue No. 8A was :

> "Is the suit barred by res judicata in view of the High Court's judgment in Civil Applications No. 260, 261 and 376 of 1952 ?"

The Trial Court held on this issue that that judgment operated as res judicata in the suit. It recorded its findings on the other issues as well, but we are not concerned with those findings. It dismissed the suit.

On appeal by the appellant, the District judge agreed with the Trial Court that the Suit was barred by res judicata in view of the judgment of the High Court on the writ petition. He accordingly dismissed the appeal. He also recorded his findings on the other points urged before him.

On second appeal, the learned Single Judge of the High Court agreed with the courts below that the decision of the High Court on the question whether the plaintiff was absolved from liability under the surety agreement must be regarded as res judicata and could not be opened in the suit. He further considered the question whether in the circumstances of the case the appellant was entitled to the injunction prayed for and held that it was open to the appellant to maintain the suit for the determination of the amount due from him as that had not been considered and determined in the writ petition. He therefore allowed the appeal, set aside the order of the District Judge and passed a decree in favour of the appellant declaring that he was liable to pay the amount due under the surety agreement less the amount paid by the contractor and such amount as had been recovered by the State by sale of the property of the contractor attached under condition No. 8. He further ordered issue of an injunction restraining the State from enforcing the liability for the amount in excess of the amount declared to be due from the appellant.

The appellant's application for leave to file an appeal under cl. 15 of the Letters Patent of the Bombay High Court was rejected. Thereafter, the appellant filed this appeal after obtaining special leave from this Court.

Mr. Desai, for the appellant, has urged two points. The first is that a decision in a writ application under Art. 226 for the issue of a writ of mandamus does not operate as res judicata in a regular suit subsequently filed for a declaration of the plaintiff's rights and for the issue of an order of injunction against the defendant. The other is that the doctrine of constructive res judicata cannot be applied when the dispute was first decided in a writ petition and is to be later decided in a regular suit. It has been said that it would be very dangerous to hold that the decision in the writ application operates as res judicata in the regular suit even if identical reliefs on identical grounds were prayed for in a writ petition, with those prayed for in the later regular suit.

The first question is really the main question for decision in this appeal as it is not a case for the application of the principle of constructive res judicata. It is clear from what has been stated above that the appellant prayed for the issue of a writ of mandamus and a writ of prohibition in the writ application on the ground that his liability as surely for the several constructors stood discharged on account of the State, without the knowledge and consent of the appellant, allowing the contractors to dispose of the goods which had been attached on the application of the appellant, an application which he could present in view of Condition 8 of the Conditions of Auction Sale. The reliefs sought in the plaint are the same and are sought on the same grounds. The High Court had to determine in the writ petition whether the appellant's liability as surely stood discharge in view of what he had alleged. The same point has to be directly and substantially decided in the suit also. The orders to be passed if the appellant's contention is upheld would be the same as that which would have been passed if his contention had been accepted in the writ petition. In both cases, on both occasions, the Court had hold that his liability as a surely stood discharged, and that as a consequence of such a finding, it had, in the writ proceedings, to issue a writ of mandamus and a writ of prohibition as prayed for in the writ petition, directing the State of Bombay not to enforce any liability which the

appellant had undertaken under the agreements executed as a surely and not to proceed with the realisation of any amount the State alleged to be due from him and in the suit to pass a decree prohibiting the defendants by a permanent injunction for all time from attaching his property, selling or causing it to be sold and also a permanent injunction to the State of Bombay restraining them from attaching and selling any property of the appellant unless a proper decree is obtained from the Court in the manner provided for the recovery of land revenue.

It is urged for the appellant that in the writ petition the contention about the appellant's liability as a surety having come to an end was based on the terms of the contract, which was based on the conditions of auction sales, between the appellant and the State of Baria while in the present suit the contention with respect to the cession of his liability as a surety was based on the auction rules. The distinction sought to be made has no substance. It is denied in the reply affidavit filed on behalf on the respondent in the writ petition that there were any Baria State Forest Auction Rules. We have not been referred to any rules. In fact, when we asked for the rules, we were provided by learned counsel for the appellant with a booklet by the name 'Conditions for the Auction Sale of Forests'. Further, the order of the High Court on the writ petition mentions in the early part of the order :

> "It would appear that the Baria State had auctioned the teak wood trees... on the terms and conditions contained in the said Forest Auction Rules."

It may be said that these conditions for the auction sale of forests have been referred to sometimes as rules, probably in view of their binding nature.

It cannot therefore be disputed that if the decision which had given in a writ petition had been given in a regular suit that decision would have operated as res judicata in the later suit. The question which arises for consideration is whether such a decision in a writ petition can also bar a later suit on account of its operating as res judicata.

Before we deal with the question, we may dispose of the short points urged for the appellant. It is urged that if a decision in a writ application on merits be held to operate as res judicata in a regular suit, the provisions of O. 2, r. 2 C.P.C. would also be applicable to the institution of the subsequent suit with respect to such part of the cause of action for which no relief was sought in the writ petition. The contention is not sound as the provisions of r. 2, O. 2 apply only to suits. Sub-r. (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portions so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of subsequent suit. Such a view was indicated by this Court in Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh ([1962] Supp. 1 S.C.R. 315.) when it was said at p. 324 :

> "The bar of O. 2, r. 2 of the Civil Procedure Code on which the High Court apparently relied may not apply to a petition for a prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."

The contention that a decision on a writ petition even on merits should not operate as res judicata as

it is discretionary for the Court to pass any order it considers fit on a writ petition and not to decide it after considering all that points urged by the parties, was negatived in Daryao v. The State of U.P. ([1962] 1 S.C.R. 574.) With regard to the point that the issue of a writ by a High Court was discretionary as it may refuse to exercise its jurisdiction under Art. 226 as for instance when the party applying for the writ was guilty of laches but the Supreme Court could not refuse to issue the appropriate writ once it was shown that a fundamental right had been infringed, it was said, at p. 589 :

> "... and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Art. 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if the High Court has refuses to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleased in support of the bar of res judicata. If, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Art. 32."

In this connection, reference may be made to what was said, about the contention that a previous judgment was not to operate as res judicata against a party as it was based on certain statements recorded before that party was impleaded, in Krishna Behari Roy v. Brojeswari Chowdranee (L.R. 2 I.A. 283, 286.) :

> "It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witness having been examined before the present Appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

Another reason urged in support of the contention is that the petitioner in writ petition had no right to apply for the issue of the appropriate writ and it is matter of discretion for the High Court to entertain any application or to grant it and that a decision in one proceeding can operate as res judicata in a subsequent proceeding only when the party initiating the first proceeding had a right to initiate both the proceedings when the nature of both the proceedings be the same. This is the same contention as the earlier one, put in a different form, and does not merit further consideration.

It is further submitted for the appellant that a writ of mandamus, according to its nature, is to be issued mainly to compel the performance by a public servant of his duty of a public nature, while in a suit the plaintiff prays for the enforcement of his personal rights. The declaration of a personal right is not an essential characteristic in the issue of a writ of mandamus. The difference in the nature of the two proceeding is immaterial if the matter decided inter parties in one proceeding is

the same which is to be determined in the subsequent proceeding and the parties to the suit were also parties to the writ petition.

It has also been contended, and support is sought from the case reported as L. Janakirama Iyer v. P. M. Nilakanta Iyer ([1962] Supp. 1 S.C.R. 206.), that the general principles of res judicata are not be applied in considering whether a decision in a previous suit bars a later suit on the ground of res judicata.

On the other hand, it is contended for the respondent that the doctrine of res judicata is not confined to the provisions of section 11 C.P.C. but is of a general application on grounds of public policy, that the fact that the proceedings on a writ petition are conducted summarily is no reason to reduce the value of the decision arrived at in those proceedings especially when a solemn decision is given after affording an opportunity to the parties to put before the Court all the relevant matters and after fully considering the merits of the matter in controversy and that it would be really dangerous if it be held that a decision so arrived at in proceedings in a writ petition does not bar a subsequent suit for the decision of the same matter in controversy. It is pertinently pointed out that if the writ application presented by the appellant had been allowed by the High Court on a finding of fact that the liability of the appellant as a surety stood discharged and a writ of prohibition had been issued against the State as prayed for by the appellant in the writ proceedings, the State could not have sued for a declaration that these orders of the High Court were bad and that a decree be passed in its favour declaring that the appellant's liability as the surely still continued and that the State was free to make any action open to it under law for the recovery of the amount due from him.

It is not necessary to consider in any detail whether all orders made on a writ petition would bar a subsequent suit. We would limit the consideration of the contentions raised before us to two main points : whether section 11 C.P.C. is exhaustive with respect to the application of the principle of res judicata in a suit and whether in a subsequent suit general principles of res judicata can bar the consideration of matters directly in issue and identical with those which had been earlier and after full contest, decided on merits by a competent Court in any other proceeding including proceedings on a writ petition.

Before discussing the law of res judicata as laid down in the Code of Civil Procedure, we may refer to the opinion of the Judges expressed in 1776 in the Duches of Kingston's Case (2 Smith's L.C. 13th edn. 644, 645.) to which reference has been invariably made in most of the cases to be considered by us. It was said in that case :

> "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 the judgment of a Court of concurrent jurisdiction, directly upon the points, 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. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

It is to be noticed that the opinion does not take into account whether the earlier judgment was in a

suit or any other proceeding and whether it was used as res judicata in another suit or proceeding. The emphasis is that the judgment be of a Court and that it is relied upon as res judicata another Court. Of course, the essential conditions that the judgment be directly upon the same point which is for determination in the subsequent suit and be between the same parties are also to be satisfied. It is obvious that the judgment of a Court of exclusive jurisdiction is to be treated as res judicata upon the same matter in another Court which will not be a Court having jurisdiction over the matter.

It would be helpful to consider how the various Codes of Civil Procedure have dealt with the question of the second suit being barred on account of an earlier decision by a Court. The first Code of Civil Procedure was Act VIII of 1859. Its section 1 gave jurisdiction to the civil courts over all suits of a civil nature with the exception of those or which cognizance was barred by any Act of Parliament or by any Regulation of the Codes of Bengal, Madras and Bombay or by any Act of the Governor General of India in Council. Since then Civil Courts had jurisdiction to try all suits of a civil nature except those whose cognizance was barred by any enactment in force. Section 2 provided that the Civil Courts would not take cognizance of any suit brought on a cause of action which had been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claimed. The bar to the second suit was based on the identity of its cause of action with that of the earlier suit which had been heard and determined by a court of competent jurisdiction between the same parties.

The language of section 2 of the Code of 1859 seems to be in pursuance of the principle recognised in common law that a cause of action on which a decree has been based merges in the decree and ceases to be cause of action for any further suit. Parke, B said in King v. Hoare (153 E.R. Exch. 206, 13 M & W 494.) at p. 210 of the English Reports :

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainly, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexations to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,' - the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject matter of another suit, and the cause of action, being single, cannot afterwards be divided into two."

This principle had the approval of the House of Lords in Kendall v. Hamilton ((1879) 4 A.C. 504.). It may be notice that, in special cases, this principle is applied when even parties to the subsequent suit are not the same who were parties in the first suit. The finality of the judgment is based on the fact that the cause of action had merged in a decree and therefore no other action can be based on the same cause of action.

In Khugowlee Sing v. Hossein Bux Khan ((1871) 7 Beng. L.R. 673, 678.) the Privy Council, after quoting the opinion in Duchess of Kingston's Case (Smith's L.C. 13th edn. 644.) said :

> "There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognised by the civil law, and it is perfectly consistent with the second

section of the Code of Procedure under this case was tried..."

In Soorjomonee Dayee v. Suddanund Mohapatter ((1872-73) I.A. Supp. 212.) the Privy Council held that the term 'cause of action' in section 2 of Act VIII of 1859 be construed with reference rather to the substance of the form of action, and that even if such an interpretation of the expression be not correct, the provisions of section 2 of the Code would by no means prevent the operation of the general law relating to res judicata and observed, at p. 218 :

> "This law has been laid down by a series of cases in this country with which the profession is familiar, and has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns (Gregory v. Molesworth), in which Lord Hardwicke held that where a question was necessarily decided in effect though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston."

In Krishna Behari Roy's Case (L.R. 2 I.A. 283.) the Privy Council again stated that the expression 'cause of action' in section 2 of Act VIII of 1859 could not be taken in its literal and most restricted sense, and observed at p. 285 :

> "But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them."

It appears that section 13 of the Code of Civil Procedure of 1877 was enacted in view of what was said about the general law of res judicata in Krishna Behari Roy's Case (L.R. 2 I.A. 283.). That section reads :

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, 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 Misir Raghobardial v. Rajah Sheo Baksh Singh ((1882) L.R. 9 I.A. 197.) the Privy Council had to construe section 13 of the 1877 - Code (Act X of 1877). It referred to section 2 of Act VIII of 1859 and then observed at p. 202 :

> "It is clear that this section would not have applied to the present case, the causes of action in the two suits - the non-payment of interest in one and the non-payment of principal in the other - being different. In fact, when the first suit was brought the cause of action in the second had not arisen. But independently of this provision in the Code of Procedure, the Courts in India have adopted the rule laid down in the Duchess of Kingston's Case (2 Smith's L.C. 13th edn. 644.), and have applied it in a great number of cases. It was recognized as the law in India by this Board in Khugowlee Singh v. Hossein Bux Khan ((1871) 7 Beng. L.R. 673.) ...."

The expression 'Court of competent jurisdiction' was construed to mean 'a Court which had

jurisdiction over the matter in the subsequent suit in which the decision was used as conclusive' or, in other words 'a Court of concurrent jurisdiction'. In considering this matter, the Privy Council referred to the fact that in this country there were Courts of various grades with different pecuniary limits of jurisdiction, that a suit had to be instituted in the Court of the lowest grade competent to try it and that it would be improper if a judgment of an inferior Court was to operate as res judicata in a suit in a superior Court, and observed at p. 203 :

> "By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the India Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case. It appears to their Lordships that if this case had arisen before the passing of Act X of 1877, the High Courts in India would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond."

and, after quoting section 13, said :

> "The intention seems to have been to embody in the Code of Procedure, by sects. 12 and 13, the law then in force in India, instead of the imperfect provision in sect. 2 of Act VIII of 1859. And, as the words of the section do not clearly shew an intention to alter the law, their Lordships do no think it right to put a construction upon them which would cause an alternation."

This shows that the general law of res judicata was applied to suits in this country despite a specific provision about it in section 2 of Act VIII of 1859.

The scope of the bar was extended by the Code of Civil Procedure, 1882 (Act XIV of 1882). Its section 13 dealt with res judicata.

Section 11 of the present Code of Civil Procedure (Act V of 1908) deals with res judicata and is in these terms :

> "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, litigation 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 head and finally decided by such Court."

The above-quoted main part of section 11 is identically the same as the corresponding part of section 13 of the Code of 1882. Section 11, by its terms, can be applicable only to a subsequent suit when the same matter in controversy had been heard and decided in an earlier suit by a Court competent to try the subsequent suit. There is nothing, however, in its language to exclude the application of the general principles of res judicata to suits.

The general principle of res judicata, has been applied to suits even though the decision on the same matter in controversy had been previously given by a competent Court in proceedings where were not suits under the Code of Civil Procedure. The case law on the subject will be discussed later. It is urged that there seems to be no good principle behind applying the general principles of res judicata

to suits in circumstances which do not bring the previous decision within the language of section 11, and that the legislature's restricting the application of the general principles of res judicata to the circumstances mentioned in section 11 must be deemed to indicate that the general principle of res judicata be not applied to bar a subsequent suit if the earlier decision of the same controversy between the same parties had been arrived at in proceedings other than suits and in which the entire procedure provided for the decision of the dispute in a regular suit might not have been followed. It appears to us that the reason for the specific provisions of section 11 is not that the legislature intended to bar the application of the general principles of res judicata to suits when the previous decision is arrived at in proceedings other than suits. The legislature was providing in the Code of Civil Procedure for the trial of suits over which the civil Court was given jurisdiction under the provisions of the Code. The preamble of the Code of 1908 reads :

> "Whereas it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows :-"

The Code was dealing with procedure of the civil Courts only and had therefore not to consider what would be the effect on the trial of suits in view of the provisions of other enactments or of general principles of res judicata or of any other kind. It had to restrict its provision about res judicata to the effect of decisions in a civil suit on a subsequent civil suit and therefore enacted section 11 in the form in which we find it. It made on of the conditions for the application of a previous decision to operate as res judicata to be that the previous decision is made not only by a Court competent to make it but by a Court which be competent to try the subsequent suit. This condition must have been considered necessary in view of the observations of the Privy Council in Misir Raghobardial's Case ((1882) L.R. 9 I.A. 197.) and on account of the hierarchy of Courts under the various Acts constituting Courts of civil judicature and it could have been felt that a decision by a Court which is not competent to decide the subsequent suit be not treated of a binding nature. Such an exceptional procedure seems to have been provided as a matter of precaution as the Court not competent to try the subsequent suit must necessarily be a Court of inferior jurisdiction and therefore more liable to go wrong. Whatever the reason may be, the provisions of section 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principles of res judicata in such particular circumstances will neither be available to bar a subsequent suit nor will be needed. It is in such context that the remarks of this Court in Janakirama Iyer's Case ([1962] Supp. 1 S.C.R. 206.) at p. 224 are to be considered. In that case, the decision in a previous suit could not operate as res judicata in accordance with the provisions of section 11 of the Code, because the parties in the two suits could not be said to be the same parties or parties who claimed through one another. It was then said :

> "Where section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of res judicata. We are dealing with a suit and the only ground on which res judicata can be urged against such a suit can be the provisions of section 11 and no other."

The observations are to be read in the context in which they are made, the context being that the question of res judicata was being considered in connection with the decision in a previous suit and the parties in the two suits being not the same. In fact, general principles of res judicata also require that the earlier decision be between the same parties. A decision not inter parties cannot, even on general principles of res judicata, operate as res judicata in a subsequent suit.

We may now refer to some of the decided cases having a bearing on the applicability of the general

principles of res judicata to suits, when the previous decision is not in a suit but in other proceedings.

In Hook v. Administrator-General of Bengal (L.R. 48 I.A. 187.) the question was whether a previous order in an administration suit could operate as res judicata with respect to matters which had been decided in the subsequent administration suit instituted for decision of certain matters left open in the previous suit. It was said at p. 193 :

> "The question as to the perpetuity had been definitely and properly before him on the former hearing, and was, in fact, decided without any reservation, as is made plain by the terms of the judgment itself, which show that the determination of the dispute as to the perpetuity was the foundation of the whole judgment... It is not, and indeed it cannot be, disputed that, if that be the case, the matter has been finally settled between the parties, for the mere fact that the decision was given in an administration suit does not affect its finality : see Peareth v. Marriott (22 Ch. D. 182). The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by section 11 of the Code of Civil Procedure."

and then reference was made to what has been said in Ram Kirpal Shukul v. Musammat Rup Kuari (L.R. 11 I.A. 37, 41.) :

> "The binding force of such a judgment depends not upon sect. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

In Ramachandra Rao v. Ramachandra Rao (L.R. 49 I.A. 129.) the question arose about the decision about the title to compensation under proceedings in Land Acquisition operating as res judicata in a subsequent suit with respect to the rights of the parties. It was said at p. 136 :

> "When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. That is exactly what occurred in the present case. How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board."

The Court then referred to what was said in Badar Bee v. Habib Merican Noordin ((1909) A.C. 615, 623.) and in Hook's Case (L.R. 48 I.A. 187.) and said that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect.

Kalipada Dev v. Dwijapada Das (L.R. 57 I.A. 24.) the Privy Council held that a decision in contentious proceedings under the Probate and Administration Act, 1881, was binding in a subsequent suit upon the parties to the earlier suit, including a part whose name had been omitted

from the formal order made and reiterated that the terms of section 11 were not to be regarded as exhaustive in regard to what decisions could operate as res judicata.

In Mst. Bhagwati v. Mst. Ram Kali (L.R. 66 I.A. 145.) a decision about title in Land Acquisition Act proceedings was held to be res judicata in a subsequent suit about the title between the same parties.

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

In Sheoparsan Singh v. Ramnandan Singh (L.R. 43 I.A. 91, 98.) it was said :

> "But in view of the arguments addressed to them their Lordships desire to emphasize that the rule of res judicata, while founded on ancient precedent, is dedicated by a wisdom which is for all time. 'It hath 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., s. 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."

This Court had to consider the question of the applicability of the general principles of res judicata in several cases and has repeatedly held that this principle is not based on a rule of technically but is based on high public policy to bring about an end to litigation by giving finality to judgments inter parties and to save a litigant from harassment a second time. The principles laid down by the Privy Council have been generally accepted. In Raj Lakshmi Dasi v. Banamali Sen ([1953] S.C.R. 154.) this Court approved of what was said by the Privy Council in Hook's Case (L.R. 48 I.A. 187.); Ramachandra Rao's Case (L.R. 49 I.A. 129.) and Mst. Bhagwati's Case (L.R. 66 I.A. 145.) and said at p. 166 :

> "... and in these circumstances it has to be held that the question of title to the four anna share was necessarily and substantially involved in the land acquisition proceedings and was finally decided by a court having jurisdiction to try it and that decision thus operates as res judicata..."

In Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha ([1961] 1 S.C.R. 96.) the question arose for the first time about applying the principle of res judicata in writ applications under Art. 32 of the Constitution and this Court said at p. 103 :

> "This Court has laid it down in the case of Raj Lakshmi Dasi v. Banamali Sen

> ([1953] S.C.R. 154.) that the principal underlying res judicata is applicable in respect of a question which has been raised and decided after full contest, even though the first Tribunal which decided the matter may have no jurisdiction to try the subsequent suit and even though the subject-matter of the dispute was not exactly the same in the two proceedings. In that case the rule of res judicata was applied to litigation in land acquisition proceedings. In that case the general principles of law bearing on the rule of res judicata, and not the provisions of section 11 of the Code of Civil Procedure, were applied to the case. The rule of res judicata is meant to give finality to a decision arrived at after due contest and after hearing the parties interested in the controversy."

This case made the decision in a former petition under Art. 32 of the Constitution res judicata in the subsequent petition under the same article with respect to the same matter.

In Daryao's Case ([1962] 1 S.C.R. 574.) this Court had again dealt with the question of the applicability of the principal of res judicata in writ proceedings. The matter was gone through very exhaustively and the final conclusions are to be found at p. 592. We may summarise them thus :

1. It a petition under art. 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.

3. If the petition under art. 226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under art. 32.

4. Such a dismissal may however constitute a bar to a subsequent application under art. 32 where and if the fact thus found by the High Court be themselves relevant even under art. 32.

5. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under art. 32 because, in such a case, there had been no decision on the merits by the Court.

In arriving at the above quoted conclusions the Court made certain observations which are helpful in determining the question in this case about the decision on a writ petition operating as res judicata in a subsequent regular suit. The basis for the rule is described thus at p. 582 :

> "But, is the rule of res judicata merely a technical rule or is it based on high public policy ? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be

> invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same king of litigation."

Again, it was said at p. 584 :

> "The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis."

Limitations to the applicability of this general rule of res judicata are indicated at p. 585 :

> "It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that general rule of res judicata should not be allowed to be invoked cannot be sustained."

The Court also said earlier at p. 585 :

> "In other words, an original petition for a writ under Art. 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Art. 226."

It can be said with equal force a regular suit for the determination of the matter which had been decided on merits by the High Court or this Court on a writ petition cannot be given the status of a de facto appeal against the order of the High Court or of this Court. A solemn declaration and order by the High Court in its extra-ordinary jurisdiction is not to be set at bought by a Court of ordinary jurisdiction whose decision are subject to the appellate or revisional jurisdiction of that Court.

The contention that the remedies available to the petitioners to move the High Court under art. 226 and this Court under art. 32 are alternate remedies and so the adoption of one remedy cannot bar the adoption of the other, which was urged in the aforesaid case, was negatived, and it was observed at p. 591 :

> "In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect. Thus considered there can be no doubt that if a writ petition filed by a party has been dismissed on the merits by the High Court the judgment thus pronounced is binding between the parties and it cannot be circumvented or by-passed by his taking recourse to Art. 32 of the Constitution. Therefore, we are not satisfied that the ground of alternative remedies is well-founded."

In The Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara ([1963] Supp. 1 S.C.R. 172.) this Court reiterated that the general principal of res judicata applied to writ petitions filed under arts. 226 or 32 and expressed the opinion that constructive res judicata which is a special and artificial form of res judicata enacted by section 11 C.P.C. should not generally be applied to writ petitions filed under arts. 226 or 32 of the Constitution and that it would be reluctant to apply this principle to the appeals under decision because they dealt with cases where the impugned tax liability were for different years.

In the late case of Devilal Modi v. Sales Tax Officer, Ratlam ([1965] 1 S.C.R. 686.) this Court has held that the principle of constructive res judicata also applied in writ proceedings when the decision of a former writ petition was on merits. It was said :

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

The Court further observed :

> "As we have already mentioned, though a Court dealing with the questions of infringement of fundamental rights must consistently endeavor to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of res judicata altogether in dealing with writ petitions filed by citizens the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgments pronounced by this Court are binding and must be regarded as final between the parties in respect of matters covered by them, must receive due consideration."

These remarks can apply with greater force when in a regular suit a party desires to obtain an order which may be at variance with the orders pronounced by the High Court in a writ petition on matters not concerning fundamental rights under the Constitution.

The appellant relies on the case reported as Smt. Bimla Chopra v. Punjab State ([1963] 65 Punj L.R. 945.) in support of its contention that a decision in a writ petition cannot operate as res judicata on the points in dispute between the parties in the civil suit. The decision was based on two grounds : (1) that the jurisdiction of the High Court art. 226 and of Supreme Court under art. 32 is almost co-extensive, while the jurisdiction of the High Court under art. 226 and of the civil Court in a regular civil suit cannot be said to be almost co-extensive and (2) that the High Court in disposing of writs is not required to go into the detailed examination of facts while in regular civil suits facts can be examined meticulously. It was further held that the plaintiff can take such grounds in the civil suit which he could take in a writ petition. A decision of the Court in a writ petition can be res judicata only with respect to the matters which have been decided on merits by the High Court or by this Court. Courts do not usually enter into disputed question of fact but there is no bar to their doing so if they feel disposed to enter into such facts and arrive at a conclusion with respect to them. We do not see why all the grounds which can be urged in support of or against a matter raised for decision

in a writ petition cannot be urged in the proceedings on it. It is true that the jurisdiction of the civil Court and the High Court or this Court cannot be said to be co-extensive, but it is plain that the civil Court, in the exercise of its jurisdiction, is subject to the appellant or revisional jurisdiction of the High Court and this Court. We do not consider the reasons for holding that a decision in a writ petition cannot operate as res judicata in a subsequent regular suit to be sound and are of opinion that the Punjab Case has been wrongly decided.

On the other hand, the Bombay High Court has held in Manahem v. Union of India (A.I.R. 1960 Bom. 196.) that a decision on merits in a writ petition would operate as res judicata in a subsequent suit.

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

We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under arts. 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. We therefore hold that on the general principle of res judicata, the decision of the High Court on a writ petition under art. 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter.

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

We therefor dismiss this appeal with costs.

SUBHA RAO, J. -

I have persued the judgment prepared by my learned brother Raghubar Dayal, J. I regret my inability to agree. I shall briefly give my reasons.

Raghubar Dayal, J., has stated that facts fully in his judgment I need not restate them. The few facts relevant to the question raised are these : The appellant filed a petition in the Bombay High Court under Art. 226 of the Constitution raising the question that he was discharged as surety, and the High Court negatived has contention. In the suit from which the present appeal arises he again raises the plea that he was discharged as surety : in other words, he seeks to reopen in the present suit the finding given by the High Court in the writ petition. The question is whether the appellant is barred by res judicata to raise the said question in suit.

Section 11 of the Code of Civil Procedure deals with the doctrine of res judicata in the context of a suit. It says, inter alia, that 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. To invoke this

doctrine, the section lays down many conditions. The most essential condition is that the matter in question should have been directly and substantially in issue in a former suit. The expression "suit" has not been defined in the Code, but section 26 thereof says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. It is not argued that an application under Art. 226 of the Constitution is a suit within the meaning of section 26 or section 11 of the Code. It follows, and indeed it is not disputed, that section 11 of the Code does not bar the appellant from raising the question of the discharge of his suretyship again in the present suit.

But it is said that under the general principles of res judicata the Court would be barred to try his suit on the said issue. When the Code of Civil Procedure enacted section 11 prescribing precisely when an earlier decision would be res judicata in a suit, it is not open to invoke the general principles of res judicata in the context of a subsequent suit, though the conditions laid down in the section were not satisfied, for otherwise the section would become nugatory : it would also introduce anomalies. A decision in a previous suit would not be res judicata in a subsequent suit unless the stringent conditions laid down in section 11 of the Code were satisfied; whereas a decision in a proceeding which was not a suit would be res judicata whether or not the said conditions were complied with. If the fundamental requisites of res judicata were satisfied, a decision, if it fell under section 11 of of Code, would be res judicata in a subsequent suit; and even if it did not fall thereunder, it would equally be res judicata. That could not have been intention of the Legislature.

The cases cited at the Bar do not compel me to accept the construction which would lead to that result. The decisions of the Judicial Committee in Ramachandra Rao v. Ramachandra Rao ([1922] L.R. 49 I.A. 129.) and Mst. Bhagwati v. Mst. Ram Kali (L.R. 66 I.A. 145.) and of this Court in Raj Lakshmi Dasi v. Banamali Sen ([1953] S.C.R. 154.) may be explained on the ground that the proceeding under section 18 of the Land Acquisition Act in the District Court wherein the title of the claimants would be put in issue were in substance a suit. The decision of this Court in Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha ([1961] 1 S.C.R. 96.), Daryo v. The State of U.P. ([1962] 1 S.C.R. 574.), The Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara ([1963] Supp. (1) S.C.R. 172.) and Devilal Modi v. Sales Tax Officer, Ratlam ([1965] 1 S.C.R. 686.) can be distinguished on the footing that the question of res judicata arose in an application either under Art. 226 or Art. 32 of the Constitution and not in a suit. On the other hand, in L. Janakirama Iyer v. P. M. Nilakanata Iyer this ([1962] Supp. 1 S.C.R. 206.) Court definitely ruled :

> "Where section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of res judicata. We are dealing with a suit and the only ground on which res judicata can be urged against such a suit can be the provisions of section 11 and no other."

These observations, in my view, correctly represent the law on the subject. This view, while it does not make section 11 of the Code of Civil Procedure an unnecessary provision, does not also lead to any practical difficulties, for the decision of a High Court on a question of low will be binding as an authority on subordinate Courts and its decision on a question of fact will rarely be differed from by the said Courts.

I would, therefore, hold that the decision given by the High Court in the writ petition would not preclude the Court from deciding the same question on merits in the present suit. The order of the High Court is set aside and the appeal is remanded to the High Court for disposal on merits in accordance with law. Costs will abide the result.

ORDER

In accordance with the Opinion of the Majority the Appeal is dismissed with costs.

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