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SUPREME COURT OF INDIA

Dr. Dhananjaya Y Chandrachud J ; Vikram Nath J ; Hima Kohli J

Jamia Masjid v. K V Rudrappa (Since Dead) By Lrs.

Civil Appeal No. 10946 Of 2014

23-09-2021

Judgement

Dr. Dhananjaya Y Chandrachud, J

Index

A. The Facts

B. Proceedings before the Courts

C. Proceedings before the High Court

D. Submissions of the Parties

E. The Analysis

E.1 Res Judicata as a Preliminary issue

E.2 The Plea of Res Judicata and the three previous suits

E.2.1 Determination of title in a Representative suit

E.2.2 Representative Suit and Res judicata

E.2.3 Conclusive decision and Res Judicata E.2.3.1 Similarity in issue and Res Judicata

E.2.4 Compromise decree and Res Judicata F. The Conclusion

1. A Single Judge of the High Court of Karnataka dismissed a second appeal filed under Section 100 of the Code of Civil Procedure 1908 [”CPC”], affirming the decision of the Trial Court and the First Appellate Court that the suit instituted by the appellant-plaintiff is barred by the principle of res judicata. The appellant moved this court in a Special Leave Petition to challenge the decision of the Single judge. Leave has been granted on 8 December 2014.

A. The Facts

2. Described as the Jamia Masjid Gubbi in the cause title, the appellant instituted the suit [O.S 149/1998] through its President for seeking the following reliefs:

(i) A declaration that the State Wakf Board is the owner in possession of the suit schedule property, being survey No. 2 of Gubbi village admeasuring 2 acres and 4 guntas of non-agricultural land with a cinema building;

(ii) A decree for possession against the defendants;

(iii) An injunction to restrain the defendants from interfering with the possession and enjoyment of the plaintiff; and

(iv) A decree for mesne profits.

3. The case of the plaintiff-appellant is as follows:

(i) The suit property is a 'Khazi Service Inam'. Abdul Khuddus, the spouse of the fifth defendant and father of the sixth to ninth defendants was the mutawalli who was managing the property for and on behalf of the Wakf Board. Abdul Khuddus, was entitled to the usufruct of the property subject to the condition precedent that he would perform his service as a Khazi or Mutawalli. During his lifetime he had given up his service as a Khazi upon being appointed by the Gubbi Muslim Jamath as the Pesh Inam on a monthly salary of Rs 30 for performing the Namaz (daily prayers);

(ii) Upon the enactment of the Wakf Act 1954, which was adopted by the then Mysore State in 1955, the Assistant Commissioner conducted a survey of Wakf Properties in 1963. Abdul Khuddus gave a declaration to the Wakf Board for the registration of the suit schedule property as a wakf. A notice inviting objections for registration of the suit schedule property as a wakf property was issued. No objection to the registration of the suit schedule property was raised and eventually the property was notified as a wakf property at serial No 136 of the Mysore Gazette notification No. MWB 19(11) dated 6 July 1965;

(iii) Under section 6 of the Wakf Act 1954, if any dispute arises on a property declared as a wakf property, a claim can be raised within one year of the publication of the notification. There is a prohibition on alienation under rule 5 of the Wakf Rules framed under the Wakf Act, 1965 unless approved by a two-thirds majority of the Wakf Board;

(iv) A person by the name of H.S. Gururajarao and his brothers were granted a lease over the schedule suit property on 8 December 1944 by the Muzrai officer to run a 'cinema talkies'. A suit, OS 748/1968, was instituted by the Wakf Board against the Abdul Khuddus and H.S. Gururajarao seeking possession of the suit property and a declaration that the property constitutes a wakf. The suit was compromised with Abdul Khuddus being permitted to collect the rent from the lessee (H S Gururajarao) on behalf of the Board;

(v) After the death of Abdul Khuddus, defendants 6 to 9 took possession of the suit property. Allegations of mismanagement of the suit property were made against them. The Chairman, D.W.C Tumkur recommended that the suit property be directly managed by the

Board under section 43(A) of the Wakf Act 1954. Pursuant to the recommendation, the State Wakf Board passed an order dated 6 April 1983 taking over the management;

(vi) H.S. Gururajarao who was in possession of the suit schedule property as a lessee, handed over possession of the cinema building to the Wakf Board on 29 June 1983. Defendants 5 to 9 however executed sale deeds in respect of the property in favour of Defendants 1 to 4. Any alienation by Defendants 5 to 9 is void since the Board did not approve the transaction with a two-thirds majority; and

(vii) The cause of action arose on 16 April 1983 when Defendants 1 to 4 together with other defendants interfered with the possession of the plaintiff on the strength of the sale in their favour executed by Defendants 5 to 9.

4. In May 2010, Defendants 2 to 4 filed their written statement raising the defence that:

(i) The suit is barred by res judicata: OS 92/1950-51 [“the first suit”] was filed by the members of the mosque known as Jamayat Masjid in which Abdul Khuddus (the predecessor of Defendants 5-9) was a party. In the said suit, the District Judge by a judgment dated 31 March 1954 declared the suit schedule property to be the personal property of Abdul Khuddus. Abdul Khuddus instituted an appeal before the High Court challenging a portion of the order of the District Judge. The High Court upheld the judgment of the District judge on 14 August 1959. Since the parties and the subject matter of the first suit and the present suit are the same, the suit instituted by the appellant is barred by res judicata;

(ii) The suit schedule property is not a Khazi Service Inam but was the personal property of Abdul Khuddus and his successors have rightfully sold it in favour of Defendants 1-4;

(iii) The suit schedule property was leased to one H.S Gururaja Rao by Abdul Khuddus and not by the then Muzrai officer as contended by the plaintiff. From 1995, a lease was granted in favour of Sri K.V Rudrappa who was running a theatre in the name of ‘Channabasaveswara Talkies’. After the death of Rudrappa, defendants 1-4 are running the theatre after obtaining a licence from the District Magistrate;

(iv) OS 748/1968 [‘the second suit”] was instituted by the Mysore Board of Wakf against Abdul Khuddus seeking a declaration that the suit property is a wakf and for possession of the suit property. However, the suit was decreed in terms of the compromise petition filed by the parties and therefore, the Wakf Board gave up its claim in respect of the suit schedule property. The subsequent suit is hit by the principle of res judicata; and

(v) OS 100/1983 [“the third suit”] was instituted by the Karnataka Board of Wakf seeking an injunction restraining the defendants (the heirs of Abdul Khuddus) from interfering in the peaceful possession of the suit property. This suit was withdrawn by the plaintiff.

B. Proceedings before the Courts

5. The Trial Court took up two issues – issues 5 and 6 – relating to res judicata and limitation as preliminary issues. By its judgment dated 3 February 2006, the trial court held

that the suit was not barred by limitation. However, the court held that the suit was barred by res judicata by virtue of the decisions in the suits instituted earlier:

(i) O.S 92/1950-51 was filed by the members of the public of Gubbi in their representative capacity by virtue of Section 92 CPC. Abdul Khuddus contended that the suit schedule property was his personal property. The first issue framed in the suit was whether 'the schedule properties belong to the Jamia Mosque, Gubbi as alleged in the plaint'. The plaintiff was held to have failed to prove that two of the suit schedule properties (Sy. No. 2 and 3, of which Sy No. 2 is the suit schedule property in the instant proceedings) belongs to the Jamia Mosque. The High Court on second appeal [R.A. 510/1954] held that the properties in Sy No. 2, 3 and 4 do not belong to the mosque. Thus, the issue with regard to the ownership of the suit schedule property has reached finality in view of the decision of the High Court of Karnataka which was not assailed before this court;

(ii) A judgment in a representative suit is binding on all the interested parties in view of Explanation IV to Section 11 CPC. Though the first suit was not filed by the Jamia Masjid in its individual capacity, it was filed by parties interested in the administration of the mosque and thus all parties interested in the mosque are bound by the judgment even if they were not impleaded as a party;

(iii) The judgment of the trial court cannot be nullified by a notification issued by the government declaring the suit property as a wakf property;

(iv) O.S 748/1968 filed by the plaintiff seeking a declaration that the Wakf is the owner of the suit property ended in a compromise by which the Wakf Board has admitted that Abdul Khuddus has the right to collect the rent from the lessee. Thus, the Wakf Board has relinquished its title over the suit property; and

(v) O.S No. 100/1983 was filed seeking an injunction against Abdul Khuddus. However, the suit was dismissed on 22 November 1984 after a memo of withdrawal was filed by the plaintiff's counsel. Thus the Wakf Board has relinquished rights over the suit property.

6. An appeal against the decree of the Trial Court was dismissed by the 3rd Additional District Judge at Tumkur on 2 July 2007 for the following reasons:

(i) The finding in O.S 92/1950 and by the High Court on appeal was not challenged by Abdul Khuddus. It was also not contested that the title of a property cannot be determined in a representative suit filed under section 92 CPC;

(ii) A representative suit filed under section 92 CPC binds not only the parties named in the suit but also those who are interested in the suit. Therefore, a decision in a previous representative suit will bind all interested parties even if they were not impleaded as a party to the suit;

(iii) The submission that the trial court had only prima facie found Abdul Khuddus to possess title to the suit property and that hence, it was not conclusively held that he had absolute title, is erroneous. To determine if a scheme should be framed for the

maintenance of a trust, the court will have to satisfy itself whether the property is owned by the trust;

(iv) The plaintiff has not specified when Abdul Khuddus made the declaration for notifying the suit property as wakf property. If the notification was made in 1963, there was no reason for the Wakf Board to file the suit, as late as in 1983;

(v) O.S. 748/1968 filed by the Wakf Board against Abdul Khuddus for a declaration that the suit property belongs to the Wakf Board ended in a compromise. The Wakf Board has waived its right over the suit property and such a compromise creates an estoppel (based on the decisions in Provash Chandra Daluj v. Biswanath Banerhee AIR 1989 SC 1834; Byram Pestonji Gariwala v. Union Bank of India AIR 1991 SC 2234); and

(vi) O.S No. 100/1983 was filed by the Wakf Board for seeking an injunction against the defendants. The suit was dismissed by filing a Memo without seeking leave to file the instant suit. The decision in Sarguja Transport Service v. S.T.A.T Gwalior AIR 1987 SC 88 was relied upon.

7. The High Court by its judgment and order dated 2 July 2008 allowed a Regular Second Appeal and remanded the matter to the Trial Court for disposal in accordance with law. The High Court held that:

(i) The present suit is not barred by res judicata since OS 92/1950-51 was instituted under Section 92 of the CPC for settling a scheme. Para 10 of the judgment of the Trial Court noted that the defendant has a prima facie right to the suit property and that if the terms of the grant have not been satisfied by the defendant, the trustees can take steps. Therefore, the question of title was not conclusively decided. The issue that was substantially in issue in OS No 92/1950-51 is not in issue in the instant proceedings. The judgement of the High Court in appeal as well cannot be read to mean that the suit schedule property belongs absolutely to Abdul Khuddus;

(ii) A suit under section 92 CPC is filed as a representative suit and is not a suit filed to vindicate the private right of an individual;

(iii) The compromise decree in OS 748/1968 did not declare the ownership of Abdul Khuddus, the predecessor- in-interest of Defendants 1 to 4. It only states that the second defendant would continue as the lessee of Abdul Khuddus;

(iv) The present suit was instituted on behalf of the State Wakf Board prior to the disposal of OS 100/1983 and was hence not barred; and

(v) The nature of the relief sought in the instant proceeding is different from the relief sought in OS 92/1950-51. Jamia Masjid was not the plaintiff in O.S No. 92/1950-51 and O.S No. 748/1968.

C. Proceedings before the High Court

8. A Special Leave Petition [SLP (C) No. 26047 of 2008] was instituted before this Court by Defendants 1 to 4. By a judgment dated 30 August 2010, this Court remanded the proceedings back to the High Court on the ground that the High Court had heard only one of the defendant – caveators and that all the defendants were not represented before the High Court. After remand, the High Court by its judgment dated 23 January 2012 dismissed the appeal for the following reasons:

(i) The ownership of the suit schedule property has been conclusively decided in OS 92/1050-51 in favour of Abdul Khuddus;

(ii) The judgment in a representative suit under Section 92 CPC binds the parties to the suit and those who are interested in the Trust (R Venugopala Naidu v. Venkatarayulu Naidu Charities AIR 1990 SC 444);

(iii) When a suit is filed for determination of a scheme for administration of a Trust, the court must primarily be satisfied that the property belongs to the Trust. The court has the power under Section 92(e) and (cc) of the CPC to order delivery of possession of the property to any person who is entitled to possession;

(iv) If a declaration was made by Khazi Abdul Khuddus declaring the suit property as a Wakf property in 1965, there is no explanation as to why the plaintiff was silent till the filing of OS 100/1983; and

(v) An issue that was substantially decided by a competent court of limited jurisdiction will operate as res judicata, though such court in view of its limited jurisdiction would not be competent to try the subsequent suit (Sulochana Amma v. Narayanan Nair (1994) 2 SCC 14)).

9. The judgment obtained through a consent decree in OS 748/1968 was intended to put the litigation to an end. It would thus operate as res judicata in the subsequent suits.

10. Leave was granted by this Court on 8 December 2014.

D. Submissions of the Parties

11. We have heard Ms V Mohana, learned Senior Counsel appearing on behalf of the appellant and Mr Basava Prabhu Patil, learned Senior Counsel with Mr Balaji Srinivasan, learned Counsel for the contesting respondents.

12. On behalf of the appellant, the following submissions have been urged:

(i) OS 92/1950-51

o The suit was instituted by Muslims in the locality interested in the proper management of the mosque since Abdul Khuddus was trying to set up his own title to the suit property;

o The suit was not for a declaration of title to the suit property and the appellant was not a party to the suit. It was a suit seeking to set up a scheme for the administration of the suit

property;

o There was no final declaration that the suit property is a private property belonging to Abdul Khuddus; and

o In a suit for settling a scheme under Section 92 of the CPC, the Court possessed limited jurisdiction and could not have issued declaratory relief.

(ii) OS 748/1968

o The basis of the suit was that Abdul Khuddus by virtue of his office as a khazi only has the right to the usufruct and the suit was instituted as an unlawful construction was in place;

o A compromise memo was filed in the suit stating that the second defendant would continue to remain as a tenant for some time and would thereafter hand over peaceful possession to Abdul Khuddus;

o On 27 October 1969, a compromise petition was filed by the parties under Order 23 Rule 1 CPC;

o The compromise decree neither concedes title of the suit property to defendants nor does it create any new right in their favour; and

o The suit proceeded on the basis that Abdul Khuddus was only entitled to the usufruct and the decree based on the compromise deed protected possession without any adjudication of title.

(iii) OS 100/1983

o The suit was instituted by the Karnataka Wakf Board for a permanent injunction, apprehending a sale at the instance of the heirs of the Abdul Khuddus to defendants 1-4;

o The appellant was not a party to the suit;

o The suit was dismissed without costs after the plaintiff filed a memo for dismissal; and

o Before the dismissal of the suit, the present suit which is a comprehensive suit seeking declaration and possession had been instituted.

In view of the above position, it was urged that the ingredients for the application of the doctrine of res judicata have not been fulfilled. In summation, it was urged that:

(i) The issue of title to the suit schedule property has not been decided in any of the three prior suits;

(ii) In view of notification No. MWB 19(11) dated 6 July 1965 the suit property was notified as wakf property;

(iii) A collateral finding does not demonstrate an adjudication of title;

(iv) In the absence of a prior adjudication, the doctrine of res judicata would not be attracted;

(v) The notification of the suit schedule property as a wakf was pursuant to a declaration dated 28 April 1963 executed by Abdul Khuddus for the general benefit of the community;

(vi) Once the property is constituted as a wakf, it would remain so in that character and no objection to the notification was filed either by Abdul Khuddus or by any person claiming through him; and

(vii) Without prejudice to the above submissions, the issue of res judicata raises mixed questions of law and fact and, in any event, ought to have been decided as a comprehensive issue pursuant to a full-fledged trial.

13. Opposing the above submissions, Mr Basava Prabhu Patil, learned Senior Counsel submitted that:

(i) In the first suit – 92/1950-51 – there was a specific finding that the suit schedule property was the personal property of Abdul Khuddus. Thus, the court having conclusively decided on the title of the suit property, a subsequent suit raising the same issue is barred by the principles of res judicata;

(ii) In the second suit which was instituted by the State Wakf Board, there was a prayer for declaration and possession. A compromise having been arrived at on a portion of the reliefs claimed in the second suit (relating to possession), this would necessarily amount to an abandonment of the other reliefs. Once a compromise is arrived at, Order 23 Rule 3A bars the maintainability of a subsequent suit;

(iii) The third suit was for a permanent injunction against alienation of the suit property. This suit was dismissed as withdrawn; and

(iv) Jamia Masjid is seeking a declaration of the title on behalf of the Wakf Board. The Wakf Board is not a party to the suit and its application for being impleaded has been rejected.

E. The Analysis

14. The rival submissions now fall for analysis.

15. The primary issue is whether the suit – OS No. 149/199813 – which was instituted by Jamia Masjid is barred by the principles of res judicata. In order to analyse whether the doctrine of res judicata is attracted, it is necessary that we decide on the plea with respect to the three prior suits:

(i) OS 92/1950-51;

(ii) OS 748/1968 and;

(iii) OS 100/1983.

13 The suit out of which the issue in present appeal arises is suit 96/1984 re-numbered as 162/1989 and 149/1998. For convenience we will refer to the suit as OS 149/1998.

16. Before analysing the three suits specifically, it is necessary that we visit the jurisprudence on res judicata. Section 11 CPC states as follows:

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

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

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

[…]

Explanation 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.]”

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

(i) The matter must have been directly and substantially in issue in the former suit;

(ii) The matter must be heard and finally decided by the Court in the former suit;

(iii) The former suit must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and

(iv) The Court in which the former suit was instituted is competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

18. In Syed Mohd. Salie Labbai (dead) by L.Rs v. Mohd. Hanifa (dead) by L.Rs (1976) 4 SCC 780, Justice S Murtaza Ali speaking for a Bench of two judges observed that before a plea of res judicata can be given effect, the following conditions must be proved:

"7…

"(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction."

The Court noted that "the best method" to decide the question of res judicata is first to determine the case of the parties as they are put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata. In that case, it was held that the judgment in the previous suit was confined to two points:

(i) The plaintiffs claimed certain rights for the performance of ceremonies in the properties and a share in the income accruing to the mosque from the worshippers; and

(ii) A claim, insofar as the graveyard was concerned for receiving pit fees for burials. Consequently, it was held that the Trial court had not decided upon either the public character of the mosque or the mode and manner or the effect of the dedication of the site for the purpose of the mosque or the graveyard.

E.1 Res Judicata as a Preliminary issue

19. Before we undertake an analysis on the applicability of the principles of res judicata vis-à-vis the three suits that were initiated with regard to the suit property it is necessary to discuss the submission of counsel for the appellant that res judicata, being a mixed question of law and facts ought not to have been decided as a preliminary issue by the trial court. It was contended that any determination of the application of the principle of res judicata can only be made after evidence is adduced pursuant to a full-fledged trial. For this purpose, reliance was placed on the decision of a two judge bench of this court in Alka Gupta v. Narender Kumar Gupta (2010) 10 SCC 141 ("Alka Gupta") authored by Justice RV Raveendran. In Alka Gupta, the trial court had dismissed the subsequent suit on various preliminary grounds, one of which was that the filing of the subsequent suit stood barred by res judicata.

However, on appeal, the two judge bench of this court held that the second suit was not barred by res judicata:

"19. The learned Trial Bench passed the order on 13-3-2009 on the preliminary issue (Issue 1) relating to res judicata. But there is absolutely no discussion in the order of the learned

Single Judge in regard to the bar of res judicata except the following observation at the end of the order: “Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable.” This was not interfered by the Appellate Bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons.

20. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea.

[…]

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

(emphasis supplied)

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

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

“(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may […]”

(emphasis supplied)

22. It has been held by this court that a determination of whether res judicata is attracted raises a mixed question of law and facts. In Madhukar D. Shende [Madhukar D Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85] and Ram Harakh [Ram Harakh v. Hamid Ahmed Khan & Ors., (1998) 7 SCC 484], it was held that the plea of res judicata was a mixed question of law and facts. In both the cases, the plea of res judicata was taken for the first time before this Court. Justice K. Ramaswamy writing for a three judge bench of this court in Sushil Kumar Mehta v. Gobind Ram Bohra (1990) 1 SCC 193 held that the principle of res judicata cannot be fit into the pigeon hole of ‘mixed question of law and facts’ in every

case. Rather, the plea of res judicata would be a question of law or fact or a mixed question of both depending on the issue that is claimed to have been previously decided. The court while determining the applicability of the plea of res judicata would determine if there has been any material alteration in the facts and law applicable:

“26. The doctrine of res judicata under Section 11 CPC is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus, the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata. Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction.”

23. In Mathura Prasad Bajoo Jaiswal v. Dossibai N.B Jeejeebhoy (1970) 1 SCC 613, the application of the plaintiff in the Court of the Civil Judge for the determination of Standard Rent under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 was dismissed on the ground that the statute did not apply to a case of open land let for the construction of buildings. This decision was affirmed in appeal. However, in view of another decision of the Bombay High Court which held that the statute would be applicable to leased land, the plaintiff filed a fresh proceeding in the Court of Small Causes. The Trial Court and the High Court held that the subsequent suit was barred by res judicata. However, Justice J C Shah writing for a 3-judge bench held that the subsequent suit was not barred by res judicata:

“5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A

decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the “matter in issue” may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata.

[…]

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

(emphasis supplied)

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

E.2 The Plea of Res Judicata and the three previous suits

24. We will now refer to the proceedings in the three suits to decide if the bar of res judicata would be applicable in view of judgments in any of the previous suits.

I. OS 92/1950-51/ The first suit

25. OS 92/1950-51 was instituted by five residents of Gubbi town against the Abdul Khuddus who was managing the mosque. The suit was instituted under the provisions of Section 92 CPC to settle a scheme for the management of the mosque since Abdul Khuddus was alleged to be misappropriating the funds accruing to the mosque and was trying to set up his own title to the property of the mosque. The reliefs which were sought in the suit were for a. Settling a scheme for the administration of Jamia Masjid situated in Gubbi and the management of its properties; and

b. Directing the defendant to render accounts in respect of the income and other funds.

The schedule to the plaint contained six properties of which serial No. 2 (which corresponds to the suit schedule property) is described thus:

“2. Dry land bearing Survey No.2, measuring 2 Acre 4 guntas, assessed at Rs.4 /- and situated in Gubbi Village.”

26. The issues which were framed by the Trial Court were as follows:

“(1) In the schedule properties being to the Jamia Masjid at Gubbi as alleged in the plaint?

(2) Is the said Mosque a public religious institution as alleged by the plaintiff?

(3) Is it a private institution belonging to the defendant’s family?

(4) Are the schedule shops built out of defendants private funds?

(5) Are plaintiffs persons interested in the Masjid and is !the suit maintainable?.

(6) Is the defendant entitled to continue in management of the mosque in question?

(7) Is the court-fee is sufficient?

(8) To what relief is the plaintiff entitled?”

(emphasis supplied)

27. The 1st Additional District Judge decreed the suit in the following terms:

“14. ...the suit is decreed directing the settlement of the scheme towards the proper management of the Jamia Masjid in Gubbi and for the due and proper administration suit schedule items 1,4 and 5 subject to the observation made above in respect of these Items 1,4 and 5 subject to the observation made above in respect of these items. The defendant shall pay costs of this suit in the plaintiffs. Pleader’s fee Rs. 30/-“

28. In the course of the judgment, the District Judge discussed the evidence adduced by both the parties and came to the prima facie finding that of the six suit properties, the mosque did not have the title to two of the properties, namely, item 2 which is the suit property in the instant proceedings in OS 149/1998 and suit item 3. Abdul Khuddus in his

testimony as D.W.6 deposed that the mosque has nothing to do with the lands (Item Nos. 2 and 3) given to him by the Government as Khazi Inam. Considering that no proof to the contrary was adduced by the plaintiffs in the suit, the District Judge recorded the following finding in paragraph 7:

“The plaintiffs have not produced anything to show that the suit items 2 and 3 were granted or acquired for the mosque. It must therefore be held that these two items are khazi granted personally to the ancestors of the defendant they do not form part of properties of the mosque.”

(emphasis supplied)

29. Significantly, after the above observation, the District Judge entered the following finding in paragraph 10:

“10. In his written statement the defendant claimed all the suit schedule immoveable as his own. But as observed before the evidence discloses his prima facie right to only suit schedule items 2 and 3. Those two items therefore be considered as belonging to the mosque. It shall however be open for the trustees to be appointed to take such steps as may deems fit if they consider that in respect of those two items (Items 2 and 3) the defendant has not satisfied the terms of the grant.”

(emphasis supplied)

30. An appeal was filed by Abdul Khuddus before the High Court Regular Appeal No. 510 of 1954 assailing the finding of the District Judge that items 1, 4 and 5 belonged to the mosque. In a judgment dated 14 August 1989, the appeal was partly allowed with respect to items 1 and 5 with the following finding:

“The result is that this appeal is allowed in part. In substitution of the decree made by Court below, we direct that the learned District Judge will now settle a scheme for the due administration of the mosque and its properties which are items 1 and 5.”

31. OS 92/1950-51 was a representative suit filed under section 92 CPC, specifically under clause (g), for settling the scheme of administration of the mosque. It has been consistently contended by Abdul Khuddus that item 2 of the suit schedule property was granted to him as a Khazi inam, and is thus not a mosque property. In order to adjudicate on the applicability of the plea of res judicata vis-à-vis the first suit, it is necessary that we decide on the following three issues:

A. The scope of the first suit which was instituted under Section 92 of the CPC;

B. Whether the parties in the first suit and the instant proceedings are the same; and

C. Whether the issue of title over the suit property was conclusively decided in the first suit.

E.2.1 Determination of title in a Representative suit

32. In Mahant Pragdasji Guru Bhagwandasji v. Patel Ishwarlalbhai Narsibhai AIR 1952 SC 143, a three judge Bench of this Court explained the ambit of a representative suit under Section 92 of the CPC. In that case, one of the reliefs sought was the declaration of the suit property as the religious and charitable trust property of Kaivalya or Karuna Sagar Panth while the defendant contended that the suit property was private property. Justice BK Mukherjea speaking for the Bench expounded on the scope of a suit under section 92 CPC, particularly in view of the relief seeking a declaration:

"10 A suit under S.92. Civil P.C. is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the Court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the section. It is only when these conditions pre fulfilled that the suit has got to be brought in conformity with the provision of S.92, Civil P.C. As was observed by the Privy Council in Abdul Rahil v. Md. Barkat Ali. 55 Ind, App. 96, P.C. a suit for a declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of S.92. Civil Procedure Code. In the case before us, the prayers made in the plaint are undoubtedly appropriate to the terms of Section 92 and the suit proceeded on the footing that the defendant, who was alleged to be the trustee in respect of a public trust, was guilty of breach of trust. The defendant denied the existence of the trust and denied further that he was guilty of misconduct or breach of trust. The denial could not certainly oust the jurisdiction of the court, but when the courts found concurrently, on the evidence adduced by the parties, that the allegations of breach of trust were not made out, and as it was not the case of the plaintiffs, that any direction of the court was necessary for proper administration of the trust, the very foundation of a suit under Section 92 of the Civil Procedure Code became wanting and the plaintiffs had absolutely no cause of action for the suit they instituted. In these circumstances, the finding of the High Court about the existence of a public trust was wholly inconsequential and as it was unconnected with the grounds upon which the case was actually disposed of, it could not be made a part of the decree or the final order in the shape of a declaratory relief in favour of the plaintiffs. It has been argued by the learned Counsel for the respondents that even if the plaintiffs failed to prove the other allegations made in the plaint, they did succeed in proving that the properties were public and charitable trust properties — a fact which the defendant denied. In these circumstances, there was nothing wrong for the court to give the plaintiffs a lesser relief than what they actually claimed. The reply to this is, that in a suit framed under Section 92 of the Civil Procedure Code the only reliefs which the plaintiff can claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of Section 92 of the Civil Procedure Code. The finding as to the existence of a public trust in such circumstances would be no more than an obiter dictum and cannot constitute the final decision in the suit."

(emphasis supplied)

33. Bhagwandasji (supra) lays down the following principles on the ambit of a representative suit under section 92 CPC:

(i) The plaintiff can only seek reliefs that fall under any of the clauses in section 92 CPC. A declaration that the suit property belongs to the trust, does not fall under the scope of any of the reliefs enumerated in section 92 CPC and is outside the scope of the provision;

(ii) Merely because the defendant denies the title of the trust over the suit property, the jurisdiction of the court cannot be ousted;

(iii) When the title of the trust is contested, a determination of the title of the suit property is necessary for the purpose of adjudication on the final relief, and thus it can be made ancillary to the main relief if the plaintiff is entitled to the relief sought under Section 92 CPC; and

(iv) If the plaintiff is not entitled to the relief sought, then in that case no determination on the title of the suit property can be made since it would be inconsequential to the final decision in the suit.

On applying the principles evolved in Bhagwandasji (supra) to the facts of the case, the relief sought in the first suit under section 92 CPC was for determination of a scheme of management of the mosque. A determination of the title of the suit property with respect to the mosque was ancillary to the main relief, under Section 92 of the CPC.

E.2.2 Representative Suit and Res judicata

34. We next advert to identifying if the parties in the instant proceedings (OS 149/1998) are the same as the first suit (OS 92/1950-51). The first suit was a representative suit filed by interested parties of the Mosque-Jamia Masjid while the instant suit was filed by the President of the Jamia Masjid in his representative capacity. In Raje Anandrao v. Shamrao (1961) 3 SCR 930, Chief Justice PB Gajendragadkar (as he then was) speaking for a two judge Bench of this Court said:

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

35. In Ahmad Adam Sait v. M E Makhri (1964) 2 SCR 647, Chief Justice PB Gajendragadkar (as he then was) speaking for a three judge Bench held:

“16…when a suit is brought under Section 92, it is brought by two or more persons interested in the trust who have taken upon themselves the responsibility of representing all the beneficiaries of the Trust. In such a suit, though all the beneficiaries may not be expressly impleaded, the action is instituted on their behalf and relief is claimed in a representative character. This position immediately attracts the provisions of Explanation VI to Section 11 of the Code. Explanation VI provides that where persons litigate bona fide in

respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear that Section 11 read with its Explanation VI leads to the result that a decree passed in suit instituted by persons to which Explanation VI applies will bar further claims by persons interested in the same right in respect of which the prior suit had been instituted. Explanation VI thus illustrates one aspect of constructive res judicata. Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by res judicata from reagitating the matters directly and substantially in issue in the said earlier suit."

The same principle was reiterated in R. Venugopala Naidu (supra). In a two judge Bench decision in Shiromani Gurdwara Parbhandhak Committee v. Mahant Harnam Singh C. (Dead) M.N. Singh AIR 2003 SC 3349, this Court held:

"19. As observed by this Court in R. Venugopala Naidu v. Venkatarayulu Naidu Charities [1989 Supp (2) SCC 356 : AIR 1990 SC 444] a suit under Section 92 CPC is a suit of special nature for the protection of public rights in the public trust and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of the public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit-title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of the law to be parties to the suit. A suit under Section 92 CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 CPC constructively bars by res judicata the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 CPC."

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

E.2.3 Conclusive decision and Res Judicata

36. The locus classicus on the point of determining if an issue was 'directly and substantially' decided in the previous suit is the decision of Justice M Jagannadha Rao (writing for a two judge bench) in Sajjadanashin Syed MD B.E. Edr. (D) by Lrs. v. Musa Dadabhai Ummer. (2000) 3 SCC 350. During the course of the judgment, the Court analysed the expression "directly and substantially in issue" in Section 11 and laid down

the twin test of essentiality and necessity:

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

[…]

18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter “directly and substantially” in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was “directly and substantially” in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was “necessary” to be decided for adjudicating on the principal issue and was decided, it would have to be treated as “directly and substantially” in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh [AIR 1965 SC 948] and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in Mulla is a correct statement of the law.

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

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

(emphasis supplied)

37. Adverting to the decision in Mahant Pragdasji Guru Bhagwandasji (supra) and two earlier decisions [Run Bahadur Singh v. Lucho Koer,ILR (1885) 11 Cal 301 ; Asrar Ahmed v. Durgah Committee, AIR 1947 PC 1.], the Court held that these were instances where in spite of adverse findings in an earlier suit, the finding on that specific issue was not treated as res judicata as it was purely incidental, auxiliary or collateral to the main issue in each of these cases and not necessary in the earlier case.

38. In another decision in Gram Panchayat of Village Naulakha v. Ujagar Singh (2000) 7 SCC

543, it has been held that the decision in an earlier suit for an injunction, where no question of title was adjudicated upon will not be binding on the question of title:

“10. We may also add one other important reason which frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into or decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed v. Musa Dadabhai Ummer [(2000) 3 SCC 350] where this Court, on a detailed consideration of law in India and elsewhere held, that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a later suit or proceeding where title is directly in question, unless it is established that it was “necessary” in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case.”

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

39. In a more recent decision in Nand Ram (Dead) Through Legal Representatives v. Jagdish Prasad (Dead) Through Legal Representatives (2020) 9 SCC 393, a Bench of two judges reiterated the principle that if a matter has only collaterally or in an auxiliary manner been in issue or decided in an earlier proceeding, the finding would not ordinarily be res judicata in a later proceeding where the matter is directly and substantially in issue. Justice Hemant Gupta (writing for a two judge bench) noted that the material test to be applied is whether the adjudication of the issue is material and essential for the decision. In Nand Ram, the land leased by the plaintiffs to the defendants was acquired under the Land Acquisition Act, 1894. A dispute arose on the apportionment of the compensation. The suit was decided against the defendant on the ground that defendant did not pay the lease rent for more than 12 months and thus according to the lease agreement, the lease had come to an end. It was thus held that the defendant would not be entitled to the compensation. Subsequently, the plaintiff filed an eviction suit asserting that the defendant was in possession of the land that was not included in the lease deed. The High Court in the second appeal held that the subsequent suit was barred by res judicata since the former suit had conclusively decided on the title of the suit property. On appeal, this court set aside the judgment of the High Court on the ground that the issue of title was not conclusively decided in the former suit.

40. In view of the authorities cited above, the twin test that is used for the identification of whether an issue has been conclusively decided in the previous suit is:

A. Whether the adjudication of the issue was ‘necessary’ for deciding on the principle issue (‘the necessity test’); and

B. Whether the judgment in the suit is based upon the decision on that issue (‘the essentiality test’).

On applying the necessity test to the case at hand, we will have to identify if the decision on the principle issue of framing a scheme for the administration of the Mosque could not have been arrived at without adjudication of the title of the suit. The plaint contains two distinct allegations against the defendant, Abdul Khuddus: (i) that he was misappropriating the funds of the mosque; and (ii) that he was setting up his own title to the suit property. The defendant contested that the suit property belonged to him. Therefore, since the title was contested, it was necessary that the court in the first suit determine if the suit property belonged to the mosque to adjudicate on the scheme of administration of the mosque. The contention that the trial court could not have adjudicated on the title of the suit property in a representative suit has already been addressed in the preceding section relying on the case of Bhagwandasji (supra). On applying the essentiality test to the judgment in the first suit, it has to be identified if the final decision rendered by the court in that case would be altered if the issue on title was determined otherwise. Whether the scheme for the administration of the mosque would also cover the suit property was necessary for adjudication in the former suit. In the next section we shall explore what precisely was the nature and import of the adjudication in the former suit.

E.2.3.1 Similarity in issue and Res Judicata

41. Apart from the issue whether the title to the suit property was conclusively decided in the first suit, it is necessary that we identify if the matters in issue in the former and the subsequent suits are the same. The first suit under Section 92 of the CPC was for settling a scheme of administration of Jamia Masjid and the management of its properties and the rendering of accounts of its funds and income by the Defendant. In the subsequent suit, the prayer was for the declaration of the suit property as a wakf property. In the first suit, it was held that the suit property was ‘prima facie’ the property of Abdul Khuddus; that it was given to his forefathers as a service inam, for his functions as a khazi. The cause of action in the subsequent suit arose because the successors of Abdul Khuddus alienated the suit property. The matters were adjudicated upon in the former suit are not the same as those in the subsequent suit for two reasons: Firstly, there was a changed circumstance resulting from the notification declaring the suit property as a wakf property which was issued after the first suit was decreed; secondly, in the first suit, which was essentially a suit for administration, the suit property was observed to prima facie belong to Abdul Khuddus as a khazi inam.

42. The adjudication on the suit property was focussed around whether it belonged to the mosque. Though the suit property was prima facie declared to not belong to the mosque, it

would not as a corollary mean that it was the personal property of Khazi Abdul Khuddus over which he possessed an absolute or inalienable right, particularly in view of his deposition that the property was given as an inam to his forefathers for their services a Khazi. There was no discussion on whether the suit property was a personal inam or an inam attached to the office; there was no adjudication in the earlier suit on the terms of the grant. Thus, no adjudication on the absolute title over the suit property was rendered in the former suit. On reading together, the findings which have been arrived at in paragraph 7 and paragraph 10 of the judgment of the trial court in the first suit, it is evident that the District Judge did not enter a conclusive finding that item 2 of the schedule to that suit (which corresponds to the suit schedule property in the present case) was the personal property of Abdul Khuddus. In fact, the use of the expression “prima facie right” in paragraph 10 extracted above clearly indicates that there was no conclusive finding in the judgment of the District Judge. The District Judge also noted it would be open to the trust to take steps as they deem fit in respect of item 2 and item 3 of the Schedule in that suit, if the defendant had not fulfilled the terms specified in the grant. Thus the finding on issue No 1 that schedule items 1, 4 and 15 belong to the mosque must specifically be read in the context of what has been stated above. From the above analysis, it becomes clear that there was no adjudication in the earlier suit that Abdul Khudus had an absolute title to the suit property.

43. In view of the above discussion, the suit that gives rise to the instant proceedings is not barred by the first suit for the following reasons:

(i) The court in the first suit was not ousted from determining if the suit property belonged to the mosque while settling a scheme for administration in a suit under Section 92 CPC;

(ii) The suit under Section 92 is of a representative character and the decree would bind all persons interested in the Trust property;

(iii) There was a ‘prima facie’ finding in the former suit that the suit property belonged to Abdul Khuddus; and

(iv) In the context of a suit for settling a scheme of administration, the issue in the first suit was whether the suit property belonged to Jamia Masjid. There was no adjudication or finding that Khazi Abdul Khuddus had absolute title over the property, particularly in view of the deposition of Abdul Khuddus that the property was given as a Khazi Inam, coupled with the observation of the court that he had a ‘prima facie’ right over the property. Therefore, the alleged claim of title of Abdul Khuddus was not adjudicated. Thus, the matters which were in issue before the court in the first suit and the instant proceedings are distinct.

II OS 748 of 1968: the second suit

44. The suit was instituted by the Mysore State Board of Wakf. Abdul Khuddus and H.S. Gururajarao were impleaded as the first and second defendants to the suit. The plaint contained the following averments:

(i) The suit property is a wakf property dedicated as a ‘Khazi Service Inam’. People who

perform the service of a Khazi are entitled to remain in possession of the service inam and to realise the usufruct after paying the wakf fund;

(ii) Abdul Khuddus was entitled to remain in possession by virtue of his office as Khazi, apart from which he had no right, title or interest;

(iii) The suit property had been notified as a wakf pursuant to enquiry. A Gazette notification had been issued on 10 July 1965 notifying the suit property as a wakf property;

(iv) The cause of action arose on 10 July 1965 when the illegal and forcible occupation of the suit property by the second defendant came to the knowledge of the plaintiff; and

(v) The reliefs sought were:

a. A declaration that the property constitutes a wakf;

b. A decree for possession of the suit property.

45. The second defendant filed a written statement stating that he was prepared to pay rent in the event that the property was held to be wakf property. A compromise petition was filed by the parties under Order 23 Rule 1 CPC on 27 October 1969 which envisaged that the second defendant shall continue to be the lessee of the suit property till the expiry of the period of lease (end of May 1971) for which the lease amount shall to paid to first defendant. In the alternative, if he desired to extend his lease thereafter, he could enter into a fresh agreement of lease with the first defendant, failing which he would vacate after demolition of the building. The suit was decreed on 27 October 1969 in terms of the compromise petition. The basis and foundation in the second suit was that:

(i) The plea that the suit property is a wakf on the basis of which a declaration was sought;

(ii) Abdul Khuddus was entitled to possession only in his capacity as a khazi, the grant being a khazi service inam;

(iii) The property has been notified as a wakf in the Mysore State Gazette on 10 July 1965 pursuant to a declaration of a wakf subscribed to by Abdul Khuddus;

(iv) The compromise decree envisages that H.S. Gururajarao would pay the rent to the first defendant and hand over possession of the suit property to the first Defendant on the completion of the tenure of the lease. There is no clause in the compromise deed that Abdul Khuddus had absolute title to the property; and

(v) In the second suit, the State Wakf Board sought declaratory relief and a decree for possession. A reading of the plaint would indicate that the essential nature of the grievance was in respect of a lease granted to the second defendant. The case of the Wakf Board was that the property had been dedicated as a wakf and was notified in the Gazette as a wakf; Abdul Khuddus was entitled by virtue of his office as khazi to the usufruct; and the lease in favour of the second defendant would not bind the wakf Board. The suit was compromised

and the second defendant agreed to handover possession to the first defendant. No part of the claim was abandoned on the question of title of Abdul Khuddus.

E.2.4 Compromise decree and Res Judicata

46. It is contended by the counsel for the appellant that since a compromise deed was arrived at between the Mysore State Board of Wakf, Abdul Khuddus and the lessee with regard to the possession of the suit property, the other reliefs have been abandoned. It was thus contended that in view of the compromise deed, the claim of title to the suit property has been abandoned and cannot be raised in the subsequent suit. In Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao AIR 1967 SC 591 and Sunderabai v. Devaji Shankar Deshpande AIR 1954 SC 82, this Court held that since a compromise decree is not a decision of the court, the principle of res judicata cannot be made applicable. However, it was held that the compromise decree may in effect create estoppel by conduct between the parties, and the parties by estoppel will be prevented from initiating a subsequent suit. Chief Justice Bhagwati (as he was then) writing for a three judge bench in Sunderabai observed:

“12. The bar of res judicata however, may not in terms be applicable in the present case, as the decree passed in Suit No. 291 of 1937 was a decree in terms of the compromise. The terms of Section 11 of the CPC would not be strictly applicable to the same but the underlying principle of estoppel would still apply. Vide: the commentary of Sir Dinshaw Mulla on Section 11 of the CPC at p. 84 of the 11th Edn. under the caption Consent decree and estoppel:

“The present section does not apply in terms to consent decrees; for it cannot be said in the cases of such decrees that the matters in issue between the parties ‘have been heard and finally decided’ within the meaning of this section. A consent decree, however, has to all intents and purposes the same effect as res judicata as a decree passed in invitum. It raises an estoppel as much as a decree passed in invitum.”

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

III. OS 100 of 1983: the third suit

47. The suit was instituted in the Court of Munsif at Gubbi by the Karnataka Wakf Board.

The defendants were Khazi Abdul Masood son of Abdul Khuddus (the first defendant) while the second, third, fourth and fifth defendants were persons to whom the property was sought to be alienated by the first defendant.

48. In was averred in the plaint that the cause of action arose when the first defendant who had no right and interest in the suit schedule property was trying to interfere with the possession of the plaintiff with the assistance of the second, third and fourth defendants. The relief which was sought in the suit was a permanent injunction restraining the defendants from interfering with the possession of the plaintiff – Karnataka Board of Wakfs. The suit was instituted on 4 August 1983. Significantly, the suit out of which the present dispute arises was instituted on 5 November 1984 for seeking declaration and possession. It was only thereafter on 22 November 1984 that OS 100 of 1983 was withdrawn. OS 100 of 1983 was a suit for a bare injunction and no declaration was claimed. In any event there was no adjudication on merits.

49. The third suit of 1983 instituted by the Karnataka Board of Wakfs was a suit for injunction simpliciter. No question of title was raised and none was adjudicated upon. As a matter of fact, the suit was instituted on the apprehension that the property was likely to be alienated by the legal representatives of Abdul Khuddus. Before the suit of 1983 was withdrawn, the suit out of which these proceedings arise was instituted for seeking comprehensive reliefs in terms of a declaration of title and a permanent injunction. Therefore, the decision in the third suit does not bar the initiation of the suit out of which the instant proceeding arises.

50. The High Court dismissed the second appeal holding that the courts conclusively decided on the title to the suit property in the first suit (OS 92/1950-51) and that any subsequent suit on the same issue of title would be barred by the principles of res judicata. In view of the discussion above, this finding arrived at by the High Court is erroneous. While holding that the judgment in the first suit has conclusively decided that the title over the suit property belongs to Abdul Khuddus, the High Court has lost sight of the observations in paragraph 7 and 10 of the judgment of the trial court. It has been specifically held there that the suit property was a Khazi service Inam and that Abdul Khuddus has a prima facie right to the suit property. There was no adjudication to the effect that Abdul Khuddus had an absolute title to the suit property. Additionally, the decision of the courts in the first suit was delivered before the suit property was notified as a wakf property in view of Notification No. MWB 19(11) dated 6 July 1965. The principle of res judicata can thus not be applied without taking into consideration this changed circumstance.

51. We are also of the opinion that the High Court has committed an error in applying the principle of res judicata based on the judgment in the second suit. It was observed by the High Court that the second suit that was decreed in terms of the compromise was intended to put the litigation to an end and would thus bar any subsequent suit on the title to the suit property by virtue of the principle of res judicata. For this purpose, reliance was placed on a two judge bench decision of this court in Byram Pestonji Gariwala (supra) where it was held that a challenge to a consent decree six years later was vitiated by reason of delay, estoppel, and res judicata. However, the High Court lost sight of the fact that the

compromise deed was entered into specifically with regard to the handing over of possession of the suit property by the lessee at the end of the lease and no compromise on the title to the suit property was arrived at.

F. The Conclusion

52. In view of the discussion above, we summarise our findings below:

(i) Issues that arise in a subsequent suit may either be questions of fact or of law or mixed questions of law and fact. An alteration in the circumstances after the decision in the first suit, will require a trial for the determination of the plea of res judicata if there arises a new fact which has to be proved. However, the plea of res judicata may in an appropriate case be determined as a preliminary issue when neither a disputed question of fact nor a mixed question of law or fact has to be adjudicated for resolving it;

(ii) While deciding on a scheme for administration in a representative suit filed under Section 92 of the CPC the court may, if the title is contested, have to decide if the property in respect of which the scheme for administration and management is sought belongs to the Trust;

(iii) A suit under section 92 CPC is of a representative character and all persons interested in the Trust would be bound by the judgment in the suit, and persons interested would be barred by the principle of res judicata from instituting a subsequent suit on the same or substantially the same issue;

(iv) Since the first suit (OS 92 of 1950-51) was filed by members interested in the Jamia Masjid and the suit out of which the instant proceedings arise (OS 149 of 1998) was filed by the President of Jamia Masjid, the formulation in (iii) above is satisfied;

(v) There was no adjudication in the first suit (OS 92 of 1950-51) on whether Abdul Khuddus had absolute title to the suit property. There was only a prima facie determination that Items 2 and 3 of the schedule of properties to the first suit belonged to Abdul Khuddus. The matters substantially in issue in OS 92 of 1950-51, which was a suit for administration and management of trust properties and for accounts, are distinct from the issues in the suit out of which the instant proceedings arise. Therefore, OS 149 of 1998 is not barred by res judicata in view of the decision in the first suit;

(vi) While a compromise decree in a prior suit will not bar a subsequent suit by virtue of res judicata, the subsequent suit could be barred by estoppel by conduct. However, neither the compromise petition dated 27 October 1969 nor the final decree in the second suit dated 27 October 1969 indicate that a compromise on the title to the suit property was arrived at. The compromise was restricted to the issue of the erstwhile lessee handing over possession of the suit property at the end of the lease; and

(vii) The third suit (OS 100/1983) was a suit for an injunction simpliciter. The third suit was withdrawn after the suit out of which the instant proceeding arises was filed for seeking a substantive declaration and an injunction. No adjudication on the rights of the parties was

made in the third suit.

53. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court of Karnataka dated 23 January 2012 in RSA 2189 of 2007. OS 149 of 1998 is restored to the file of the Principal Civil Judge (Senior Division) Tumkur for trial. Having regard to the fact that the suit was instituted in 1998, the Trial Judge is requested to dispose of the suit and to complete trial within a period of one year from the date of the receipt of the certified copy of this judgment. There shall be no order as to costs.

Citation : AIR 2021 SC 4523: (2021) 11 Scale 173, (2021)11 SCR 672