‘ROME HAS SPOKEN, THE CAUSE HAS ENDED; ROME SPOKE THROUGH HER LAWS.’

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PREFACE

One of the pillars of Roman law is contained in the maxim *res judicata pro veritate accipitur*, that is, a thing adjudicated is received as the truth. This maxim of Roman law is based upon two other maxims of Roman law, namely, *interest reipublicae ut sit finis litium*, that is, it concerns the State that there be an end to law suits, and, *nemo debet bis vexari pro una et eadem causa*, that is, no man should be vexed twice over for the same cause. Doctrine of *res judicata* simply put states that, ‘*If a person though defeated at law sue again he should be answered, “You were defeated formerly”*’. The recognised basis of the rule of *res judicata* is different from that of technical estoppel. Estoppel rests on equitable principles and *res judicata* rests on maxims which are taken from Roman law.

The underlying principle governing the doctrine of *res judicata* is that, there should be finality in litigation and that a party should not be vexed twice in the same matter. *Res judicata* is a doctrine of fundamental importance and has being statutorily embodied in India in Section 11 of the Code of Civil Procedure, 1908. To put it tersely, the obverse side of the doctrine of *res judicata* is that, when applicable, if it is not given full effect to, an abuse of process of the court takes place. There are certain notable exceptions to the application of the doctrine of *res judicata* and these are: **(1)** the doctrine of *res judicata* cannot impart finality to an erroneous decision on the jurisdiction of a court, and, **(2)** an erroneous judgment on a question of law, which sanctions something that is illegal, cannot be allowed to operate as *res judicata*.

If a matter stands decided by a court of competent jurisdiction but an appeal is filed against it within the period of limitation, then, the *res* never becomes *judicata*. Therefore, until the

limitation for filing an appeal is over the *res* remains *sub judice*. It is only when the limitation period is over that the *res* can be considered to be *judicata*. Interestingly, in the United States, unlike in India, the principle of *res judicata* comes into play the moment a judgment is pronounced, despite the fact that an appeal may be filed against the said judgment. In the matter of: *Nilvaru* V/s *Nilvaru*, ILR 6 Bom 110, the Hon'ble Bombay High Court held that, "*…when the judgment of a court of first instance upon a particular issue is appealed against, that judgment ceases to be res judicata and becomes res sub judice…*"

PRINCIPLES CONTAINED IN SECTION 11 OF THE CODE OF CIVIL PROCEDURE, 1908: *SHEODAN SINGH* V/S *DARYAO KUNWAR*, (1966) 3 SCR 300:

In the matter of *Sheodan Singh* (Supra) the Hon'ble Supreme Court of India held that a plain reading of Section 11 of the Code of Civil Procedure, 1908 would show that to constitute a matter *res judicata*, the following conditions must be satisfied:

i. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit;
ii. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
iii. The parties must have litigated under the same title in the former suit;
iv. The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and,
v. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Further, Explanation I to Section 11 of the Code of Civil Procedure, 1908 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier.

WHETHER THE FILING OF AN APPEAL WOULD BY ITSELF TAKE AWAY THE *RES JUDICATA* EFFECT OR WHETHER A MATTER HEARD AND FINALLY DECIDED BY THE FIRST COURT WAS *RES JUDICATA* UNTIL IT WAS SET ASIDE ON APPEAL?

In the matter of: *Canara Bank* V/s *N.G. Subbaraya Setty & Anr*, 2018 SCC Online SC 427, it was held that:

A. A decree from which an appeal lies and from which an appeal has been preferred, the fact that the appeal has been filed would render the matter *res sub judice* and not *res judicata*.

B. In dealing with Section 52 of the Transfer of Property Act, 1882, it has been held that a person who purchases property between the date of the disposal of the suit and filing of the appeal would be bound by the rule of *lis pendens*. If the appeal is only a continuation of the original proceedings and the suit is, for the purpose of Section 52 of the Transfer of Property Act, 1882, regarded as pending between the date of the decree and that of the filing of an appeal, it is difficult to see why the same rule should not apply when dealing with Section 11 of the Code of Civil Procedure, 1908.

C. Until the limitation period for filing of an appeal is over, the '*res*' remains '*sub judice*'. After the limitation period is over, the '*res*' decided by the first court would then become '*judicata*'.

D. In matters where the hearing in the second case is shortly after the limitation period for filing an appeal in the first case has ended, the hearing in the second case may be adjourned or may be stayed in order to await the outcome of the appeal in the first case.

E. If the period of limitation for filing an appeal has not yet expired or has just expired, the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as *res judicata*. No hard and fast rule can be applied. The entire fact circumstance in each case

must be looked into before deciding whether to proceed with the second proceeding on the basis of *res judicata* or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding.

F. Where the law is altered since the earlier decision, the earlier decision will not operate as *res judicata* between the same parties. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

DICTUM IN THE MATTER OF: *MATHURA PRASAD BAJOO JAISWAL* V/S *DOSSIBAI N.B. JEEJEEBHOY*, (1970) 1 SCC 613:

In the matter of: *Mathura Prasad Bajoo Jaiswal* (Supra) it was held that:

(1) The 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.

(2) An issue of fact or an issue of mixed law and fact decided by a competent court and finally determined between the parties cannot be reopened between them in another proceeding.

(3) The previous decision on a matter in issue alone is res *judicata*; the reasons for the decision are not *res judicata*.

(4) Matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law to it.

(5) A pure question of law unrelated to facts which give rise to a right cannot be treated as a matter in issue.

(6) If a previous decision is *res judicata*, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties.

(7) A previous decision of a competent court on facts which give rise to the right and on the relevant law applicable to the transaction is *res judicata*.

(8) If a previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded.

(9) A decision on an issue of law applies as *res judicata* in a later proceeding between the same parties if the cause of action of the later proceeding be the same as in the previous proceeding, but not when the cause of action is different.

(10) Even between the same parties, a decision will not be *res judicata* when the law stands altered after the earlier decision, or when the decision relates to the jurisdiction of the court to try the earlier proceeding, or when the earlier decision declares valid a transaction prohibited by law.

(11) A question of jurisdiction of the court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit is not *res judicata* in the later suit.

(12) If by an erroneous interpretation of the statute, the court holds that it has no jurisdiction, the question would not operate as *res judicata*.

(13) By an erroneous decision, if the court assumes jurisdiction, which it does not possess under the statute, the question cannot operate as *res judicata* between the same parties, whether the cause of action in the later litigation is the same or otherwise.

WHETHER AN ISSUE OF LAW DECIDED INTER PARTIES COULD BE HELD TO BE *RES JUDICATA* IN A SUBSEQUENT PROCEEDING BETWEEN THE SAME PARTIES?

A pure question of law including the interpretation of a statute will be *res judicata* in a subsequent proceeding between the same parties. To this salutary rule, 4 (four) specific exceptions can be indicated: **(1)** When the cause of action is different, the rule of res judicata would not be attracted; **(2)** Where the law has, since the earlier decision, been altered by a competent authority; **(3)** Where the earlier decision between the parties related to the jurisdiction of the court to try the earlier proceedings, the same would not be allowed to assume the status of a special rule of law applicable to the parties and therefore, the matter would not be res judicata; and, **(4)** Where the earlier decision declared valid a transaction which is patently prohibited by law, that is to say, it sanctifies a glaring illegality.

The question whether the decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The doctrine of *res judicata* is

essentially that, in certain circumstances, the court shall not try a suit or issue, but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances, it must necessarily be wrong for a court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision rendered was correct/incorrect and test whether requisite effect should be given to it or not, and further decide whether the previous decision rendered was right/wrong based on the understanding of what it conceives to be right or wrong.

In India, at all times, the party which takes the plea of *res judicata* has to show that the matter directly and substantially in issue was directly and substantially in issue in the former suit and also that the former suit was heard and finally decided. The phrase 'matter directly and substantially in issue' has to be given a sensible and business like meaning, particularly in view of Explanation IV to Section 11 of the Code of Civil Procedure, 1908, which contains the expression 'grounds of defence or attack'. Section 11 of the Code of Civil Procedure, 1908 says nothing about "causes of action", a phrase which always requires careful handling. Nor does Section 11 of the Code of Civil Procedure, 1908 say anything about points of law or pure points of law. As a rule parties do not join issue upon academic or abstract questions but upon matters of importance to themselves. Therefore, Section 11 of the Code of Civil Procedure, 1908 requires that the doctrine of *res judicata* be restricted to "matters in issue" and of these to matters which are directly as well as substantially in issue.

TAKEAWAYS:

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

II. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. (See: *State of Orissa* V/s *Sudhansu Sekhar Misra*, AIR 1968 SC 647)

III. A decision by a court on a question of law cannot be absolutely dissociated from the decision on the facts on which the right is founded.

IV. In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and finally decided by court of competent jurisdiction, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, the previous decision can be attacked on a particular point. It is plain from the terms of Section 11 of the Code of Civil Procedure, 1908, that what is made conclusive between the parties is the decision of the court and that the reasoning of the court is not necessarily the same thing as its decision.

V. The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are *res judicata* in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

To this general rule, there are 3 (three) exceptions:

i. **Subject Matter Jurisdiction:** Where an issue of law decided between the parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not *res judicata* in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. An erroneous decision as to the jurisdiction of a court cannot clothe that court with jurisdiction where it has none. A civil court cannot send a person to jail for an offence committed under the Indian Penal Code, 1860. If it does so, such a judgment would not bind a Magistrate and/or Session Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Indian Penal Code, 1860. Similarly, a civil court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special court with jurisdiction to decide such suits.

ii. **Erroneous Interpretation of the Statutory Law:** An issue of law which arises between the same parties in a subsequent suit or proceeding is not *res*

judicata if by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding.

iii. **Change of Law by Competent Authority:** Where the law is altered by the competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different. Thus, in such cases the subsequent suit filed will not get defeated on the ground of it being barred by the doctrine of *res judicata*.