MANU/BH/0050/1964

Equivalent Citation: AIR1964Pat174

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 1173 of 1957

Decided On: 20.12.1963

Appellants: **Lalbihari Tiwari**
Vs.
Respondent: **Sheo Shankar Prasad**

Hon'ble Judges/Coram:
Vaidynathier Ramaswami , C.J., R.K. Choudhary and Kamla Sahai , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Balabhadra Prasad Singh, Brajesh Chandra Varma and Amla Kant Choudhuri, Advs.

For Respondents/Defendant: Lalnarayan Sinha, Adv.

JUDGMENT

R.K. Choudhary, J.

1. This appeal by the plaintiff arises out of concurrent decisions of the Courts below dismissing his suit for a declaration that the order of eviction passed against him under Section 11 of the Bihar Buildings (Lease Rent and Eviction) Control Act, 1947 (hereinafter to be referred to as 'the Act') was without jurisdiction.

2 . The appellant is the owner of a holding consisting of a building within the Dinapore Cantonment area. On the 17th of July, 1951, he executed a registered rehan deed for a term of two years in respect of this holding in favour of the defendant-respondent and put him in possession of the same. On the 25th of July, 1951, the respondent let out the building to the appellant on a monthly rent. On the 3rd of February, 1953, the respondent made an application under the Act before the House Controller for eviction of the appellant on the ground that he had made default in payment of the rent since May, 1952. The appellant resisted the claim mainly on, the ground that there was no relationship of landlord and tenant between the parties. On, the 16th of March, 1953, the Controller overruled the objection and passed an order in favour of the respondent for eviction of the appellant. On appeal by the appellant, the order of the Controller was affirmed by the appellate authority and a revision application filed before the Commissioner was summarily rejected on the 13th of August, 1953. The appellant, thereafter, moved this Court under Art. 226 of the Constitution, and the respondent resisted the writ petition. On the 11th September, 1956, this Court overruled the contention of the appellant and dismissed the writ application upholding the order of eviction passed by the House Controller.

Thereafter, on the 13th of September, 1956, the appellant instituted the suit for a declaration that the order of the Controller was ultra vires mainly on the ground that it was incompetent of the Bihar Legislature to enact the Act so far as it was made applicable to the Dinapore Cantonment area. The suit was contested by the

respondent on several grounds, one of which, with which we are concerned in this appeal, was that the suit was barred by the principles of constructive res judicata. Both the Courts below gave effect to the contention raised on behalf of the respondent and held the suit to be barred by res judicata. The plaintiff has, therefore, filed this second appeal which was heard by a Division Bench of this Court. Their Lordships rejected the plea of res judicata raised on behalf of the defence. So far as the contention raised on behalf of the appellant in regard to the vires of the Act, so far as it was made applicable to the Dinapore Cantonment area, was concerned, their Lordships held that the question raised was of great general importance, inasmuch as a large number of proceedings under the Act in respect of buildings in the Cantonment area will have to be rendered invalid if the contention of the appellant was to be accepted. They therefore, passed an order referring the question, at issue to be decided by a larger Bench. Accordingly, this Full Bench has been constituted to dispose of the appeal.

3. Before Mr. Balsbhadra Prasad Singh, appearing for the appellant, could start his argument on the vires of the Act, Mr. Lalnarayan Sinha, appearing for the respondent, submitted that it was not necessary in the present case to decide the constitutional point about the vires of the Act, inasmuch as the suit of the appellant is barred by the principles of res judicata. He has, therefore, urged that the question of res judicata should be decided first so that, if it succeeds, the question about the vires of the Act will not have to he decided by this Full Bench. We, therefore, heard Counsel on both sides on the question of res judicata.

4. It may be noted here that in the writ application that the appellant filed in this Court the question of the vires of the Act was not raised and the writ application failed on other grounds. The argument put forward by learned Counsel for the respondent is that the decision of this Court in the writ application bars a subsequent suit for the same relief by the doctrine of res-judicata and the point of the vires of the Act, not having been raised in the writ application, could not be raised in the suit as having been barred by the principles of constructive res judicata.

On behalf of the appellant it has been contended that their plea of res judicata applicable to a suit can be given effect to only under the provisions of Section 11 of the Code of Civil Procedure and its principle cannot be stretched to a suit where an earlier decision has been given not in a suit, but in some other proceeding. In other words, his submission is that, so far as the suit is concerned, Section 11 of the Code of Civil Procedure is exhaustive and, if the case does not come under the terms of that section, res judicata cannot be applied to the suit.

In reply to this argument raised on behalf of the appellant, Counsel for the respondent has submitted that, even if on the terms of Section 11 of the Code of Civil Procedure, the doctrine of res judicata may not be applicable, the suit would be barred apart from that section on the general principle of res judicata.

5. Section 11 of the Code of Civil Procedure runs as follows :-

> "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 of that

> section says that 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.

6. The argument raised on behalf of the appellant is that under this section only a decision given in a previous suit would bar a subsequent suit by the doctrine of res judicata, and similarly the bar of constructive res judicata will be applicable only when any matter which might and ought to have been raised in the previous suit has not been raised therein. In other words, his contention is that, in order to apply the doctrine of res judicata under Section 11 of the Code of Civil Procedure, both the proceedings, must be suits, and not any proceeding other than a suit.

In support of this contention, he has relied on a Supreme Court decision in Janakirama Iyer v. Nilakanta Iyer, MANU/SC/0352/1961 : AIR 1962 SC 633. In that case a suit was filed under the provisions of Order 1, Rule 8, of the Code of Civil Procedure by certain creditors on behalf of the general body of creditors for administration, against the trustees and alienees of the properties which belonged to their debtors, defendants 1 to 6. Prior to the institution of this suit, defendants 1 to 6 themselves had filed a suit for the administration of the trust created by them, for accounts from the trustees and for recovery of the, trust property. This suit was ultimately withdrawn by them when an appeal against the decision of the Court below was pending in the High Court; and, as a result of the withdrawal, the suit was dismissed with costs. It was pleaded in the suit filed by some of the creditors that it was barred by res judicata. The argument raised against the plea of res judicata was that the parties in the two suits were different.

In that connection their Lordships of the Supreme, Court observed as follows :-

> "The argument is that on general grounds of res judicata the dismissal of the suit (O. S. No. 30 of 1943) filed by defendants 1 to 6 should preclude the trial of the present suit. It has been fairly conceded that in terms Section 11 of the Code cannot apply because the present suit is filed by the creditors of defendants 1 to G in their representative character and is conducted as a representative suit under Order 1 Rule 8; and it cannot be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who have brought the present suit are the same parties or parties who claim through each other. Where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of res judicata. We are dealing with a suit and the only ground on which res judicata can be urged against such a suit can be the provisions of Section 11 and no other."

It thus appears that their Lordships had to deal with two suits in which the parties were different and certainly in such a case neither on the terms of Section 11 nor on general principle of res judicata can be applied.

The observation of their Lordships that "the only ground on which res judicata can be urged against such a suit can be the provisions of Section 11 and no other", read along with the facts of that case, does not, in my opinion, mean that in case of a suit the general principle of res judicata can never be applied.

7. On behalf of the respondent reliance has been placed in this connection on an earlier decision of the Supreme Court in Smt. Raj Lakshmi Dasi v. Banamali Sen, MANU/SC/0063/1952 : AIR 1953 SC 33 : 1953 SCR 154. In that case what happened was that one Rajballabh died in 1870 leaving behind him his widow, Mati Dassi, and

three grandsons, referred to for brevity sake as 'Sens', who were sons of a predeceased daughter of Rajballabh by another wife. On the death of Rajballabh, his widow entered into possession of his estate and, in accordance with an authority conferred on her by Rajballabh, she adopted one Jogendranath in 1873. Jogendranath was married to one Katyayani, and Raj Lakshmi was their only child. The widow of Raj Ballabh died in 1899, and it appears that on her death the Sens took possession of the estate. In 1903 Katyani instituted a suit against the Sens claiming three-fourths share for herself as the widow of Jogendranath. This Sens, however, claimed the entire estate as the legal heirs of Rajballabh. During the pendency of the suit, the Sens mortgaged the entire estate, claimed to have been inherited by them from Rajballabh, to one Das. The trial Court decreed the suit of Katyayani with respect to the entire estate of Rajbailabh, There was an appeal before the District judge in which the mortgagee Das was also added as a party. The appeal was, however, compromised and a compromise decree was passed in 1907 according to which different parties were held entitled to get specific shares in the said estate. The suit was, therefore, remanded to the trial Court for effecting partition. A partition was made in due course and a final decree was passed. Under this compromise the Sens got four annas share in the estate and one of the properties included in the said four annas share was described as "2 Deb Lane, Calcutta". This property was notified by a declaration under the Land Acquisition Act for acquisition in 1921. The mortgagee Das made an application claiming the entire amount of compensation. Raj Lakshmi, on the other hand, claimed the entire amount asserting herself to be the owner of the sixteen annas share of Rajballabh's estate. A joint award was made in favour of all the claimants. Raj Lakshmi, therefore, made an application for a: reference to the Court on the point of apportionment of the compensation money asserting that the Sens and their mortgagee Das were not entitled to any portion of the compensation money. A special Judge was appointed under the Land Acquisition Act who tried this matter and disallowed Raj Lakshmi's claim and held that the Sens were entitled to the entire compensation money. In appeal to the Privy Council, however, Raj Lakshmi was declared to be entitled to the entire compensation money. Soon thereafter she filed a suit against the sens and the mortgagee Das for possession of the properties which represented the four annas share of the estate allotted to the Sens.

It was held by the Supreme Court that the claim of possession, made by the respective parties was founded on the assertion of their respective titles in that part of Rajballabh's estate which under the partition decree had been allotted to the Sens subject to the charge of Das mortgagee and the decision on the question of apportionment depended on the determination of that title. It was further held that the Land Acquisition court had jurisdiction to decide the question of title of the parties in the property acquired and that title could not be decided except by deciding the controversy between the parties about the ownership of the four annas share claimed by the Sens and Raj Lakshmi; that the question of title to the four annas share was necessarily and substantially involved in the land acquisition proceeding and was finally decided by a Court having jurisdiction to try it and that that decision thus operated as res-judicata and estopped the Sens and the Das mortgagee from reagitating that matter in the suit.

Their Lordships pointed out that the condition regarding the competency of the former court to try the subsequent suit was one of the limitations engrafted on the general rule of res judicata by Section 11 of the code of Civil Procedure and has application to suits alone; but when the plea of res judicata is founded on general principle of law all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction and it did not seem

necessary in such cases to further prove that it had jurisdiction to hear the latter suit. A plea of res judicata on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction, like revenue courts, land acquisition courts, administration courts etc. These courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute. Their Lordships, therefore, observed that it could not be held that the Judge who decided the apportionment issue in the Land Acquisition proceedings was a special Judge appointed under the Land Acquisition Act, and, not being a District Judge, the special Judge had no Jurisdiction to hear the present suit. Thus, according to this decision of the Supreme Court, it is clear that the general principle of res judicata would be applicable to a suit with reference to a prior decision in a proceeding other than a suit.

8. In G. H. Hook v. Administrator-General of Bengal48 Ind App 187 : AIR 1921 PC 11 a testator by his will and codicile provided that certain annuities should be paid out of a trust fund thereby created and that the residue of the income of the fund should be paid to the deacons of a Baptist Church, subject to certain conditions with a gift over to another Baptist Church if the conditions were not fulfilled. In an administration suit in the High Court during the life of the last surviving annuitant it was held that the condition had not been fulfilled and that there was not an intestacy and to the surplus income rejecting a contention on behalf of the next of kin that We gift over was invalid, as created (?) a perpetuity the decree provided that the determination of the destination of the income or corpus of the fund upon the death of the annuitant should be deferred until after that event. In further proceedings in the suit after the annuitant's death the next of kir contended that under the reservation in the decree they were entitled again to raise, the contention that the gift over was invalid. It was held that the validity of the gift over was res judicata.

9. Counsel for the appellant has also relied on a Bench decision of this court in Bhagwati Prasad v. Radha Kishun, MANU/BH/0091/1950 : AIR 1950 Pat 354. In that case the appellant obtained a decree for ejectment against the defendant-respondents who were tenants of the premises in question. The decree was sought to be executed, and in the execution proceedings the tenants-respondents took up a plea that Section 11 of the Act was a bar to the decree-holder evicting them; by these proceedings. The trial Court dismissed the objection of the tenant on the ground that they did not take such objection in the suit itself and they were disentitled from raising such objection in the execution proceedings by virtue of the principles of constructive res judicata as contemplated by Section 11 explanation IV, of the Code of Civil Procedure.

On an appeal the lower appellate court took the view that the provisions of Section 11 of the Act are wide enough to entitle the tenants to raise this objection during the execution proceedings and that there is no bar against statute. In the High Court also a contention was raised on behalf of the appellant that, as the above plea was not granted to the tenants in the suit in ejectment itself, they were not entitled to raise this plea at the execution stage and their right, if any, was barred by res judicata. That argument did not prevail and the tenants were held entitled to raise the above objection at the execution stage. The contention raised on behalf of the appellant, however, appears to have been negatived because of the express terms of Section 11 of the Act. Section 11 of the Act as it stood then ran as follows:-

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession

of any building he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise, except.....".

Thus it appears that under the Act itself the tenants were given a right to make an objection even at the execution stage. This case, therefore, is no authority for the proposition that the doctrine of res judicata will not be applicable to a suit where there had already been a decision on the point in issue in a proceeding of special jurisdiction.

10. Counsel for the appellant has also referred to certain passages from Halsbury's Laws of England, Third Edition Volume 15-paragraph 358 at page 185 and paragraph 387 at page 207. Paragraph 358 states as follows:

> "Essential of res judicata -- In order that a defence of res judicata may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between, the same parties, where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

Paragraph 387 reads as under:

> "Matter on record not then in issue. Apart from, the effect of express and implied admission in pleadings, no estoppel arises as to matters which were not in issue in the proceedings the record of which is relied upon. It is not sufficient that they were decided by implication. On this principle a plaintiff who has two heads of claim, and recovers judgment for one only, full relief not being open to him on the other, is not barred in a subsequent action as to the latter. . . . ."

11. It has been, contended that the general principle of 'res judicata' applicable in this country is derived from decisions in English Courts and, in view of the statements referred to above in Halsbury's Laws of England, there is no scope for application of constructive 'res judicata' apart from Section 11 of the Code of Civil Procedure; and, in support of this contention reliance has been placed on a decision of the Privy Council in Munni Bibi v. Tirloki Nath, 58 Ind App 158 : (MANU/PR/0031/1931 : AIR 1931 PC 114). But that case itself, in my opinion, supports the contention in favour of the applicability of constructive 'res judicata'.

In that case what happened was this. The house in dispute belonged to one Joti Prasad who died in 1870 leaving behind a widow, Mossammat Mukandi, and two sons, one of whom was Amarnath, and two daughters, one of whom was Kashi Dei. Kashi Dei claimed the house on the basis of inheritance from her mother, Mukandi, in whose favour Joti Prasad had executed a deed of gift in 1864. Munni Bibi was the daughter of Amarnath and she claimed the house on the basis of inheritance from her father, Amarnath, who held possession of the house after the death of Joti Prasad, treating the deed of gift to have remained inoperative. An assignee of a decree against Amarnath sought to execute his decree against this house. An objection was raised by one Kanno, as Mutawalli, who claimed to be in possession of it on the basis

of a deed of dedication executed by Kashi Dei, which was allowed. The assignee of the decree then filed a suit in 1909 for a declaration of his right to attach and sell the house in question in execution of the decree. In that suit, along with Kanno, Kashi and Munni both were made parties. Munni, however, did not appear and contest the suit. Ultimately, the suit was decreed in 1912 and the assignee's right to attach and sell the house was affirmed. In 1919, Munni filed a suit for possession of the house against the descendants of Kashi, who, in the meantime, paid off the decretal dues of the said assignee of the decree and came in possession of the house in question. A point was raised in this suit that the question of title between Munni and Kashi was 'res judicata' by reason of the decision in the suit of 1909. Ultimately, the matter came up before the Privy Council on appeal by Munni. A point of res judicata as between these two ladies, the co-defendants, was raised before their Lordships of the Judicial Committee, and their Lordships observed as follows:

> "The doctrine of res judicata finds a place in Section 11 of the Code of Civil Procedure of 1908, but it has been held by this Board on many occasions that the statement of it there is not exhaustive; the latest recognition of this is to be found in Kalipada De v. Dwijapada Das, LR 57 !nd App 24 : (MANU/PR/0007/1929 : AIR 1930 PC 22). For the general principles upon which the doctrine should be applied, it is legitimate to refer to decisions in this country: (Their Lordships then refer to certain cases). That there may be res judicata as between co-defendants has been recognized by the English Courts and by a long course of Indian decisions. The conditions under which this branch of the doctrine should be applied are thus stated by Wigram V. C. in Cottingham v. Earl of Shrewsbury, (1843) 3 Hare 627 at p. 638; 'If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound; but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.' This statement of the law has bean accepted and followed in many Indian cases: (Their Lordships refer to several decisions). It is, in their Lordships' opinion, in accord with the provisions of Section 11 of the Code of Civil Procedure, and they adopt it as the correct criterion in cases where it is sought to apply the rule of 'res judicata' as between co-defendants. In such a case, therefore, three conditions are requisites (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided".

According to their Lordships, these conditions were established in that case; and though the appellant did not enter appearance in the suit, their Lordships did not regard this factor as really material, and in that connection their Lordships observed as under:

> "if she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position. The test of mutuality is often a convenient one in questions of res judicata. If the decision had gone the other; way the appellant could hardly have claimed that because she did not choose to appear she was not bound by it, and so have compelled Kashi to litigate the matter over again; and if the appellant would have been bound, so must Kashi be."

Their Lordships, therefore, held that the title to the house as between the appellant Munni and Kashi was res judicata in that suit by reason of the 1909 decision. This decision, therefore, is of no assistance to the appellant here for the proposition that the general principle of res judicata applicable in this country is derived from decisions in English Courts, although their Lordships referred in this connection to the English decisions along with Indian decisions on the point.

12. Reference has also been made on behalf of the appellant to the Supreme Court decision in Satyadhan Ghosal v. Sm. Deorajin Debi, 1960-3 SCR 590 : (MANU/SC/0295/1960 : AIR 1960 SC 941). In that case certain tenants made ar application under Section 28 of the Calcutta Thika Tenancy Act, 3949, praying that the decree obtained by the appellant-landlords against them be set aside on the ground that they were thika tenants. The Munsif held that the applicants were not thika tenants within the meaning of that Act, and dismissed their application. An application in revision was filed by the tenants in the High Court. Daring the pendency of that application, the Calcutta Thika Tenancy Ordinance, 1952 and the Calcutta Thika Tenancy (Amendment) Act, 1953 came into force and the latter Act omitted Section 28 of the original Act. The High Court, after considering the provisions of the Amendment Act, held that it did not affect the operation of Section 39 of the original Act which was applicable to those proceedings. The High Court also found that the petitioners were thika tenants and remanded the case to the Munsif for disposal according to law. After remand, the Munsif rescinded the decree. The landlord-appellants went up in revision to the High Court under Section 115 of the Code of Civil Procedure against the order of the Munsif, and the High Court held that the question of applicability of Section 28 was res judicata between the, parties and could not be raised again before the High Court, and dismissed the landlords' application. By special leave granted to the landlords, an appeal was filed in the Supreme Court where on behalf of the tenant-respondents it was contended that the appellants were barred by principle of res judicata from raising before that Court the question whether, on the enactment of the Thika Tenancy (Amendment) Act, ,1953, Section 28 of the original Act survived or not in respect of the proceedings pending on the date of the commencement of the Thika Tenancy Ordinance, 1952, and, in support of this contention, it was submitted that the landlord-appellants had not preferred an appeal from: the order of remand passed by the High Court.

Their Lordships held that the appellants were not precluded from raising before that Court the question that Section 28 of the original Thika Tenancy Act was not available to the tenants after the Thika Tenancy (Amendment) Act came into force, merely because they had not appealed from the High Court's order of remand. It was further pointed out that an interlocutory order which did not terminate the proceedings and had not been appealed from, either because no appeal lay or, even though an appeal lay, an appeal was not taken, could be challenged in an appeal from the final decree or order. Thus, this case is of no assistance to the appellant, because in this case the plea of res judicata was denied on the ground that the question decided by the remand order could be taken up for consideration in an appeal from the final decree or order.

13. Mr. Lalnarayan Sinha, appearing for the respondent, has relied, in support of his contention, on the cases of Radha Shyam Datta v. Patna Municipal Corporation, Patna, MANU/BH/0046/1956 : AIR 1956 Pat 182; Shamsul Haque v. Asst. Custodian of Evacuee Property, Bhilsa, AIR 1958 Madh Pra 82; M. S. M. Sharma v. Dr. Shree Krishna Sinha, MANU/SC/0020/1960 : AIR 1960 SC 1186; Daryao v. State of U. P., 1962-1 SCR 574 : (MANU/SC/0012/1961 : AIR 1961 SC 1457) and Baijnath Prasad

Sah v. Ramphal Sahni, MANU/BH/0024/1962 : AIR 1962 Pat 72 (FB).

14. In the case reported in MANU/BH/0046/1956 : AIR 1956 Pat 182, a Bench of this Court held that filing of successive writ applications on the same cause of action by the same person on grounds which could have been taken in the earlier application should be discouraged on general principle so that the opposite party may not be unnecessarily harassed on more than one occasion in respect of the same matter, and that, even if one were to agree that the provisions of res judicata as incorporated in Section 11 of the Code of Civil Procedure may not strictly apply to successive writ, applications, the general principle of res judicata, apart from Section 11 of the Code of Civil Procedure, can be made applicable to writ applications also.

In Shamsul Haque Dastgirali's case MANU/MP/0034/1958, the petitioner filed a writ petition which was dismissed by the High Court. Subsequently he filed another writ petition precisely on the very facts that had been alleged in the previous application with only a new addition of ground that the vires of a particular Ordinance was challenged. It was held that, although Section 11 of the Code of Civil Procedure did not apply in terms to cases of writ, the principle contained in it should be applied and the petitioner ought to have challenged the vires of the Ordinance in the former writ application. The second petition was, therefore, held to be barred by constructive res judicata.

In M. S. M. Sharma's case, MANU/SC/0020/1960 : AIR 1960 SC 1186, the petitione made an application in the Supreme Court under Article 32 of the Constitution of India against the Chairman, Committee of Privileges of the State Legislative Assembly and Committee of Privileges (without any name being given) regarding the power of privilege of a house of a legislature of a State prohibiting the publication of the report of proceedings of the House which were discussed and decided by the Supreme Court in that writ application. The petitioner filed another writ application under Article 32 of the Constitution against the Chairman and the Members of the Committee of Privileges of a State Legislative Assembly seeking the same reliefs, and it was held that the subsequent writ petition was barred by the principle of res judicata and was, therefore, not maintainable.

In Daryao's case, (1962) 1 SCR 574 : (MANU/SC/0012/1961 : AIR 1961 SC 1457), a petition under Article 226 of the Constitution was considered on merits and discussed by the High Court. It was held that the decision pronounced was binding on the parties, unless modified or reversed by appeal or other appropriate proceeding under the Constitution, and an application under Article 32 of the Constitution to the Supreme Court for the same relief would not lie as having been barred by the general principle of res judicata. These decisions, therefore, lay down that the general principle of res judicata, including constructive res judicata, would be applicable to writ petitions.

15. In the case of MANU/BH/0024/1962 : AIR 1962 Pat 72, a Full Bench decision of this Court, somewhat similar points arose for consideration. In that case, in execution of a money decree passed against two persons, father and son, who were Malahs by caste, the decree-holders purchased their qaemi kasht lands and the sale was duly confirmed. During the pendency of the execution, however, Section 49-M of the Bihar Tenancy Act was amended by the Bihar Tenancy (Amendment) Act of 1955, in pursuance of which no decree or order could be passed by any Court for the sale of the right of a raiyat, belonging to certain classes which, under the notification of the Government of Bihar, included a Malah also, in his holding or in any portion thereof,

nor could such right be sold in execution of any decree, except in certain cases with which the court was not concerned in that appeal. The judgment-debtors did not appear at any stage in the execution case, in spite of service of all relevant processes on them. After the confirmation of the sale, however, one of the judgment-debtors filed a petition on the 28th of September, 1956 under Sections 47 and 151 of the Code of Civil Procedure with a prayer to set aside the sale on the ground that, in view of Section 49-M of the Bihar Tenancy Act, his kasht land could not be sold in execution of the money decree. The sale was ultimately set aside by the lower appellate Court and a second appeal was filed in this Court by the decree-holders which was heard by a Full Bench. Before the Full Bench, Counsel for the appellants also raised a point that Section 49-M of the Bihar Tenancy Act was ultra vires of the Constitution as being hit by Articles 15 and 19. The Full Bench did not decide this point, but by a majority judgment held that the question of non-saleability of the kasht land, not having been raised during the execution proceedings, could not be raised in the present proceeding as having been barred by constructive res judicata.

The proposition of law that was enunciated in that case in this connection is as follows:

> "It is well settled, however, that the doctrine of res judicata is very much wider in scope than Section 11 (Code of Civil Procedure). It applies to execution proceedings and also, in certain circumstances, to decisions of courts of special jurisdiction. It may also apply in some cases when the former court was not competent to try the subsequent cause. If a party takes an objection at a certain stage of a proceeding and does not take another objection which it might and ought to have taken at the same stage, it must be deemed that the court has adjudicated upon the other objection also and has held against it. This principle of constructive res judicata has been extended further. If a party has knowledge of a proceeding, and having had an opportunity when it might and ought to have raised an objection, it does not do so, it cannot be allowed to raise that objection subsequently, if the court passes an order which it could not have passed in case that objection had succeeded on the ground that it must be deemed to have been raised by the party and decided against it. In other words, when an order is passed by a competent court, which is inconsistent with the existence of fact or law on which the party could have based its objection, it must be deemed that the court has decided those facts or law against it." It was further observed--
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> > "It is immaterial whether the sale of the lands in question is void or voidable because we have to consider, at present, the consequence of the judgment-debtor not having raised the objection before the sale when he might and ought to have raised it."

16. On a consideration of the authorities referred to above, my concluded opinion is that, where a party has filed a writ application in the High Court, but has omitted to raise certain points, including the vires of certain Act, its subsequent suit for a declaration about the vires of that Act is barred by constructive res judicata. The suit of the plaintiff is accordingly barred by the principles of constructive res judicata. In view of this decision, it is not necessary to go into and decide the question of vires of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, so far as it was made applicable to the Dinapore Cantonment area.

17. There is thus no merit in this appeal which is, accordingly, dismissed with costs.

Vaidynathier Ramaswami, C.J.

18. I agree.

Kamla Sahai, J.

19. I agree.