MANU/BH/0024/1962

Equivalent Citation: AIR1962Pat72

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.O. No. 93 of 1958 with Civil Revn. No. 348 of 1958

Decided On: 24.10.1961

Appellants: **Baijnath Prasad Sah**
Vs.
Respondent: **Ramphal Sahni and Ors.**

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

Counsels:
For Appellant/Petitioner/Plaintiff: Prem Lall, S.C. Mukharji and R. Nandy, Advs.

For Respondents/Defendant: S.P. Srivastava and S.S. Varma, Advs. and Govt. Adv.

JUDGMENT

Kamla Sahai, J.

1. The principal point which arises for consideration in this case is as to the extent and scope of applicability of the doctrine of constructive res judicata in execution cases. This Bench has been constituted because it was felt that the Full Bench decision in Uchit Lal Misser v. Raghunandan Tewari MANU/BH/0074/1934 : ILRPat 52 : AIR 1934 Pat 666) required further consideration.

2. The decree-holders auction purchasers have filed both the Miscellaneous appeal and the Civil revision against an order dated the 16th December, 1957, passed by the Additional District Judge, 2nd Court, of Muzaffarpur whereby he has set aside the sale of Kaimi Kasht lands of Ramphal Sahni, the judgment-debtor, held on the 12th March, 1956, in execution of a money decree. They have been made analogous, and have been heard together. This judgment will govern them both.

3. The facts of the case may be shortly stated. Money suit No. 62 of 1953, was decreed against Ramphal Sahni and his son on the 16th November, 1953. The decree-holders filed an application for execution of the decree on the 8th August, 1955. An order dated the 6th September, 1955, shows that notice under Order XXI, Rule 22 of the Code of Civil Procedure (hereinafter to be referred to as the Code) was served. The order dated the 1st October, 1955, shows that attachment was effected. It appears from the order dated the 19th November, 1955, that notice Under Section 13 of the Money Lenders Act was also served. No objection relating to valuation having been raised by the judgment-debtors, the court accepted the valuation given by the decree-holders by its order dated the 11th January, 1956, and passed an order for issue of sale proclamation fixing the 12th March, 1956 for sale. Two lots of the judgment-debtors'.' Kaimi Kasht lands were sold on the 12th March. The order of that date shows that the decree-holders themselves became the purchasers, and that set off prayed for by them as provided in Rule 72 (2) of Order XXI was allowed. The sale

was confirmed on the 12th April.

4. It may be mentioned that Section 49-M of the Bihar Tenancy Act was amended by the Bihar Tenancy (Amendment) Act 1955. As a result of that amendment, the words 'a raiyat, who is a member of the scheduled tribes, scheduled castes or backward classes' have been substituted in place of the words 'an aboriginal raiyat' in Clause (b) of Section 49-M with which clause we are concerned in this case. The amending Act came into force on the 2nd November, 1955. The clause as it stands after the amendment, reads :

> "49-M Restriction On sale o f tenant's rights under order of Court:--(1) Notwithstanding any. thing in this Act.
>
> * * *
>
> (b) no decree or order shall be passed by any Court for the sale of the right of a raiyat, who is a member of the scheduled tribes, scheduled castes or backward classes in his holding or in any portion thereof, nor shall such right be sold in execution of any decree except as provided in Sub-section (2)."

In Section 49-B, as introduced by the amending Act, the expression 'backward classes' has been defined to mean "such classes of citizens as may be declared by the State Government by notification in the Official Gazette, to be socially and educationally backward". A notification dated the 7th February, 1956, was published in the Bihar Gazette D/- 22-2-1956 giving a list of the classes of citizens, who were declared by the Government of Bihar to be socially and educationally backward. According to this notification, a Mallah is included in the list of backward classes for the whole of the State of Bihar.

5. The judgment-debtors are admittedly Mallahs by caste. They did not appear in the execution case at any stage. It was on the 28th September, 1956, that Ramphal Sahni alone filed an objection under Sections 47 and 151 of the Code with a prayer to set aside the sale. He alleged in the application that the processes in the execution Case had not been served, and that, in view of Section 49-M of the Bihar Tenancy Act, his kasht lands could not be sold in execution of the money decree. The learned Munsif, who heard the application, dismissed it, holding that the processes were duly served, that the applicant had full knowledge of the execution proceedings and that the amended Clause (b) of Section 49-M (1) had no application to this case. He also held that the application was barred by limitation.

6. The applicant, Ramphal Sahani, took an appeal to the Court of the District Judge, and the Additional District Judge, 2nd Court, who heard it, held that the Munsif's finding that the processes in the execution case were duly served was correct, and he also said that it had not even been challenged before him. He, however, held further that Clause (b) of Section 49-M (1) was applicable to the case, that the sale was void as the kasht lands of persons who being Mallahs by caste belonged to the backward classes had been sold, and that Article 166 of the Limitation Act was not applicable to this case it being governed by three years' limitation.

7. Appearing on behalf of the appellant, Mr. Prem Lall has urged three points, which are as follows :

> (1) That the processes having been duly served, the judgment-debtors had full knowledge of the execution proceedings. As they did not object to the

sale of their kasht lands before the sale On the ground of those lands being non-saleable by statute, the executing court must be deemed to have decided the question of saleability of the lands against them by holding the sale and by confirming it later. The applicant, is therefore, barred by the principle of constructive res judicata from raising the objection.

(2) That the sale is, in any case, voidable and not void and that article 166 applies and not article 181, which is applicable to an application for getting a void sale set aside.

(3) Section 49M of the Bihar Tenancy Act is ultra vires of the Constitution because it is hit by Articles 15 and 19.

7-A. The learned Government Advocate, who has appeared on behalf of the State of Bihar, has only disputed the correctness of the last point urged by Mr. Prem Lall and has submitted that Section 49-M is not hit by any provision of the Constitution,

8. Mr. Srivastava, who has appeared on behalf of the judgment-debtor respondent, has urged that the sale is void, and that the period of limitation would be three years because article 181 of the Limitation Act would apply.

9. On the point relating to res judicata, which I proceed to consider. Mr. Srivastava has urged that the doctrine of constructive res judicata does not apply in the circumstances of this case. There is no disagreement between Prem Lall and Mr. Srivastava upon the point that the prohibition against sale provided for in Clause (b) of Section 49M(1), operates at two stages; one at the time when the decree or order for sale is passed and the other at the time of actual sale in execution of any decree. The notification declaring Mallahs to belong to the backward classes and thereby making them entitled! to the protection of Clause (b) of Section 49M (1) was published on the 22nd February, 1956. As the order for sale and issue of sale proclamation was passed on the 11th January 1956 the executing court could not have taken that notification into consideration at that stage. It cannot, therefore, be deemed to have then decided the question whether the sale of the judgment-debtor's land was prohibited under a valid statute. I may make it clear that, if that question could be deemed to have been decided at that stage, the decision would have operated as res judicata, and the parties could not have been allowed to raise it at the later stage.

In the circumstances of this case the learned Advocates are agreed that the order for sale cannot operate as res judicata. Mr. Prem Lall has, however, argued that the sale by the court and the order of confirmation of the sale operate as res judicata. On the other hand, Mr. Srivastava has, firstly, urged that the sale of a property in disregard of a statutory prohibition against its sale, which is based upon public policy, is void and as the court has no jurisdiction to sell such a property, acceptance of the sale or confirmation thereof by it cannot operate as res judicata. His second line of argument is that the facts admitted by the decree-holders in the application for execution, itself made out that the judgment-debtor's property was not liable to sale and hence the court acted without jurisdiction in selling that property. He has contended that even if the proposition in general form as he has put up in his first line of argument is not accepted, he must succeed on the basis of the second argument.

Without proceeding any further, I may mention at this very stage that Mr. Prem Lall has submitted that the mere fact that the judgment-debtors are Mallahs by caste and that the properties in question are their kasht lands are not sufficient to enable the

court to hold that those properties are non-saleable. His contention is that he is still challenging the legality of Section 49M as it stands after the amendment, and that even when there is a point of law which has to be decided1. before a property can be held to be non-saleable, the court must be deemed to have decided that question against the party which failed to raise the objection when it might and ought to have raised it.

10. The doctrine of res judicata has a wide application it is based upon the principle of finality and sanctity of judgment between the parties. If the same matter can be re-opened again and again, there will be no end to litigation. There will be a great oppression in the name of law, and the parties and their descendants will never have any repose. The question whether the decision is right or wrong is immaterial for application of the doctrine of res judicata. The court may commit an error on facts, on law or even on a point of jurisdiction when the court has exclusive power to decide whether it has jurisdiction Or not, and still the judgment or order will operate as res judicata. The doctrine has been embodied in a restricted form in Section 11 of the Code. That section prohibits a court from trying "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." Explanation IV lays down the principle of constructive res judicata and states that a matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue.

11. There are two important limitations on the application of Section 11. The first is that it applies only to suits and the second is that the court trying the former suit must be competent to try the subsequent suit. It is well settled, however, that the doctrine of res judicata is very much wider in scope than Section 11. 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 likes 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 parry could have based its objection, it must be deemed that the court has decided those facts or law against it.

12. In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's Immovable property, there are five important stages. Under the Patna amendment of Rule 22 of Order XXI, the court has to issue notice in every case to the person against whom execution is levied, requiring him to show cause why the decree should not be executed against him. Rule 23 reads :

> "(1) where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the Satisfaction of the court why the decree should be executed, the court shall order the decree to be executed.

> (2) where such person offers an objection to the execution of the decree, the court shall consider such objection and make such Order as it thinks fit."

This is the first stage. If the notice under order XXI, Rule 22 is not served upon the judgment-debtor, that is a different matter; but, if the notice is served upon him, he must raise all his objections to the executability of the decree at that stage. If he docs, the Court's decision on those objections will operate as res judicata in all further proceedings. If, in spite of service of notice he fails to raise an abjection which he might and ought to nave raised at that stage, for instance, an objection on the sound of limitation, the court, in passing the order for execution of the decree, must be deemed to have decided the objection against him.

Ordinarily, however, the court does not pass an express order to the effect that the decree be executed. That order is implied in the order for issue of attachment, which is the next stage. In the present case also the order under Rule 23 (1) is implied in order for issue of attachment. All objections to the executability of the decree have to be raised in such cases before the order for issue of attachment. The third stage is one when the court orders sale of the judgment-debtor's property. Rule 64 of Order XXI provides that an executing Court may order the sale of any property attached by it, provided that the property is liable to sale. As the court has come to a decision at this stage that the property in question is liable to sale, any objection on the ground of non-saleability of the property must be raised before that stage. If an objection relating to saleability is raised, the court's decision will be binding upon the parties. In case the judgment-debtor fails to raise any such question, the court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale it cannot pass that Order.

13. The next two stages are the sale and the confirmation of sale. If any circumstance comes into existence between the date on which the order for sale has been passed under Rule 54 and the date of actual sale and that circumstance makes the property non-saleable, the Court cannot possibly proceed to sell the property, if it sustains an objection that subsequent to the order of sale, the property has, become non-saleable by reason of a prohibition contained in a statute or otherwise. The sale is the culmination towards which the execution proceeding moves. The Order for sale of a property is passed only in order to enable the court to sell it later. The order and the sale are thus connected together. The judgment-debtor must know after the Order for sale that the court would necessarily sell the property unless he raises an objection before sale, if such an objection is available to him, that the property has become non-saleable after the order for sale. Having knowledge and opportunity, the judgment-debtor, who desires to object to the Sale of the property on such a ground, might and ought to raise it before the sale.

Under Rule 65 of Order XXI, a sale is conducted by an officer of the court Or by a person appointed for that purpose by the court. The sale must nevertheless be considered to have been held by the court. It acts judicially in accepting the bid and in passing an order for set off under Rule 72 (2) where such an order is necessary. The court's order accepting the sale must operate as res judicata in subsequent proceedings because that order is inconsistent with the non-salability of the property. In this connection I may refer to the Patna amendment of Rule 90 of Order XXI which lays down that

> "no application to set aside a sale shall be admitted (a) upon any ground which could have been but was not put forward by the applicant before the

sale was concluded........."

Under Rule 92 of the same Order, the sale becomes absolute when it is confirmed by the Court. Once the sale becomes absolute, title to the property is deemed, under Section 65 of the Code to have passed to the purchaser on the date of sale. It is manifest that, whatever objection the judgment-debtor can take on the ground of the property having become non-saleable after the order of sale and before the date of sale, her must take it before the sale. If there is a ground which has become open to him to take after the sale and be fore the confirmation of sale, he must take it at that stage. If he fails to take any objection in time, the Court must be deemed to have given its decision against that objection by accepting the sale or by passing an order of confirmation of the sale, as the case may be.

14. I shall now consider the decisions which have been cited at the Bar. I would first refer to the decisions of the Privy Council and the Supreme Court, and would thereafter refer to the decisions of the different High Courts.

15. The earliest decision which has been brought to our notice is that of the Judicial Committee in Mungul Pershad Dichit v. Grija Kant Lahiri 8 I A 123 (PC). The question which arose for consideration in that case was whether the seventh application for execution which was filed on the 22nd September, 1877, was barred by limitation. The sixth application for execution was filed on the 5th September, 1874. Notice to show cause why the decree should not be executed was served upon the judgment-debtor on the 23rd September, 1874, and the Court made an order of attachment on the 8th October, 1874. The High Court held that the decree was barred on the 5th September, when the sixth application was filed, and said that "a decree once dead no proceeding by means of an application out of time could revive it". While reversing the decision of the High Court, their Lordships of the Judicial Committee observed that the Subordinate Judge, before whom the sixth application for execution was filed had jurisdiction to determine on the 8th October when the decree was barred by limitation. When he passed an order on that date for attachment, he must be deemed to have done so on an adjudication that the decree was not barred by limitation.

Section 3 of the Limitation Act lays down that every suit application, etc., filed after expiry of the period of limitation "shall be dismissed although limitation has not been set up as a defence". In delivering the judgment of the Judicial Committee, Sir Barnes Peacock has stated, with reference to the Subordinate Judge's order of attachment dated the 8th October, 1874 :

> "He, whether right or wrong must be considered to have determined that it was not barred. A judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it appears that the cause of action is barred by limitation. But if instead of dismissing the suit he decrees for the Plaintiff, his decree is valid, unless reversed upon appeal; and the Defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation."

It is to be noticed that the judgment-debtor did not raise any objection on the ground of limitation, and there was no express adjudication on any such objection. The order of attachment dated the 8th October, 1874, was inconsistent with the application being barred by limitation, and their Lordships, therefore, held that, until that order was reversed in accordance with procedure known to law, it was binding upon the

parties as a decision that the application of the 5th, September was not barred by limitation.

16. In Aninachellam v. Arunachellam 15 I A 171 (PC), the judgment-debtors held part of a village named Kattanoor containing fifteen hamlets in proprietary fight and the other part as mortgagees. In execution of a decree against them, sale proclamation was issued, fixing the 22nd July, 1882, for sale. They knew of the execution proceeding and the date fixed for sale but they filed an objection for the first time on the 29th July, 1882, i.e. about a week after the sale. The objection was based upon two grounds : (1) that the description of the property in the sale proclamation was defective because it was not indicated therein that the judgment-debtors held part of the property as mortgagees, and (2) that the village had several hamlets attached to it, and the sale of one of them alone would have been sufficient for realisation of the decretal amount. The High Court set aside the order confirming the sale and also an order whereby an application to set aside the sale was rejected; On the ground that the description of the property in the sale proclamation was 'most imperfect', and that 'the purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case'.

Sir Richard Couch, who delivered the judgment of the Judicial Committee, stated :

> "Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating the sale--for that appeared to be the contention of the counsel for the Respondents--the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed and then as to have it set aside on account of this, as they say misdescription .... It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any mis-description of the property attached, and about to be sold, which he knew well, but of which the execution-creditor or decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated."

17. It is clear from the observation which I have quoted above that their Lordships were of opinion that the sale was the decisive point. The objection in question could not be taken before the order for sale under Rule 64 because it arose from the sale proclamation issued under Rule 66 of Order XXI of the Code. As it was taken about a week after the sale, their Lordships said that the judgment-debtors could not raise it after the sale was completed.

18. In Bindeshwari Charan v. Bageshwari Charan MANU/PR/0009/1935 : AIR 1936 PC 46, Jadu Charan, the owner of an impartible estate, made a maintenance grant of properties yielding an annual income of Rs. 1,300/- in favour of his younger son, the appellant, on the 17th November, 1909. The appellant instituted a suit in 1917, claiming a maintenance grant of properties yielding an annul income of Rs. 4,000/-. As properties yielding an annul income of Rs. 1,300/- had already been granted to him, he claimed a further grant of properties yielding an annual income of Rs. 2,700/-. Jadu Charan as well as the appellant's brothers, including Ramdhan, the respondent's father, were parties to the suit. The suit was decreed. In order to

implement the decree, Jadu Charan executed another maintenance grant on the 21st February, 1920, in respect of properties yielding an annual income of Rs. 2,700/-. After the respondent succeeded to the estate, he instituted the suit for declaration that the two maintenance grants of 1909 and 1920 were illegal and invalid, and were not binding upon Him. In the High Court Agarwala, J., with whom James, J, concurred, held that the grants in favour of the appellant were void under Sub-section (3) of Section 12-A of the Chota Nagpur Encumbered Estates Act, and observed :

> "The grant of 1909 was in my opinion stillborn and the decision in the suit of 1917 could not impregnate it with life."

Delivering the judgment of the Judicial Committee, Lord Thankerton stated :

> "Truly the third sub-section of Section 12-A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. The decision of the Court in the suit of 1917 determined that the section had never applied to the transaction of 1909, and it is difficult to follow the reasoning of the learned Judge which allowed him not only to express a strong contrary view as to the applicability of the section, which he was entitled, to do, if he so chose, but to try anew the issue as to its applicability--in face of the express prohibition in Section 11 of the Code."

That was a case where Section 11 of the Code expressly applied; but the principle is applicable in cases of constructive res judicata also. What their Lordships have laid down is that, though a transaction is void if a certain provision of law applies, it is for the Court to decide whether that provision is applicable. Once a competent Court has given a decision, holding expressly or by implication, that that provision of law is inapplicable and the transaction is not void, that decision operates as res judicata between the parties. Applying that principle to the facts of the present case, it is manifest that the sale may have been made in disregard of the provision of Clause (b) of Section 49M(1) but it was for the court to decide whether that provision was legal and. as a matter of construction, whether it made the properties in question non-saleable. If an order of the Court is deemed to have decided that question, that order is binding upon the parties.

19. Mahajan, J., who delivered the judgment of the Supreme Court in Raj Lakshmi Dasi v. Banamali Sen MANU/SC/0063/1952 : AIR1953 SC33, has quoted an observation of the Privy Council in T. B. Ramachandra Rao v. A. N. S. Ramachandra Rao 49 I A 129; (AIR 1922 PC 80), a part of which is as follows :

> "...........it has been recently pointed out by this Board in G. H. Hook v. Administrator-General of Bengal 48 I A 187: (AIR 1921 PC 11) that the principle which prevents the same matter being twice litigated is of general application, and is not limited by the specific words of the Code in this respect."

His Lordship has also quoted an observation of Sir Lawrence Jenkins in delivering the judgment of the Judicial Committee in Sheoparsan Singh v. Ramnandan Prasad Narayan Singh 43 I A 91: AIR 1916 PC 78 which is as follows:--

> "In view of the arguments addressed to them, their Lordships desire to

> emphasize that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It hath been well said' declared Lord Coke, 'interest reipublicae ut sit finis litium--otherwise, great oppression might be done under colour and pretence of law' (6 Coke 9A) ....And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

20. Mahajan, J. has stated that the doctrine of res judicata is based upon general principles of law, and that the provisions of Section 11 of the Code are limited in their application, He has observed :

> "The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted On the general rule of res judicata by Section 11 of the Code and has application to suits alone. When a plea of res judicata is founded on general principles 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. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later 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."

21. In Mohanlal Goenka v. Benoy Kishna MANU/SC/0008/1952 : AIR 1953 SC 65 Ghulam Hasan, J. has observed:

> "The foregoing narrative of the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property has been sold to the auction-purchaser who has entered into possession. There are two occasions on which the judgment-debtor raised the question of jurisdiction for the first time. He did not, however, press it with the result that the objection must be taken to have been impliedly overruled."

His Lordship has further stated:

> "There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata'."

These observations leave no room for doubt that a decision, express or implied--even an erroneous decision on a question of law or jurisdiction--is binding upon the parties. Mr. Srivastava has, however, pointed out that S. R. Das, J. has rested his decision in that case on a different point. That is so; but Mahajan and Rose, JJ. have said that the decision can be rested either on the ground raised by S. R. Das, J. or on the ground raised by Ghulam Hasan, J. They have thus agreed with the view expressed on the question of res judicata by Ghulam Hasan, J., and the decision on

that question is a decision of a majority of the Judges who constituted the Bench.

22. Mr. Srivastava has drawn our attention to Ledgard v. Bull 13 I A 134 (PC). The action in that case was instituted for damages for the alleged infringement of certain exclusive rights secured to the plaintiff by three Indian Patents. It was instituted in the Court of the Subordinate Judge, though it should have been instituted in the Court of the District Judge. The defendant took the pleca of lack of jurisdiction but joined with the plaintiff in praying to the District Judge that the case be transferred to his Court. The District Judge passed an order for transfer, and thus the suit came to his Court. Their Lordships of the Judicial Committee held that the order of transfer was incompetently made when the Court before which the action was originally instituted was incompetent. Their Lordships further observed :

> "When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him."

23. That case is thus clearly distinguishable oh facts. Besides, it does not help Mr. Srivastava because their Lordships have said that, if the defendant had not raised his objection in time and had allowed the case to go to trial on its merits, he would have been barred from raising it later because there was no lack of inherent jurisdiction in the District Judge, who was perfectly competent to try the suit.

24. Mr. Srivastava has also referred to Merla Ramanna v. Nallaparaju, (S) MANU/SC/0079/1955 : AIR 1956 SC 87. That case is also of no help to him because the plea of res judicata was neither, raised nor decided in it.

25. Only one case of the Lahore High Court has been referred to, and that is the decision Of a Full Bench in Gauri v. Ude AIR 1942 Lah 153. Bhide, J., with whom the other, learned Judges have concurred, has observed :

> "Before the auction sale, the judgment-debtor gets notice at first about the attachment of the property under Order 21, Rule 54, Civil procedure Code, and then in connection with the proclamation of sale under Order 21, Rule 66, Civil Procedure Code. IÂ£ the judgment-debtor is duly served but fails to raise any objection to the proposed sale, I do not see why he should not be held to be debarred from raising the objection later on the principle contained in the observations of their Lordships of the Privy Council quoted above." (The reference is to 15 I A 171.)

He has further stated:

> "Along with Rule 66 have to be read Rules 90 and| 92 which I think leave little doubt that the Code does not contemplate any objections being raised after the auction, except such as fall within the scope of Rule 90, i.e., objections relating to material irregularities and fraud in publishing and conducting the sale. This is presumably because objections such as those to the liability of the property to be sold are intended to be disposed of before the sale."

26. In a Full Bench decision of the East Punjab High Court in Pirji Safdar Ali v. Ideal Bank. Ltd. AIR 1949 EP 94, it has been held that the judgment-debtor must raise all questions affecting the saleability of the property before the order for sale is made,

and that, if he does not do so, he is barred by the rule of res judicata from agitating them after the order is made.

27. In Chhaganlal Kishoredas v. Bai Harkha ILR Bom 479, which Mr. Prem Lall has relied upon, it has been held that a plea of estoppel by res judicata can prevail even where the result of accepting such a plea would be to sanction what is prohibited! by statute. In that case, one Govind gave some bhagdari lands in possessory mortgage to the plaintiff and took the lands back as a lessee on a tenancy agreement. The mortgage was unlawful and void under Section 3 of the Bhagdari Act (Bombay Act V of 1862). The plaintiff instituted a suit for rent against Govind and obtained an ex parte decree. After Govind's death, the plaintiff instituted the suit in question for recovery of rent in respect of other years.

It was argued on behalf of the defendants that, the mortgage being illegal, the lease was also illegal, and hence rent was not recoverable. Their Lordships, however, held that the question which was raised by the defendants in the second suit might and ought to have been raised by their predecessor in the first suit, and that, since the Court had granted a decree in the first suit, it must be held that it had decided the question against the defendants in that suit. This decision thus supports- the proposition that, though an act is illegal, its legality cannot be questioned as between the same parties in a subsequent action, if that must be deemed to have been decided to be a legal act by a competent Court in an earlier action between them.

28. In Venkataseshayya v. Virayya AIR 1958 A P 1, the facts were as follows. The appellants mortgaged two items of properties, which were carpenter service inam lands of the family, to defendant No. 1. That defendant obtained a mortgage decree, in execution of which both items were sold and were purchased by the decree-holder himself. After confirmation of the sale, he sold them to the second defendant. Under Section 5 of the Madras Hereditary Village-offices Act (III of 1895), attachment and sale of carpenter service inam lands by the courts were absolutely prohibited. On the basis of that prohibition, the appellants treated the sale as void, and instituted a suit for permanent injunction, restraining the defendants from interfering with their possession and enjoyment of both the items of properties. The second defendant contested the suit which was dismissed. An appeal in the first appellate Court failed, and the plaintiffs filed a second appeal in the High Court. That appeal came before the Full Bench, and one of the points for decision was whether it was open to an inamdar to treat the court sale as null and void, though he had raised no objection at any stage of the proceeding in the mortgage suit to the saleability of the lands in question.

Their Lordships agreed that a judgment delivered by a Court which had no jurisdiction could not operate as res judicata, but said that the furisdiction of a Court depended upon whether it had pecuniary or territorial jurisdiction or jurisdiction. Over the subject-matter, A decision as to whether a mortgage or sale was valid or invalid did not go to the root of the jurisdiction. The Court which granted the mortgage decree in that case had jurisdiction to decide whether the mortgage was valid, having regard to the provisions of Act III of 1895. If the defendant of that suit had raised the plea that the mortgage was void as it covered carpenter service inam lands and the court had given an express decision that the mortgage was valid, such a decision would have been the decision of a Court of competent jurisdiction and as such binding upon the parties. That being so, there could be no reason for saying that, if the decision was an implied one, it was the decision of a court of incompetent jurisdiction.

Referring to Explanation 4 to Section 11 of the Code, Subba Rao, C. J. (as he then was), who delivered the judgment of the Bench, observed :

> "If the appellants, who could have non-suited the plaintiff by raising the question of inalienability of the carpenter service inam, did not raise it, by reason of that Explanation, the said question must be deemed to have been constructively in issue in a suit. When a decree was made, the Court must be deemed to have decided that the said property was alienable property and, therefore, the said decree would operate as res judicata in a subsequent suit. The same reasoning would also apply to the order of the confirmation of sale made in execution proceedings. The plaintiffs ought to have raised the plea that the items being carpenter service inams were not liable to be sold. By confirming the sale, the Court must be deemed to have held that the property was alienable and that order would operate as res judicata''.

His Lordship has emphasised that, though a transaction is void in law, the decision of a competent Court that it is valid operates as res judicata in a subsequent suit between the same parties or their representatives.

Referring to the decision of a Division Bench of the Madras High Court in Rajah of Kalahasti v. Venkatadri Rao MANU/TN/0122/1927 : ILRMad 897: AIR 1927 Mad 911) to the effect that a judgment-debtor could take an objection at the execution stage as to the inalienability of an impartible estate, though a decree for sale of that estate had been passed in the suit without any objection by him, his Lordship has stated :

> "This decision, if I may say so with respect, gives the executing Court the status of an appellate Court. If the conclusion arrived at by the learned Judges be correct, by the same parity of reasoning, the executing Court can come to a different conclusion on a finding of fact different from that arrived at by the original Court. If the original Court had held that the property in question was alienable, the executing Court on the same facts could come to a different conclusion and refuse to execute the decree. This would effect the finality and sanctity of decrees passed by competent Courts.............."

He has further said :

> "It is true, that, if an executing Court could go behind the decree and hold that an alienation was void, it would be incongruous to hold that the decision in that suit would be res judicata in another suit. I would prefer to adhere to the strict rule barring the executing Court going behind the decree rather than to stretch the rule to a breaking point to sustain principles of public policy. Both can co-exist without doing violence to either.
>
> "A wrong decision express or implied, directing a sale and thus taking a case out of the rule of prohibition based on public policy can be set aside or modified by appropriate procedure ....."

He has said that such a decision is good until it is set aside, and has further stated :

> "There is no conflict between the principle of res judicata and that of prohibited alienation of particular properties on the ground of public policy. An alienation of properties prohibited by public policy or statute may be void. But the said prohibition cannot have the effect of depriving the jurisdiction of Courts to decide in a particular suit whether the alienation is void or not.

> Nor can it override the principles of res judicata. The former belongs to the domain of substantive law and the latter to the rule giving finality to decrees of competent Courts. The sanctity of final judgments is as much based on public policy as prohibition against the alienation of properties annexed to certain public offices. The fundamental question in each case, therefore, is whether the court has inherent jurisdiction to entertain a particular suit".

29. I do not think that there is a lack of inherent jurisdiction simply because there is want of territorial jurisdiction; but I may say with respect that otherwise I entirely agree with the principles laid down in that case which I have referred to above. I may mention that the decision makes it clear, firstly, that an express or implied decision of a Court trying a suit and passing a decree on the question of saleability of a property cannot be questioned in the executing Court, and, secondly, that an objection to the salability of a property which is not raised in the executing Court before the confirmation of sale cannot be raised thereafter.

30. A Division Bench of the Madras High Court has held in Somasundaram v. B. Kondayya MANU/TN/0052/1925 : AIR 1926 Mad 12, that, if, being aware of the execution proceedings and having had an opportunity, the judgment-debtor fails to object to the sale of a property on the ground of its non-sale-ability, he is a party to the order by which the sale is confirmed, and he cannot later be allowed to impugn the sale on the ground of non-saleability of the property. The property in question was an unenfranchised inam and as such inalienable at the time of the Court sale.

While referring to an argument that the sale was absolutely void and consequently the plaintiff's suit should be dismissed, Venkatasubba Rao, J. has said :

> "I cannot follow this contention. As I have said, we are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold. In this view, it is unnecessary to consider Raja of Vizianagram v. D. Chelliah, ILR 28 Mad 84, Sannamma v. Radhabhavi MANU/TN/0510/1917 : ILRMad 418 : AIR 1918 Mad 123) (FR) Narahari Sahu v. Siva Korithan Naidu 24 M LJ 482 and other cases cited on this point".

Thus, this decision lays down that an order confirming a court sale amounts to an adjudication on the question of saleability of the property as between the same parties.

31. Mr. Prem Lall has cited the decision of another Division Bench of the Madras High Court in. D. Venkatranga Reddi v. P. C. Sithamma MANU/TN/0305/1940 : AIR 1941 Mad 440. Following Mungul Pershad Dichit's case, 8 I A 123 (PC) that decision lays down that, when an order for execution is made after notice to the judgment-debtor who does not appear and raise an objection on the point of limitation, he cannot be allowed later to urge that the application for execution is barred by limitation.

32. In a recent Full Bench decision of the Madras High Court in Mohan Ram v. T. L. Sun-dararamier AIR 1860 Mad 377, the question which arose for consideration was how far the executing Court could go behind the decree. Ramaswami, J. delivered one Judgment for himself and Somasundaram, J., and Ananfanarayanan, J. concurred with him but wrote a separate judgment. While there are observations in both the

judgments to the effect that the executing Court cannot be allowed virtually to hold a fresh trial and to investigate disputed questions of fact Or law, they have held, in disagreement with the principle laid down in the Full Bench decision in Venkataseshayya's case AIR 1958 A P 1, that the executing Court should, on being satisfied by reference only to the pleadings, the issues and the judgment that the property ordered by the decree to be sold was inalienable, stay its hand and refuse to sell it. With great respect, I am unable to accept this view as correct.

If a Court trying a suit does not lack pecuniary jurisdiction or jurisdiction over the subject-matter, it is within its competence to decide whether a property is saleable or not. The defendant can raise an objection on the ground of, non-saleability. If he does, the Court's decision will be final between the parties, even though it may be erroneous and somewhat against material in the pleadings and the issues, until it is reversed in accordance with procedure known to law. If the defendant does not raise the objection, the point will nevertheless be deemed to have been decided as it was an objection which the defendant might and ought to have raised. That will, therefore, operate as constructive res judicata, and the parties cannot be allowed to raise that question either in execution proceedings or in any other suit or proceeding. Anantanarayanan, J. has Said that the power of the Court to refuse to do some thing which is prohibited on the ground of public policy arises because its conscience would not permit it to act otherwise. I may quote his Lordship's observation in this connection :

> "......... I do not see how it is possible not to hold that, under certain exceptional circumstances at least, an executing court can go behind the decree, and refuse to execute a decree which is both opposed to public policy and to enacted law. As I conceive it, this power of the court is not the right of a party, or the power of a party at all; though a party can invoke the exercise of this power by bringing facts to the notice of the court, the power arises really because the conscience of the court is stirred''.

I respectfully differ from this view. The Court's conscience is also concerned with the question of res judicata, express or constructive. It has to see that a party should not be allowed to take advantage of its negligence and to urge an objection subsequently, though it did not raise that objection earlier when it might and ought to have raised it.

33. A Full Bench of the Orissa High Court has held in Jagannath Ramanuj v. Lakshmi Narayan MANU/OR/0067/1960 that the decision of the Court on the question of jurisdiction of the executing court to execute a decree in a prior execution case is binding upon the parties in all subsequent execution leases relating to the same decree irrespective of whether the decision was right or wrong,

34. Mr. Prem Lall has referred to several cases of the Calcutta High Court, In Dwarkanath Pal v. Tarinj Sankar ILR Cal 199, a non-transferable occupancy holding was sold, in execution of a money decree. When the question of validity of the sale was raised, their Lordships held that, as the purchaser had subsequently obtained! the landlord's consent to the sale, it was rendered valid. They also discussed, however, the question of res judicata and. accepted the principle laid down in Sheikh Murullah v. Sheikh Burullah MANU/WB/0296/1905 : 9 C WN 972, and Durga Charar Mandal v. Kali Prasanna Sarkar ILR Cal 727 to the effect that,

> "after a judgment-debtor with a full knowledge of the execution proceedings

> and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that as between the purchaser and the judgment-debtor the title to the property vested in the purchaser on the confirmation of the sale".

35. In Newton Hickie v. Official Trustee of West Bengal MANU/WB/0173/1954 : AIR 1954 Cal 506, two suits for ejectment of tenants from two flats of the same house were instituted under the Rent Control Act in the Calcutta Court of Small Causes. The defendants appeared and filed written statements; but later they took no step. The suits were decreed ex parte. The tenants, subsequently, filed a suit for a declaration that the decrees in the previous suits were nullities because the court which passed them had no jurisdiction. Their Lordships held that the tenants should have raised the objection as to jurisdiction in the first two suits, and, that, as they did not, the Court, in passing the decrees, must be deemed! to have decided it against them. Chakravartti, C. J. has observed :

> "I am entirely unable to accept the first contention of Mr. Roy that the question of jurisdiction was not decided in the former suits. It was certainly not decided directly and in express terms, but. to constitute the bar of res judicata, an "explicit decision is not necessary. If an adjudication on a matter is necessarily involved in a decision, it is, for purposes of, res judicata, decided".

He has also said that even an ex parte decree operates as res judicata in respect of grounds of defence against the actual claim and also in respect of matters inconsistent with such claim which might and ought to have been raised. He has further remarked that there was a doubt at one time whether the rule of constructive res judicata applied to the question of jurisdiction; but the decision of the Supreme Court in Mohanlal's case MANU/SC/0008/1952 : AIR 1953 SC 65 has decided that it does apply. I must make it clear, however, that this observation does not apply to a case where there is an inherent lack of jurisdiction in the Court. For instance, a Subordinate Judge tries a case relating to a subject-matter which is exclusively triable by the District Judge. Even though the Subordinate Judge decides the case without objection by the defendant, his decision will be a nullity and will not operate as res judicata. An express or implied decision on the question of jurisdiction will operate as res judicata when certain facts have to be proved in order to show that the Court has no jurisdiction but the interested party does not allege those facts or take an objection as to lack of jurisdiction before the Court decides the case.

The facts of Newton's case may themselves be taken as example. The jurisdiction of the Chief Judge of the Court of Small Causes or a judge nominated by him to try suits for ejectment was limited to tenancies with a maximum rent of Rs. 506/- per month. The plaintiff of the previous two suits instituted each suit for ejectment of the defendants from each flat of the house, alleging that there were two separate tenancies, and that the rent for one flat was Rs. 350/- and that for the other flat was Rs. 375/- per month. On these allegations both the suits were well within the jurisdiction of the Court of Small Causes. The defendants did not raise any objection as to jurisdiction and the suits were ultimately decreed ex parte.

In the subsequent suit by the defendants of the previous suits, it was alleged that the tenancy for both flats was really one, carrying a monthly rent of Rs. 725/-, and hence

the court had no jurisdiction to try the previous suits. It was held that they were barred by res judicata from raising this plea. If, however, the plaintiff of the previous suits had alleged in his suits for ejectment that the defendants held the two flats under one tenancy on a monthly rent of Rs. 725/-, they would have been beyond the pecuniary jurisdiction of the Court of Small Causes, and, if that court had tried the two suits, its decisions would have been nullities, irrespective of whether the defendants did or did not raise any objection as to want of jurisdiction in the court.

36. A lack of territorial jurisdiction stands on a different footing because under Section 21 of the Code, objection on the ground of such want of jurisdiction must be taken at the earliest stage or else it will not be entertained later in the absence of a consequent failure of justice. In such a case, therefore, objection to jurisdiction can be waived and there is no lack of inherent jurisdiction as Ghulam Hasan, J, has said in Mohan Lal's case AIR 1933 SC 65, while holding Raghubir Saran v Hari Lal (MANU/UP/0051/1931 : ILRA31 560 : AIR 1931 All 454) to have been wrongly decided.

37. Mr. Srivastava has also drawn our attention to some decisions of the Calcutta High Court. In Krishna Kishore De v. Amarnath ILR Cal 770 : AIR 1920 Cal 131, it has been laid down that the decision of a court which has no jurisdiction to render it is void and cannot operate as res judicata. This principle cannot be disputed; but, with great respect, it is difficult to accept the view expressed by Mookerjee, J., who has delivered the judgment of the Bench, when he says:

> "In this case, as already stated, the question of jurisdiction was neither raised nor decided: the position might have been different if the question had been raised and decided, for where a court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as res judicata."

In my judgment there is no reason why an implied decision on a question of jurisdiction cannot operate as res judicata when and only when an express decision on that question would.

38. In Jogeshwar Mohata V. Jhapal Santal MANU/WB/0159/1923 : AIR 1924 Cal 638, it was held that an aboriginal tenant could not waive the protection afforded to him under Section 49-K of the Bengal Tenancy Act against involuntary sale of his right as a tenure-holder, raiyat or under-raiyat as that provision was meant for the benefit of a particular class of persons. No question of res judicata was raised or decided in that case.

39. In Gora Chand Haldar v. Prafulla Kumar MANU/WB/0059/1925 : AIR 1925 Ca 907, a Full Bench has held :

> "......Where the decree presented for execution was made by a court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing court is authorised to question the validity of a decree." As I have already said, the position will be different in the case of lack of territorial jurisdiction; but, as

for the rest, I respectfully agree with the observation which I have quoted. It only means that a decree made by a court which has no inherent jurisdiction to decide the suit is void and, therefore, inexecutable.

40. The latest case of the Calcutta High Court is a Full Bench decision in Union of India v. Kazi Siddique Ahmad MANU/WB/0017/1961 : AIR 1961 Cal 92. The questior of territorial jurisdiction of the court was not raised by the defendant in the suit, and a contested decree was passed against him. In execution, however, he pleaded that the decree was a nullity because the court which passed it had no territorial jurisdiction. Their Lordships held that he was not entitled to raise the question for the first time in execution. There are some observations in the judgment to the effect that the executing court can look into the decree and if the decree is ambiguous, into the pleadings in order to find out whether there was a lack of jurisdiction in the court which passed the decree. I respectfully accept this proposition in so far as it is applicable to a case where a lack of inherent jurisdiction is pleaded; but an alleged lack of territorial jurisdiction does not stand on that footing.

41. I may now refer to the decisions of this court which Mr. Prem Lall has cited. In Surendra Kumar Singh v. Srichand Nahata MANU/BH/0123/1935 : ILR 15 Pat 808 : AIR 1936 Pat 97) (FB), lands of the judgment-debtor which had already been previously sold in execution of a rent decree, were subsequently sold in execution of the decree-holder's money decree, and a note was made that his decree had been satisfied. The decree-holder later started another execution proceeding relating to his money decree, treating the first sale in execution of his decree to be a nullity as the judgment-debtor had no saleable interest in the lands at that time. A full Bench of this court held :

> "A sale of Immovable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing court or void as between the judgment-debtor and the decree-holder or auction purchaser." .

42. Another Full Bench of this court had to consider in Ramranbijaya Prasad Singh v. Ram Kawal MANU/BH/0156/1947 : AIR 1949 Pat 139 whether the grant of a second reduction of rent under Section 112 (1) (d) within fifteen years of a previous reduction of rent in violation of Section 113 of the Bihar Tenancy Act was without jurisdiction. It was held that the second reduction was valid and not without jurisdiction. Subject to what I have already said about territorial jurisdiction, I respectfully agree with the observations of Ramaswami, J. (as he then was) in his judgment in that case which are as follows :

> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. As pointed out by West J. in Amritray Krishna v. Balakrishna Ganesh ILR 11 Bom 488:
>
> > 'Jurisdiction consists in taking cognisance of a case involving the determination of some jural relation, in ascertaining the essential points of it, and in pronouncing upon them.'
>
> Objections affecting jurisdiction must relate either to the person, the place or the character of" the suit. If a court has competence in these respects, it may exercise jurisdiction and does exercise it whether correctly or erroneously in dealing judicially with a cause placed before it. If however by reason of any

limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled, R, v Essex Justices (1895) 1 Q.B. 38 : (64 LJ MC 39) C. A; see also Scrutton LJ. in Coleshill v. Manchester Corporation (1928) 1 KB 776: (97 LJ KB 229) C. A.

A different question, however arises, when it is suggested that a court in the exercise of the jurisdiction, which it possesses, has not acted according to the mode prescribed by the statute. If such a question is raised, it relates obviously not to the existence of jurisdiction but to the exercise of it in art irregular or illegal manner. In such a case the maxim consensus tillit errorem applies."

43. Following the decision in Mohan Lal's case MANU/SC/0008/1952 : AIR 1953 SC 65, a Division Bench of this court has field in Dhirendra Nath v. Satish Chandra MANU/BH/0002/1956 : AIR 1956 Pat 4 that, where there is no want of inherent jurisdiction in the executing court to execute the decree, the failure of the judgment-debtor to object to the jurisdiction of the court to execute the decree at a stage when he could have raised the objection precludes him from objecting to the jurisdiction of the court at a subsequent stage of the same execution proceeding on the principle of constructive res judicata.

44. In Bansiclhar Estate Collieries and Indus-trios, Ltd. v. State MANU/BH/0085/1959 : AIR 1959 Pat 319, an application under Order XXIII, Rule 3 for recording a compromise was dismissed as the plaintiffs' lawyers stated on the date fixed that they had no further instructions to proceed with the hearing of the application. Appeals against that order were dismissed by this court. Subsequently, the plaintiffs filed another application under Order XXIII Rule 3 on the same facts for recording the compromise. It was held that the subsequent application on the same facts was barred by the principles of constructive res judicata. Several observations of my learned brother Kanhaiya Singh, J., who delivered the judgment of the Bench in that case, support the views which I have expressed on several points.

45. Mr. Prem Lall has also relied upon the decision of my learned brother Untwalia, J., sitting singly, in Nageshwar Prasad v. Lakshman Prasad MANU/BH/0056/1960 : AIR 1960 Pat 171; but that decision proceeds upon the proviso to Sub-rule (1) of Rule 90 of Order 21 as amended by the Patna High Court and not upon the ground of res judicata.

46. I proceed now to discuss the cases of this court which Mr. Srivastava has relied upon. In Jadhu Mahoto v. Kali Prasonno MANU/BH/0019/1916 : 1 Pat LJ 33 : AIR 1916 Pat 183), the provision in question was Section 47 of the Chota Nagpur Tenancy Act which prohibited the court from passing a decree or order for sale of the right of a raiyat in his holding and also the sale of such a right in execution of a decree Or Order, and was thus a provision similar to Section 49M of the Bihar Tenancy Act. A Bench of this Court held that the question as to the non-saleabflity of such a holding could be raised even at the stage of execution of a mortgage decree for sale of the holding as it was covered by the prohibition against the sale in execution of a decree or order. Their Lordships did not consider the question of res judicata or the effect of the implied decision of the court which' passed the mortgage decree that the right in question was saleable. With great respect, I am of opinion that this point has been

wrongly decided in the case.

47. The facts in Rup Nath Mandal v. Jagannath Mandal MANU/BH/0058/1927 : ILR Pat 178: AIR 1928 Pat 227) were similar to those in Jadhu Mahto's case MANU/BH/0019/1916 : 1 pat LJ .33 : AIR 1916 Pat 183), and, following that decision, a Bench of this court held that the question of non-saleability of a holding could be raised even at the stage of execution of a mortgage decree for safe of that holding. Kulwant Sahay, J. said in his judgment :

> "The fact that the judgment-debtor did not raise the question in the mortgage suit which he might and ought to have raised does not, in my opinion, operate as an estoppel in the present case inasmuch as there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding, and once it is found that the lands in dispute do form the raivati holding, whether the judgment-debtor took the objection or not, the sale of such a holding cannot take place in the face of the clear provisions of Section 47, Chota Nagpur Tenancy Act."

In my opinion, no question of estoppel against statute arises in such a case. A sale in contravention of a provision made in a statute may be void or voidable according to the construction put upon the provision by the court, but what has to be seen, when a question of constructive res judicata is raised, as to whether the aggrieved party might and ought to have raised the question of its non-saleability at an earlier stage. If he might and ought to have raised it, then he should not be allowed to raise it later for otherwise the principle of finality of judgments would be infringed. With great respect, I am of opinion that this case has also been wrongly decided.

48. In MANU/BH/0074/1934 : AIR 1934 Pat 666, a Full Bench of this court had to consider Section 27 of the Santal Parganas Settlement Regulations of 1872, the first two sub-sections of which are as follows :

> "27. (1) NO transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement shall be valid unless the right to transfer has been recorded in the Record of Rights, and then only to the extent to which such right is so recorded.
>
> (2) No transfer in contravention of Sub-section (1) shall be registered or shall be in any way recognised as valid by any court, whether in the exercise of civil, criminal or revenue jurisdiction."

It will be seen that these provisions are not as stringent as those in Section 47 of the Chota Nagpur Tenancy Act, or Section 49M of the Bihar Tenancy Act, which is under consideration in this case. It [Ray also be seen that these provisions prohibit private sales and they do not prohibit sale by a court in execution of a decree or order for sale. The relevant facts of the case were that an ex parte mortgage decree for sale of a raiyati holding in the Santal Parganas was passed against a tenant. The judgment-debtor objected at the execution stage that the holding could not be sold in view of the provisions contained in Sub-sections (1) and (2) of Section 27 of the Regulation. Their Lordships held that the objection could he raised at that stage and they upheld it. Courtney-Terrell, C. J., who delivered the judgment of the Bench, agreed with the observation of Kulwant Sahay, J. in Run Nath Mandal's case MANU/BH/0058/1927 : ILR Pat 178 : AIR 1928 Pat 227), which I have already quoted. Besides other grounds, with the greatest respect, it seems to me that the case has been wrongly decided because the principle of constructive res judicata has not been kept in view.

As stated by Subba Rao, C. J. in Venkata Seshayya's case AIR 1958 A P 1, a decree which directs the sale of properties which are not saleable on the ground of public policy is good until it is set aside in the manner known to law. The decision converts the executing court into a court of appeal. It is, accordingly, overruled.

49. In Sham Sundar Singh v. Dhirendra Nath MANU/BH/0116/1950 : AIR 1950 Pat 465, a Division Bench of this court held that, where a judgment-debtor does not take all his objections to the execution at the stage when he might and ought to take them, they will be deemed to have been impliedly decided against him and the principle of constructive res judicata would apply. Sarjoo Prosad, J. (as he then was), who has delivered the judgment of the Bench, has however, drawn a distinction between a case where the property in question is admittedly non-saleable and a case where the facts, which may lead to the inference that the property in question is unsaleable, have themselves to be decided. In his opinion, there will be no bar of res judicata or estoppel on account of failure to raise the objection in the former case, whereas there would be a bar in the latter case.

It seems to me that the decree-holder seldom admits in so many words that the property against which he proceeds in execution is non-saleable. He generally admits some facts which, if proved along with some other facts, lead to the inference that the property is non-saleable. In such a case, it is within the jurisdiction of the court to decide, on a construction of the law and on a consideration of the facts, whether the property is saleable, and if the court passes an Order which implies a decision that the property is saleable the judgment-debtor would be precluded from challenging the stability of the properly subsequently by reason of constructive res judicata.

50. In Kameshwar Singh v. Krishnanand Singh ((S) MANU/BH/0110/1955 : 1955 B LJR 273 : AIR 1955 Pat 423), properties of the judgment-debtor were in the hands of a receiver. The court permitted the decree-holder to realise his dues by proceeding against the properties of the judgment-debtor in the hands of the receiver. The decree-holder sought to get three lots of the judgment-debtor's house properties sold in execution. Attachment and sale proclamation were effected The judgment-debtor twice took time, waiving all objections and irregularities. He then filed an objection under Section 47 of the Code in which he alleged that the house properties were not in the hands of the receiver and hence they could not he sold. When the objection was placed before the Subordinate Judge, the decree-holder's pleader admitted that the properties in question were the personal properties of the judgment-debtor and had not vested in the receiver. The objection succeeded before the Subordinate Judge, and the decree-holder came up in appeal to this Court.

My learned brother Choudhary, J., who delivered the judgment of the Bench, held by reason of the admission of the decree-holder's pleader, that the principle of constructive res judicata did not apply to the case. If I may say so with respect, the decision may be justified on the ground that there was a lack of inherent jurisdiction in the executing Court to sell the house properties as they were not in the hands of the receiver, and the Court had directed the decree-holder to realise his dues from properties which were in the hands of the receiver.

51. In Chintaman Saran Nath v. Zahiruddin MANU/BH/0016/1956 : AIR 1956 Pat 57, three plots viz., 81, 83 and 106, were given in mortgage. The mortgagee instituted a suit to enforce it. The contesting defendants pleaded that the mortgage bond was invalid because plot Nos. 81 and 83 were not transferable in view of the provisions of

Section 46 of the Chota Nagpur Tenancy Act. It was not pleaded that plot No. 106 was not transferable. The Court held that the houses standing on plot Nos. 81 and 83 were liable to be sold, and the mortgage bond was not null and void. The suit was decreed, and the decree was later made final. In execution, the judgment-debtors raised the plea that plot No. 106 was their raiyati lands, and that Section 47 of the Chota Nagpur Tenancy Act prohibited its sale in execution of a decree. The Subordinate Judge upheld the objection, and the decree-holder came up in appeal to this Court, A Bench held on facts that plot No. 106 was not the raiyati land of the judgment-debtors and it further held that.

> "in view of the previous decision in the mortgage suit that khata No. 106 is not the raiyati land of the judgment-debtors, it is not open to the respondents to challenge the saleabifity of the land, and the decision operates as res judicata and is binding upon them."

If I may say so with respect, the decision is perfectly correct; but I find it difficult to accept some observatious of my learned brother Kanhaiya Singh, J. in the course of his judgment in that case. He has agreed with the principle laid down by Kulwant Sahay, J. in Rup Nath Mandal's case MANU/BH/0058/1927 : ILRPat 178 : AIR 1928 Pat 227) which I have already held to be wrong. He seems to have expressed the view that, where there is a prohibition against the sale of a certain class of land, a contested decree for sale of land of that class will operate as res judicata but an ex parte decree will not. In my judgment, this is not a sound principle. Even when a decree is passed ex parte, it must be deemed to have decided against the defendants those facts which, if raised and established would have induced the Court to dismiss the suit or to pass a different order.

52. On a review of all the decisions referred to above, I have come to the conclusion that there is no substance in the argument which Mr. Srivastava has advanced. 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. In accordance with the views which I have expressed, I hold that the judgment-debtor is barred by the principle of constructive res judicata from raising the objection on the ground of non-saleability of the kasht lands.

It is also manifest that there is no admission by the decree-holders in their application for execution that the lands in question are non-saleable. Although it has been stated that they are kasht lands of the judgment-debtors, who are Mallahas by caste, the legality and construction of Section 49M of the Bihar Tenancy Act were open to the Court to adjudicate upon. It had complete jurisdiction to decide these questions. That being so, the second line of Mr. Srivastava's argument must also be rejected. In these circumstances, there can be no doubt that the learned Additional District Judge was in error in allowing the judgment-debtor to raise the question of non-saleability of the lands, which have be"n sold, as he was barred by the principle of constructive res judicata from raising this objection.

53. Both the learned counsel are agreed, that, as held in Merla Ramanna's case, (S) AIR 1950 SC 87, Article 181 of the Limitation Act applies to an application for declaring void a sale which is void and a nullity, and Article 166 applies to an application for setting aside a sale which is voidable. It seems to me to be unnecessary, however, to decide whether the sale in this case would have been void or voidable, if the judgment-debtor had not been barred by res judicata from

assailing it. In view of my decision on the point of res judicata, it is also unnecessary to decide the constitutional point which has been raised.

54. In the result, I allow the miscellaneous appeal with costs. The civil revision is also allowed. The order of the learned Additional District Judge, 2nd Court, of Muzaffarpur, whereby he has set aside the sale, is set aside.

Vaidynathier Ramaswami, C.J.

55. I agree with the reasoning and conclusions of my learned Brother Mr. Justice Sahai.

R.K. Choudhary, J.

56. I entirely agree with my learned Brother Mr. Justice Sanai.

57. KANHAIYA SINGH, J. : I agree with my learned Brother Mr. Justice Sahai and have nothing useful to add.

N.L. Untwalia, J.

58. I have had the privilege and advantage of reading the judgment prepared by my learned Brother Sahai, J. I extremely regret my inability to agree with it. In my judgment, for the reasons hereinafter stated, the impugned sale is void and has been rightly declared to be so by the Court of appeal below. The plea of the judgment-debtor respondent No. 1 (hereinafter to be referred to as the respondent) that the sale being in contravention of Section 49-M of the Bihar Tenancy Act, hereinafter referred to as the Act, is void, if, on the facts of this case, not barred by the principles of constructive res judicata.

59. The decree-holders, after having obtained the money decree on the 16th of November, 1953, levied execution on the 8th of August, 1955, against the respondent Ramphal Sabni and his son Parmanand Sahni. In the execution petition, the description of the judgment- debtors as given in column 9 is:

> ''Jat mallah pesha Kashtkari ...."

The execution was levied for realisation of a total sum of Rs. 2047/12/3 including the cost of execution. In the list of properties sought to be proceeded against were mentioned two lots, namely, lot No. 1 comprised of 'char bigaha erazi kebza Kasht....' and lot No. 2 comprised of 'thar bigaha Chhao Katha agarah dhur erazi kabza kasht ....'.

60. The execution case was transferred under the administrative Orders of the District Judge of Muzaffarpur to the file of the Special Execution Munsif. Order No. 2 dated 13-8-55 to Order No. 8 dated 3-1-56 show that notices under order 21 Rule 22 of the Code of Civil Procedure, hereafter referred to as the Code, and under Section 13 of the Bihar Money Lenders Act were served upon the judgment-debtors and attachment was also effected. Order No. 9 dated 11-1-56 reads thus:-

> "Notice under Section 13 M. L. A. already served. No objection raised against valuation given by D. Hr. Let the valuation be accepted. Requisites of S. P. already filed. Issue S. P. fixing 12-3-56 for sale at 12 noon."

The next order (order No. 10 dated 12-3-56) is to the following effect:-

> "Sale proclamation served. Property put to sale Lot No. 1 sold for Rs. 1000/- and Lot No. II sold (for Rs.) 1163-6-9 to D. Hr. and knocked down. Pondage fee and set off petition filed, Set off allowed. To 12-4-56 for confirmation of sale and stamp."

Order No. 11 dated 12-4-56 is to this effect:-

> "Thirty days from the date of sale elapsed No objection raised. Let the sale be confirmed and the Ex. Case be dismissed on full satisfaction."

61. The respondent filed the application for setting aside the sale on 28-9-56. The main, rather, Only ground of attack on the sale is that by a notification published; in the Bihar Gazette of the 22nd February, 1956 Mallahs was included in the list of backward classes and thus the protection of Section 49-M of the Act became available to the judgment-debtors before the holding of the sale and consequently the sale held in direct contravention of the prohibition contained in the said provision of the Act is void. It was also alleged by the respondent that the notices and processes in the execution case had not been served and had been fraudulently suppressed. This was, however, found against the respondent by the executing court and the finding was not challenged in the Court of appeal below by him. In the executing Court the application for setting aside the sale failed on the ground that the money decree having been passed before the amendment of Section 49-M of the Act in the year 1935, the Advantage of the prohibition was not available to the respondent and that the application was barred by the law of limitation.

62. In appeal before the learned Additional District Judge, it was conceded on behalf of the decree-holders that 'sale has taken place in contravention of the provisions of Section 49-M of the Bihar Tenancy (Amendment) Act, 1955'. The only point argued was that 'the sale is not void but voidable and consequently the application for setting aside sale having not been filed with (in) 30 days from the date of sale, it is barred by limitation'. The teamed Additional District Judge, however, held that the sale was void and consequently the application for setting it aside filed within 3 years was within time as Article 166 of the Limitation Act would not apply. The decree-holders preferred the miscellaneous appeal as well as the revision against the said order of the learned Additional District Judge.

63. At the outset I would like to point out that there is no specific order made by the execution Court in the execution case in terms of. and in accordance with, the provisions of Order 21 Rule 64 of the Code. The 9th order dated 11th of January, 1956 quoted above is an order fixing the valuation under Section 13 of the Bihar Money Lenders Act by accepting the valuation put by the decree holders and is also an order directing the issuance of the sale proclamation fixing the 12th day of March, 1956, as the date for. sale. In view of the Patna amendment of Rule 66 of Order 211 of the Code, it was not necessary to give any further notice to the judgment-debtors for drawing up the sale proclamation. The said 9th order may involve in itself an order for sale under Rule 64. But it is important to note that it was passed on a day when the prohibition as to sale contained in Section 49-M of the Act was not applicable to the kasht lands of the respondent. In view of the notification published in February, 1956, however, the prohibition was there directing the Court not to sell 'the right of a raiyat, who is a member of the backward classes .... to execution of any decree ....'

My considered and definite opinion is that, on the facts of this, case, the sale of the

property by the Court against the said statutory prohibition is not a judgment, order or a judicial decision deciding either directly or indirectly that, in spite of the said prohibition, the property in question was saleable and could be sold. No such decision is involved either in the holding of the sale or its confirmation. Even on the view that, when a decree or order for sale is made in contravention of the statutory bar contained in Section 49-M of the Act after notice to the parties concerned, the question of saleability of the property will be deemed to have been decided and thereafter it is not open to them to raise this question afresh in any other proceeding or suit, I have not been able to persuade myself to accept that the order of a Court accepting the sale, must operate as res judicata in subsequent proceedings on the ground that the order would be inconsistent with the non-saleability of the property. It may well be that the Court passing a decree or an order for sale against the statutory prohibition decides, directly or indirectly, rightly or wrongly, that, in spite of the statutory prohibition, the property can be sold and, if such a decree or order is not reversed by a higher court, it is final as between the parties.

But conducting the sale, accepting the bid by the Court and allowing set off under Rule 72(2) of Order 21 of the Code are not judgments or orders deciding about the saleability of the property either expressly or by necessary implication. The mere holding of the sale in violation of the statute does not involve in it any adjudication in regard to the question of violation. It is manifest that the question as to whether sale has taken place in violation of the statute must necessarily arise and fall for adjudication in a subsequent proceeding.

The facts of the present case are so peculiar that the point is not directly covered by any authority of any court, and, in the view which I have expressed, perhaps it is not necessary for me to go into the question as to whether- a decree or an order for sale of the right of a raiyat who is a member of the scheduled tribes, scheduled castes or backward classes would operate as res judicata in a subsequent proceeding or suit on the question as to whether such a decree or order could be made in contravention of the prohibition. But, since I do not find myself in complete agreement with the view expressed by my learned Brother in that regard too and also in Order to support the view taken by me on the facts of this case, it is necessary for me to go into, and discuss the larger question of res judicata based upon the passing of a decree or an order for sale.

64. It is well settled and beyond any dispute that the statutory rule of res judicata in India is engrafted in Section 11 of the Code but it is not exhaustive. A plea of res judicata is available and bars certain proceedings or suits on the general principles of res judicata or, as they have often been called, general principles of law Or jurisprudence. These general principles of law or res judicata are not circumscribed by any statutory enactment. The principles and the limits of their applicability are to be found in various judicial decisions in this country as also in England. They are generally based upon old maxims, public policy and current legal thought. One of the questions I pose, therefore, is that, if in a proceeding it is found that there is a conflict between these unmodified principles of res judicata and a codified law based upon public policy, which is to prevail? This question has been posed and answered in different ways in two recent Full Bench decisions in AIR 1938 A P 1 and AIR I960 Mad 377. In the Full Bench decision of this Court in MANU/BH/0074/1934 : AIR 1934 Pat 666 the question has not been posed and answered precisely on this life but it has been held that a decree for sale passed against the statutory prohibition based upon public policy is a nullity.

Having had the advantage of reading the judgments and opinions expressed in so many decisions of eminent Judges, I have come to the conclusion that the question is a very vexed one and to capable of diverse answers according to one's own notions. After considering some of these oases, I would venture to give my own answer which seems most commendable to me from the point of harmony between the conflicting principles of law.

65. Chapter VIIA was introduced in the Act by the Bihar Tenancy (Amendment) Act 1935 and it was further amended, as said above, in the year 1955. The heading of this Chapter is :

> ''Restrictions on Alienation of Land by Protected Tenants."

Not only the involuntary sale of the right of a raiyat of the protected tenants in the State of Bihar has been prohibited as embodied in Section 49-M relevant portions of which have been extracted in the judgment of my learned Brother. but also voluntary alienations have been restricted and prohibited.

Section 49-C provides:-

> "No transfer by a protected tenant of his right in his tenure, holding Or tenancy or in any portion thereof, by private sale, gift, will mortgage, lease or any contract or agreement, shall be valid to any extent except provided in this Chapter."

Thereafter certain exceptions and procedures have been provided in. Sections 49F and 49G of the Act to enable the members of such protected classes to transfer their rights under certain circumstances. There cannot be, therefore, any doubt that the provisions of Chapter VII-A of the Act have been enacted on the ground of public policy of giving protection to, and to the properties of, certain socially and economically backward people of the State; and, that is the reason that Section 49-M has been very strongly worded and it provides not only that no decree or Order shall be passed by any Court for the sale of the right of a raiyat of a member of a protected class in his holding or any portion thereof but it also engrafts a prohibition to the effect:-

> "..... nor shall such right be sold in execution of 'any decree' ... ."
>
> (Underlining (here in ' ') is mine.) The words 'any decree' would include a decree--' such as a mortgage decree directing the sale of the property.

66. A number of authorities relating to similar statutes, expressing diverse views on the points have been referred to, and discussed in the two Full Bench decisions, namely, of the Andhra Pradesh and the Madras High Courts referred to above. The conclusions arrived at by Subba Rao, C. J., who delivered the judgment of the Full Bench of the Andhra Pradesh High Court are these :-

> "It is true that, if an executing Court could go behind the decree and hold that an alienation was void, it would be incongruous to hold that the decision in that suit would be res judicata in another suit. I would prefer to adhere to the strict rule barring the executing Court going behind the decree rather than to stretch the rule to a breaking point to sustain principles of public policy. Both can co-exist without doing violence to either.

* * * * * *

> There is no conflict between the principle of res judicata and that of prohibited alienation of particular properties on the ground of public policy. An alienation of properties prohibited by public policy or statute may be void. But the said prohibition cannot have the effect of depriving the jurisdiction of Courts to decide in a particular suit whether the alienation is void or not.
>
> Nor can it override the principles of res judicata. The former belongs to the domain of substantive law and the latter to the rule giving finality to decrees of competent Courts. The sanctity of final judgments is as much based on public policy as prohibition against the alienation of properties annexed to certain public offices. The fundamental question in each case, therefore, is whether the Court has inherent jurisdiction to entertain a particular suit.
>
> A duty is cast upon a Court to raise relevant issues arising on the pleadings and give definite findings on each of the issues. The question whether a carpenter service inam is alienable raises a mixed question of fact and law which is certainly within the jurisdiction of the Court to decide. When it decides the question one way, the finding will be res judicata in another suit.
>
> If the defence which ought to be raised is not raised, the Court must be deemed to have decided against the contention not raised. In the instant case, the validity of the mortgage on the ground of public policy was not raised in the earlier suit or in the execution proceedings, and therefore, the decree and the order confirming sale would operate as res judicata in the present suit."

Only a couple of years later, Ramaswami, J., delivering the judgment of the Full Bench in MANU/TN/0258/1960 : AIR 1960 Mad 377 on his behalf as also on behalf of Somasundaram, J., has said at page 382:-

> "This principle of res judicata which is a cardinal principle of all legal system of most civilised countries and winch has been described as the most salutary cannot prevail as the long line of Madras decisions referred to above show, to the extent of compelling the executing court to sell inalienable service inam lands prohibited on grounds of public policy either by statute or under the general law; ...."

Anantanarayanan, J., the third learned Judge constituting the Full Bench, agreeing with the opinion of Ramaswami, J., has further observed at page 383:-

> "But, equally, I do not see how it is possible not to hold that, under certain exceptional circumstances at least, an executing Court can go behind the decree, and refuse to execute a decree which is both opposed to public policy and to enacted law. As I conceive it, this power of the Court is not the right of a party, or the power of a party at all; though a party can invoke the exercise of this power by bringing facts to the notice of the Court, the power arises really because the conscience of the Court is stirred. Either it is undisputed by the parties, or it is indisputably established and made evident from material which is upon the same footing as decree sought to be executed, that the decree contravenes both public policy and the enacted law."

* * *

"The power of the executing Court to go behind the decree because it is opposed to public policy and also offends a statutory prohibition, is upon another plane altogether. It must be carefully delimited, and no executing Court can launch into what is virtually a fresh trial, because of mere allegations, or of further new material claimed to be available. To stir the conscience of the Court, material on the same footing, as the decree itself, and equally evident and indisputable, must show that the land is inalienable, and that the sale offends public policy and law. I am in entire agreement with my learned brother, that we must circumscribe the power of the executing Court to go behind the decree to such instances, in answering this reference."

In Baj Suraj v. Haribhai Motabhai MANU/MH/0077/1942 : AIR 1943 Bom 54, a Bench of Bombay High Court referring to the case of ILR Bom 479 relief on and referred to in the judgment of my learned Brother, has said:-

"Then Mr. EX'sai has argued that the plaintiffs are estopped from pleading the Bhagdari Act and he relies on two cases ILR Bom 479 and Basangouda Giriyeppagouda v. Basalingappa MANU/MH/0148/1935 : 38 Bom LR 593 : AIR 1936 Bom 301), where it was held that the plea of estoppel by res judicata may prevail even when the result of giving effect to it may be to sanction what is illegal in the sense of being prohibited by statute. But in neither of those cases was there any question of the Court itself being held hound to take any action contrary to the express words of a statute, and in our opinion no rule of estoppel between parties can compel the Court to do so."

A Full Bench of the Allahabad High Court in Katwari v. Sita Ram Tewari AIR 1921 AH 118 has held:-

"No doubt it was not open to the judgment-debtor to contest the validity of the decree which was passed against him but it was open to him to say to the Court that as the law contains a mandatory provision which precludes a Court executing a decree from selling an occupancy holding the Court was bound to carry out the provisions of the law and not to act in violation of those provisions. In my opinion, in view of the provisions of Section 20 a Court executing a decree cannot order an occupancy holding to be sold, no matter whether the decree is a decree directing a sale of the holding Or is a simple money decree."

Although the provisions of Section 27 of the Santal Parganas Settlement Regulation, 1872, were not as stringent as the provisions of Section 47 of the Chotanagpur Tenancy Act Or Section 49-M of the Bihar Tenancy Act, the learned Chief Justice, who delivered the judgment of the Full Bench in MANU/BH/0074/1934 : AIR 1934 Pat 666 (FB) held at page 669:-

"And yet, if, on the other hand, the decree expressly directed the sale of a raiyati interest and was therefore on the face of it bad, the executing Court would be able to treat the decree as a nullity. It seems hardly logical that a judgment-debtor against whom the decree in Court has expressly decided that specific property is raiyati and nevertheless saleable (a decision which it is conceded is a nullity) is in a better position, to resist the execution of the

decree than a judgment-debtor against whom the matter has not been so expressly decided. In short, the plea of res judicata can hardly be more cogent than a contention that the decree is a nullity. In my opinion it was quite open to the executing Court to examine the nature of the property directed by the decree to be sold."

With utmost respect, I am also of the view that the law laid down in such broad terms with reference to Section 27 of the Santal Parganas Settlement Regulation of 1872 is not correct. I shall express and state my view with reference to the section in question a bit later. I would also like to quote here a few passages from the judgment of my learned Brother Kanhaiya Singh, J., in MANU/BH/0016/1956 : AIR 1956 Pat 57, who, although the final decision in that case on fact as to whether plot 106 was the raiyati land of the judgment-debtor or not is otherwise, has, in the course of the judgment observed at page 60 while considering the provisions of sections 46 and 47 of the Chotanagpur Tenancy Act:-

"This section does not prohibit a Court from investigating whether or not the land involved in any suit or execution constitutes the raiyati holding. When in a suit it is admitted or proved that a land forms a raiyati holding and if in spite of such proof the Court by its decree directs the Sale of such a land, the direction is wholly null and void as being contrary to the express provision of law. In all such cases, the decree for sale will be a nullity, and it is well established that the executing Court can refuse to execute a decree which is non-existent in the eye of law.

It may well happen that a decree for sale of a raiyati holding, as in the Case of a mortgage decree, is passed ex parte against a raiyat. Here also the Court should not have passed such a decree, and once the decree has been passed the executing Court is not precluded from ignoring such a decree, because what was directed to be sold was admittedly a raiyati holding, the sale of which is absolutely prohibited by Section 47 of the Chota Nagpur Tenancy Act.

It is true that an ex parte decree also constitutes res judicata in a subsequent suit, but in order to determine the extent to which the principle of res judicata applies in ex parte decree, it will be necessary in such cases to ascertain precisely what matters were involved in such decisions. Assume that an ex parte mortgage decree was passed directing sale of a raiyati holding. Assume further that the land involved was admittedly a raiyati holding and there was no dispute about that.

In such a case the direction about sale of a raiyati holding in an ex parte decree cannot constitute res judicata, since such a direction was in contravention of a statute and as is well known, there is no estoppel against a statute."

In (S) MANU/BH/0110/1955 : AIR 1955 Pat 423 : 1955 BLJR 273 decided by my learned Brother Choudhary, J., sitting with Das C. J., the facts are that on 13-9-49 the Court passed an order permitting the Maharajadhiraj of Darbhanga to realise the amount by executing the order of the Court against the properties of the judgment-debtors in the hands of the receiver. The Maharajadhiraj as decree-holder started execution of the order on 11-2-50 and) sought to proceed against three lots of house properties of the judgment-debtors. After attachment and sale proclamation were

duly effected, the judgment-debtors, on 19-6-50, took time to pay the decretal dues and waived all objections regarding the issue of fresh sale proclamation. The case was, therefore, adjourned to 21-7-50, on which date the judgment-debtors again took time for settling the matter by compromise, and waived all irregularities in connection with the issue of fresh sale proclamation. On the adjourned date of sale, i. e., on 21-8-50 the judgment-debtors' filed a miscellaneous case challenging the proceedings in the execution on various grounds, one of which was that the house properties sought to be sold in execution of the order were not in the hands of the receiver and they, therefore, could not be sold.

On 13-11-50 when the miscellaneous case came up to be beard the learned pleader on behalf of the decree-holder admitted that the properties sought to be proceeded with in the execution case were the personal properties of the judgment-debtors and that they had not been put in the hands of the receiver. In view of this admission on the question of fact, it was ultimately held by the execution Court that the decree-holder could not proceed with the execution as against the properties of the judgment-debtors which were not in the hands of the receiver. In appeal filed by the Maharajadhiraj in this Court, it was contended on his behalf that 'the objection raised by the judgment-debtors that the properties sought to be proceeded with in the execution case were not liable to be sold, was barred by constructive res judicata inasmuch as the judgment-debtors at the earlier stage of the execution did not raise such objection'. The argument was that 'where a judgment-debtor fails to raise all his objections to the execution, which be might and ought to have raised, and the execution is ordered to proceed, all Such objections will be deemed) to have been impliedly decided against him and he will be precluded from raising the same objections at a later stage of the same execution proceeding'.

This argument was repelled by Choudhary, J., stating:-

> "In this case, as clearly observed, the lawyer for the decree-holder admitted that the house properties sought to be sold in execution of the decree were the personal properties of the judgment-debtor and they had not vested in the receiver. The order of the Court dated 13-9-1949, entitled the decree-holder to realise the amount by proceeding against the properties in the hands of the receiver only. Therefore, the execution of the decree as against the properties which were not in the bands of the receiver was absolutely without jurisdiction.
>
> Such properties were not liable to be sold in view of the order of the. Court, and the executing Court had no jurisdiction to sell them. That being the position, I do not think that the doctrine of the constructive res judicata applies to this case, The case of MANU/BH/0116/1950 : AIR 1950 Pat 465, referred to above, in my opinion, instead of helping the appellant supports the contention raised on behalf of the judgment-debtors.
>
> In that case their Lordships made a distinction between a case where the property is admittedly non-saleable and a case where it has to be proved as a fact that such property, is non-saleable arid their Lordships held that where the property is admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objection in time does not create any estoppel and res judicata because there is no estoppel against the statute. But, where the facts themselves have to be determined which may lead to the inference that the property is not saleable, those facts mast be pleaded and

proved like any other question for determination by the Court itself, and if those questions are not raised at a proper stage, the bar of res judicata must be applicable.

As in the present case, it is the admitted case of the parties that the house properties not being in the hands of the receiver were non-saleable, the objection raised by the judgment-debtors in this behalf is not barred by constructive res judicata."

67. If I may say so with respect, the decision in Kameshwar Singh's case is just on the line of the decision of the Supreme Court in (S) MANU/SC/0079/1955 : AIR 1956 SC 87. In that case in execution of a mortgage decree certain properties were sold on 14th and 15th April, 1936 and were purchased by the decree-holder himself. The sale was confirmed on 26-6-36 and possession was taken On 15-12-36. Later on in a suit instituted the main ground of attack on the sale was that the mortgage decree had directed the sale of mortgage rights under Ext. A and not of the properties. The suit was treated as a proceeding under Section 47 of the Code of Civil Procedure and it was held that the sale in excess and contravention of the mortgage decree was void and that 'an application by a party to the suit to recover possession of properties which had been taken delivery of under a void execution sale would be in time under Article 181, if it was filed within three years of his dispossession.'

It is important to note that the judgment-debtors respondents before the Supreme Court were deprived of all claims for mesne profits on the ground that:-

"They did not appear in the suit, and put forward their rights under Ex. A. They intervened at the stage of execution, but their complaint was mainly that the 'ex parte' decree had been obtained by fraud, a plea which has now been negatived.

Even in this suit, they did not press the plea on which they have succeeded until they came to the High Court."

The case was argued on both sides by eminent counsel and was decided by distinguished Judges, the judgment on behalf of the Bench being of Venkatarama Ayyar, J. In those circumstances, although the point of constructive res judicata does not seem to have been raised! and decided in this case, the reason for such omission, if at all it is an omission, is not far to sock.

The impugned sale had taken place in execution of a mortgage decree which had directed the sale of mortgage rights only in the properties covered by Ex. A. The decree, therefore, could not and did not operate as res judicata. There must not have been any further order for sale in execution of the mortgage decree. The sale itself was in excess and contravention of the terms of the decree. It was, therefore, held to be void and the judgment-debtor's rights were affected only when they were dispossessed from the properties in respect of which the sale was void. They were held entitled to go to the execution Court within 3 years of the date of their dispossession under Article 181 of the Limitation Act. The holding of the sale or accepting the bid could not be said to be such orders as would indirectly decide that the executing Court had a right to sell the whole of the property in contravention or excess of the decree.

These facts are so abundantly clear that, even though the point of constructive res judicata has not been raised in and decided by the Supreme Court in Ramanna's case,

(S) MANU/SC/0079/1955 : AIR 1956 SC 87 I have no doubt in my mind that the point was not raised and decided as it could have been raised only to be mentioned and rejected without any elaborate discussion. It is to be noticed that Kameshwar Singh's case 1955 BLJR 273 : Â£ (S) AIR 1955 Eat 423) decided by Choudhary, J., as I have said above, is more or less on the lines of the decision of the Supreme Court in Ramanna's case, (S) MANU/SC/0079/1955 : AIR 1956 SC 87, the only difference being that in the former the point of constructive res judicata was raised and, if I may say so with respect, rightly rejected and in the latter the point was not thought worth being raised.

68. It will be seen hereinafter that my conclusion will be more or less on the lines of the dicta of my learned Brethren Choudhary and Kanhaiya Singh, JJ., extracted above from the cases of Kameshwar Singh ((S) MANU/BH/0110/1955 : 1955 BLJR 273 : AIR 1955 Pat 423) and Chintamani. MANU/BH/0016/1956 : AIR 1956 Pat 57.

69. I would now refer to three English decisions, viz., Bradshaw v. McMullan. (1920) 2 IR 412 and New Brunswick Rly., Co. v. British and French Trust Corporation, Ltd. 1939 AC 1 decisions of the House of Lords, and Griffiths v. Davies 1943) 2 All ER 209 a decision of the Court of Appeal. In Bradsaw's Case, the enactment under consideration was Section 52 of the Local Government (Ireland) Act, 1898 which provided under Sub-section (1)--

> "The poor-rate shall be made upon the occupier, and not the landlord, of a hereditament''.

Further, by Sub-section (2) it was provided that--

> "The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, and any contract to the contrary respecting such deduction shall be void."

Contrary to the said provisions, an agreement was entered into between the parties on the 1st of September, 1908. Certain earlier legal proceedings respecting that agreement were relied upon by the respondent before the House in support of his plea of estoppel. The plea was repelled. I would like to quote a few passages from the speech of Lord Shaw of Dunfermline at pages 423 to 426:-

> "Estoppel is a well-known refuge for litigants in distress; the refuge is also well known to be frequently insecure. The present is a startling illustration of the extremes to which attempts to seek cover under it may go. The estoppel here pleaded is estoppel by matter of record, and an examination of these proceedings shown that the substantial and specific plea is simply res judicata......
>
> * * * * *
>
> My Lords, as I have observed, the overruling consideration with regard to res judicata is that there should have been a judicium. That is to say, that the merits of the identical dispute between the identical parties, on the identical subject-matter, and on the same media, should have been settled by judgment. The judicial mind should have been applied to it. This is the principle, familiar and fundamental...... It is, I am aware, possible to maintain that a judgment by consent has the qualities of a judicium to which I have referred. There are expressions of opinion in some of the numerous

> English cases upon the subject. it seems to me that such a doctrine may be founded, not upon the judgment pronounced, but upon the consent with all its limits and to all its extent which preceded the judgment; that, in short you have there left the region of strict res judicata, find entered the region of a possible wide estoppel .... I do not see my way to sanction the application of this specific plea of res judicata or the more general plea of estoppel, to any transaction such as the present which is in plain defiance of statutory injunction. Such a plea, if allowed, would, place the Courts of the country in open conflict with the determination of the legislature. The parties in this case, according to the plea of one of them, have contracted out of the provisions of the Irish Local Government Act, although that Act made clear to them that such contracting out was not legally permissible. They have chosen to arrange their affairs upon another footing. The plea of res judicata arises in this way, that under proceedings in a former suit the parties chose to settle on the footing of recognizing the agreement and contravening the Act, How does the law stand relative to such a plea?.....But with regard to the future, whether the debt be under a gambling contract or a contract such as the present, when the attention of Courts of Law is directed to the foundation of the demand, no decree of a court can be obtained to enforce a claim in defiance of the prohibition of a statute. T am of opinion that it would be of the worst example to sanction the introduction of the doctrine of estoppel, in any of its phases, into such a transaction. When once a Court of Justice is asked to give judicial effect to a transaction which a statute distinctly forbids, in my opinion its duty is to refuse. It ought not to do by a form of law what is essentially contrary to the law".

Following this case, Lord Greene, Master of Rolls, in the case of (1943) 2 All ER 209 delivering the main judgment of the Court of Appeal has observed at page 212:

> "I do not think I need refer at length to authority for the proposition that, where there is a statutory prohibition or direction, it cannot be overridden or defeated by a previous judgment between the parties,"

Earlier in the judgment, his Lordship has said with reference to the statutory direction or prohibition in question in that case :

> "That is a statutory direction to the Court to abstain from giving a judgment for recovery of rent which is shown to the Court to be excessive.
>
> It appears to me beyond all question that, if, in a previous case where the point was not taken, judgment for an amount of contractual rent which is, in fact, excessive has been given against the tenant, and, later an action is brought against the tenant for the contractual rent at the same rate, in which later proceedings it is shown that that rent is excessive, the earlier judgment cannot give to the court a jurisdiction which this section has denied to it. In other words, if two actions are brought in respect of two different rent periods, and in the first judgment for the contractual rent is given and in the second it is shown that the contractual rent is too high, the Court is bound in the second action to give effect to the provisions of the section and to refuse to give judgment for the recovery of the excess rent: otherwise the Court would be doing something which the statute says is not to do".

I would like to follow the dicta of Lord Grecne in preference to those of Scott C, J., in

ILR 33 Bom 479. It is also to be noticed that that case was decided with reference to the statutory rule of res judicata contained in Section 13 of the Code of 1882. Different considerations, may follow if there is a conflict between the statutory prohibition contained in Section 11 of the present Code and the statutory direction contained in any other Law. In the case of 1939 AC 1, the appellant railway company before the House had issued a series of mortgage bonds in 1884. The respondent corporation had bought 992 such, bonds on August 15, 1934, and one on August 20, 1934. The corporation started an action on the basis of one bond and obtained an ex parte judgment. Later on it started another action on the basis of 992 bonds. In regard to the dispute as to the construction of the bonds which were all Similar, a point of estoppel by record or res judicata was raised before the House on behalf of the corporation on the basis of the earlier Judgment in default.

Lord Mangham rejected the Contention holding--

> "In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense. If that be the principle, the appellants are not in the present case estopped from raising any contention they think fit in an action on the 992 bonds."

I would also like to quote a few lines from the speech of Lord Wright at pages 37 and 38:-

> "No authority has been produced in which a party has been held to be estopped from, raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default and omitted to raise the issue .... There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept ......
>
> .... It is true that the default judgment expressly declares that the plaintiffs were entitled to half-yearly interest on the basis of the gold clause. I may observe that in my experience it is unusual, and I think it is undesirable, in a default judgment to make a declaration on the construction of a document, but apart from that it is here a declaration limited to bond 3300. There was no issue before the Court as to any or all of the 992 bonds now sued on. The construction of each and any of these bonds was not a traversable issue in the previous action. The appellants could not be charged with the omission to traverse a claim which could not be traversed in that action because it was not before the Court."

70. In the light and with the help of the principles of law as laid down in several authorities referred to above, my considered and concluded opinion in regard to the conflict between the principles of res judicata which are undoubtedly based upon

public policy and the statutory prohibition of alienation of properties founded on public policy, which opinion, according to me, is the most harmonious one, is--

> (1) If in a suit asking for a decree for sale or in the execution proceeding asking for an order for sale of the property, alienation of which is prohibited by statute on grounds of public policy, the defendant or the judgment-debtor appears and contests on questions of fact or law as to the interpretation or application of the statutory prohibition and, in spite of his contest, a decree or an order for sale is made, the decree or the order passed for sale is not a nullity and the point whether Such decree or order could be so passed in spite of the prohibition will be barred by the principles of res judicata in a subsequent proceeding or suit.
>
> (2) If an ex parte decree or order for sale is obtained by the plaintiff or the decree-bolder by stating such facts as, on their face, did not give protection to the defendant or the judgment-debtor on the ground of the prohibited alienation, the facts cannot Be allowed to be controverted in a subsequent proceeding or suit as those facts, right or wrong, must be deemed to have been admitted by, or decided against, the defendant or the judgment-debtor on the principles of constructive res judicata. In such a case, there is neither any estoppel against statute nor a conflict between the principles of res judicata and the law of prohibited alienation on the ground of public policy.
>
> (3) But in a case where the facts have at no point of time been in dispute--rather they are admitted and at no point of time the Court was invited to apply its mind to, and decide, the question of the applicability of the statutory prohibition to the facts of the case either by reason of the defendant or the judgment-debtor remaining ex parte at the time the decree or order for sale is made or because of his failure to raise these questions in time, he ought to be allowed to raise this question at any time before sale. In such a situation, strictly speaking, it will not amount to asking the court to go behind the decree, or against the order for sale but it will be asking the court not to sell the property against the command of the legislature in spite of the decree or the order for sale being there. It is in this type of cases that there is a conflict between the principles of constructive res judicata (as it is possible to take the view that the passing of the decree or the order for sale is inconsistent with the plea of statutory bar raised at a later stage) and the statutory prohibition of alienation of certain properties of the backward people being based upon the ground of public policy.

I would prefer not to go against such statutory direction of the legislature rather than to give effect to the abstract principle of constructive res judicata. In my opinion, the latter has to give way to the former in such a situation. If, however, the judgment-debtor fails to bring it to the notice of the court the statutory command not to sell the property in execution of any decree before the Sale is held, he shall not be permitted to raise this question after the sale, as, after it has taken place, the court will not be doing anything against the statutory command and then the principle of constructive res judicata should have the upperhand and the sale should not be allowed to be challenged because, by the passing of the decree or order for sale, it must be held that the court decided that it could pass such decree or order.

71. After expressing my views on the question of res judicata in relation to a case where the judgment-debtor, in spite of the service of summons in the suit and

notices in the execution case, fails to raise objection to the passing of the decree or order for sale, I now proceed to examine the question of res judicata with reference to the facts of the instant, case. As I have said above, the facts were admitted in the execution petition itself that the judgment-debtors were mallah by caste and that the property sought to be proceeded against in the case was their kasht land. The order for sale can be said to have been passed in this case on the 11th of January, 1956. On that date, the point of statutory bar of sale of their raiyati right could not be raised. After the notification published in February, 1956, neither the decree-holders nor the judgment-debtors brought it to the notice of the court at any time before the sale that the court, in view of the provisions of Section 49M of the Act, had no power or jurisdiction to sell the property. It seems the execution court was not aware of the statutory bar made applicable to the case by notification. In those circumstances. I find it difficult to accept that by acting against the statutory command the court decided by necessary implication that it could sell the property in spite of the statutory prohibition.

I will elucidate my point like this. If, after the issuance of the notification, the decree-holders would have brought the notification to the notice of the court by filing an application and still contending that, notwithstanding it, on certain grounds the court was entitled to sell the property of the judgment-debtors, the court would have been obliged to issue a fresh notice of such application to the judgment-debtors. Either in that event or if the judgment-debtors would have themselves come and brought it to the notice of the court that, in view Of the statutory bar being made applicable to the sale of their property, the court had no jurisdiction to sell it, the court must have been under the necessity to decide this question by a separate order either in presence of the judgment-debtors or, they remaining ex parte in spite of the service of notice of the fresh application, as to whether it could or could not sell the property in view of the statutory bar brought about by the notification.

It is manifest that such an order would have been an order under Section 47 of the Code of the Civil Procedure subject to appeals. The court obviously in such situation could not say to the party....... 'I will not decide this question, prior to the holding of the sale. I will decide it in the process of the holding of the sale. If I sell the property, it will be deemed that I have decided that I had power to sell; if I do not sell, the decision should be deemed otherwise'. If that he so, I fail to follow how constructively, on mere failure of the judgment-debtors to raise the point before the holding of the sale, the point of salability should be deemed to have been decided "against them by the holding of the sale. They might, if they liked, raise this point before the sale and in that situation, the court would have been obliged to decide it by a separate order and not by holding the sale and accepting its hid. But the question is as to whether the judgment-debtors' failure to raise this point before the sale debars them from Subsequently asking the court to declare it void or to set it aside if it is voidable.

If the point is not barred by the principles of constructive res judicata as is my view it is obvious that failure of the judgment-debtors to raise the point before the sale will not estop them from raising this question at a later stage on the principle that there is no estoppel against statute. If such point is raised by the defendant or the judgment-debtor before the passing of the decree or order for sale, it is obvious that the point has got to he decided in the judgment or the order. Therefore, there is no difficulty in taking the view that if the point is not raised, the judgment or order directing the sale of the property will be deemed to have decided constructively the point which is inconsistent with such decree or order.

72. I shall briefly consider some of the decisions of the Privy Council and the Supreme Court, on the point of res judicata as also some of the cases in which it has been held or observed that an order confirming the sale decides the saleability of the property.

73. I n I L R Cal 51 (PC), the question before the Judicial Committee of the Privy Council was as to whether the 7th petition for execution of the decree filed on 22nd September, 1877, was maintainable in view of the contention raised on behalf of the judgment-debtors that the 6th petition for execution was barred by limitation. The 6th petition was filed on 5th September, 1874. Notice to show cause as to why the execution should not proceed was served on the judgment-debtors on the 23rd September, 1874. Judgment-debtors failed to show cause. Decree holders filed petition to attach properties on the 8th October, 1874, and on that date, the subordinate Judge of Maymensing passed an order 'that the attachment process be issued, fixing the 12th December next'. Sir Barnes Peacock delivering the judgment on behalf of the Board held :

> "But, as already observed, the Subordinate Judge had jurisdiction upon the petition of the 8th October 1874 to determine whether the decree was barred on the 8th October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must he considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But, if instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed, upon appeal; and the defendant cannot upon art application to execute the decree set up as an answer that the cause of action was barred by limitation."

I would like to quote a few lines more from the said judgment which, in my opinion, support the view which I have taken. The passage is--

> "Suppose the order for attachment of the 8th of October 1874 had been affirmed on appeal by the High Court, upon the ground that it was not barred by limitation, it is clear that the Judge of the original court, when the application for a sale of the property attached under it was made, could not have rejected the application upon the ground that the decree was barred on the 5th of September 1874, or on the 8th of October, 1874, when the order was made, upon the ground that the decree was dead when the petition upon which the order was made was presented."

The decree for sale of the property or an order for sale would be appealable; so would have been the order if passed before the sale in a situation I have stated above while elucidating my point, hut the mere order accepting the hid and declaring certain person to be the purchaser of the property is not appealable. I do not mean to suggest that an order for being capable of operating as a bar of res judicata must be an appealable one. But I do suggest that an order involving the determination of the question as to whether the property is saleable Or not in view of the statutory prohibition cannot but be an appealable order under Section 47 of the Code.

74. In Ram Kirpal v. Bup Kuari ILR All 269 (PC) in connection with an earlier order in a proceeding which was a continuation of a suit made by Mr. Probyn, Sir Barnes Peacock again delivering the judgment of the Privy Council and after referring to the case of ILR Gal 51 : 8 I A 123 (PC), observed :-

"The question, if the term 'res judicata' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment an a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon Section 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation. The judgment or order of Mr. Probyn was an interlocutory judgment. He merely held that, according to the propter construction of the decree of the Sadr Court, mesne profits were awarded by it....The decree of the Sadr Court, was a written document. Mr. Probyn had jurisdiction to execute that decree, and it was consequently within his jurisdiction and it was his duty to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not .... a decision which, not having been appealed, was final and binding upon the parties and those claiming under them 8 I A 123 (PC)."

I have extracted passages from the judgment of the Privy Council in Ram Kripal's case ILR 6 All 269 (PC), to show that such principle of res judicata is based upon general principles of law and that an order to be final and binding between the parties must be an order adjudicating the point, which, if appealable and not appealed against, is final.

75. Mr. Prem Lall has relied upon the case of ILR Mad 19 : 15 I A 171 (PC), in support of his contention that the sale and the order accepting the bid operpte as res judicata in the instant case in regard to the question of sale-ability of the property. I would like to point out that on the facts of that case, the judgment-debtors were not allowed to challenge the sale on the principle of estoppel by conduct as would appear from the following passage extracted from the judgment of Sir Richard Couch :

"Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating this sale--for that appeared to be the contention of the counsel for the respondents--the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have at set aside on account of this, as they say, mis-description. It appears to come within what was laid down by this Board in the case in Macnaughten v. Mababir Pershad Singh 10 I A 25 (PC), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained.

It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment debtor could lie by and afterwards take advantage of any mis-description of the property

> attached and about to be sold, which he knew well, but of which the execution-creditor or decree-holder might be perfectly ignorant--that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to nave given effect to this objection."

The paragraph following the above would show that the alleged objections were treated as a mere irregularity and there was no evidence that it was followed by a substantial injury and on that ground also the Privy Council upheld the sale. It is obvious that the decision is not based upon any principle of res judicata but is substantially based on the judgment-debtors' failure to vaise objection as to certain facts in time and therein lies the distinction between the two types of estoppel--one in Arunachellam's case 15 I A 171 (PC), and the other in the instant one, the latter being wholly covered by the well-recognised principle that there is no estoppel against statute.

76. In Raja of Ramnad v. Velusami Tevar MANU/PR/0008/1920 : AIR 1921 PC 23) the appellant before the Privy Council purchased the decree from the then plaintiffs and made an application to be brought on the record as assignee of the decree and to have the decree executed. The decree was barred by limitation. The matter came up for hearing before a Subordinate Judge who delivered the judgment on the 13th of December, 1915. By that judgment, other points raised by the judgment-debtors were specifically decided against them but the point of limitation was neither discussed nor decided. An application for review of the order failed, inter alia, on the ground that the order of the 13th December did not reserve any question of limitation for determination in a future litigation. The plea of limitation was in a subsequent case, allowed to be raised.

In that connection, Lord Moulton delivering the judgment of the Board held--

> "Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of the 13th December, 1915, is a positive order that the present appellant should be al lowed to execute the decree. To that order the plea of limitation, if pleaded, would according to the respondent's case have been a complete answer, and therefore it must be taken that a decision was given against the respondents on the plea. No appeal was brought against that order, and there fore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was 'not only competent' to the pre sent respondents to bring the plea forward on that occasion, but it was 'incumbent' on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon." (Underlining is mine (here in (' ')).

To me it appears that the passage I have extracted from the decision of the Privy Council supports the view I have expressed in my judgment for the reasons I have already stated. I may also add that in our case it would have been quite competent for the judgment-debtors to raise the plea in question before sale, but It was not incumbent upon them to do.

77. Very great reliance was placed by Mr. Prem Lal on the decision of the Privy Council in MANU/PR/0009/1935 : AIR 1936 PC 46. The respondent before the Board

instituted a suit in 1926 asking for a declaration that the two maintanance grants of 1909 and 1920 were illegal and invalid and not binding on him. In an earlier suit between the parties instituted in the year 1917, the learned Subordinate Judge had directly decided about the grant of 1909 that it was not illegal and invalid.

78. In consequence of that decision, another grant 'if 1920 was made. One of the questions was as to whether the decisions in the earlier suit operated us res judicata. The High Court held that it did not. Reversing this decision, Lord Thankerton held:-

> "Truly the third sub-section of) Section 12-A renders void any transaction to which it is applicable, but the question its to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. The decision of the Court in the suit of 1917 determine that the section had never applied to the transaction of 1909, and it is difficult to follow the reasoning of the learned Judge which allowed him not only to express a strong contrary view as to the applicability of the section, which he was entitled to do, if he so chose, but to try anew the issue as to its applicability in face of the express prohibition, in Section 11 of the Code."

The difference between Bindeswari's case MANU/PR/0009/1935 : AIR 1936 PC 46, decided by the Privy Council and the instant one is so marked that it requires no elaborate pointing out. There the point had been, rightly or wrongly, but expressly decided in the earlier suit and it was not open to be decided in the second suit between the same parties 'in face of the express prohibition in Section 11 of the Code'. The conclusions arrived at by me in the earlier portion of my judgment are also in the light of this decision and not against it.

79. The facts of the Privy Council case in Shivraj Gopalji v. E. Ayissas Bi MANU/PR/0022/1949 : AIR 1949 PC 302, are that the decree-holder appellant contended before the Board that he was entitled to proceed in execution against certain properties of the judgment-debtors who were Mappilla Mohammedans of Malabar governed by Marumakkathayam law under which descent is traced in the female line. Formerly, the members of a tarwad had only a right of maintenance and could not enforce a partition in the family properties but under the Mappilla Marumakkattayam Act, 1938 (Madras. Act No. XVII of 1939) they could obtain a share of the properties by partition or alternatively have the tarwad properties registered as impartible. In a suit brought in 1930, the plaintiff obtained an order of attachment of the Immovable properties of the respondents who objected subsequently that the attachment might be raised on the ground that the respondents had no saleable rights in the attached properties. They were 'referred to an original suit' and in that a straight issue was raised as to whether the property in question was liable to attachment. The clear decision in the suit was that the properties in question were not liable to attachment.

The appellant before the Board obtained an assignment of the decree passed in the money suit and filed an execution petition for its execution. In that he prayed for recognition of the assignment of tile decree in his favour and for attachment of the rents and profits of the same Immovable properties belonging, as he alleged, to the respondents. To this, they objected contending that the petition was barred by the judgment in the earlier suit the execution court recognised the assignment but rejected the prayer for attachment on the ground raised by the respondents. In appeal against that order, for the first time, it was contended before the High Court of

Madras on the provisions of Madras Act XVII of 1939 that the respondents had separate interest in the properties. The High Court did not allow this point to be raised for the first time in argument of the appeal.

Lord Simonds, delivering the judgment of the Board, has stated:

> "Thus there was, as it appears to their Lordships, a second clear judicial decision in proceedings, to which the present appellant and respondents were parties, that the properties in question were not liable to attachment."

The assignee decree-holder, even after two clear decisions as to the liability to attachment of the property in question asked the execution court in a fresh execution case filed in 1943 for the attachment of the right, title and interest of the respondents in the property relying upon the provisions of the Act of 1938. The respondents objected on the ground of res judicata. The Subordinate Judge passed a decretal order allowing the attachment of the right, title and interest of the respondents in the property, observing that the plea of res judicata was not pressed and in any case it was not a valid plea. The respondents appealed to the High Court of Madras, the High ground that the plea of res judicata was a valid one.

Upholding the decision of the High Court, Lord Simonds held :-

> "The Act of 1938 had come into operation (if that is a relevant fact) before the earlier petition was filed. Through his own default the appellant did not raise whatever plea he could found upon it until It was too late to do so. Apart from the provisions of Section 11, Civil P. C., it would be contrary to principle (see 11 I A 37 : ILR All 269 (PC)) to allow him in fresh proceedings to renew the same claim viz, that the properties in question were properties of the respondents liable to attachment or, as he would now put it, that the respondents had severable interests in the properties which are liable to attachment, merely because he neglected at the proper stage in previous proceedings to support that claim by an argument of which he now wishes to avail himself."

This again is a decision of the Privy Council which makes the view I have expressed earlier in consonance with the authoritative pronouncements in regard to the question at issue instead of making it contrary to them.

80. T now refer to the Supreme Court cases, namely MANU/SC/0063/1952 : AIR 1953 SC 33 and MANU/SC/0008/1952 : AIR 1953 SC 65. In the former case the poin decided is :

> "The condition regarding the competency of the former Court to try the subsequent suit is one of the limitation engrafted on the general rule of res judicata by Section 11 of the Code and has application to suits alone. When a plea of res judicata is founded on general principles 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. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later 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 Court, administration Courts, etc."

So far as I can see, I could not express nor have I expressed any view of law

contrary to the one declared by the* Supreme Court in Raj Lakshmi Dasi's case MANU/SC/0063/1952.

81. In enunciating the principles earlier in my judgment, I have very much kept in view the decision of the Supreme Court in Mohanlal Goenka's case MANU/SC/0008/1952 : AIR 1953 SC 65. First, in connection with that case, it is to be noticed that Das J., as he then was, held :

> "In the circumstances, the omission to send those documents over again to the Asansol Court was a mere irregularity which did not affect the question of jurisdiction of the executing Court."

Mahajan and Bose, JJ. agreed with this decision. The decision of Ghulam Hasan J., with which also they agreed, is chiefly based upon the point of constructive res judicata. But with reference to the facts of the case it would be noticed that on several previous occasions in several earlier execution cases the facts and the point on which the plea of want of* jurisdiction in the executing court was founded were not raised. In that situation, the raising of the point of want of jurisdiction in the execution court in the last case was held to be barred on the principles of constructive res judicata as there was no question of inherent lack of jurisdiction in the execution court on the grounds stated by the judgment-debtors. I do not see how the decision helps us to hold that the point of the statutory prohibition to sell the property in question not having been raised before the sale must be deemed to have been decided by the holding of the sale.

82. If I am right in my view that the holding of the sale or the order accepting its bid does not operate as res judicata, it is manifest that the sale held in contravention of the stringent, statutory prohibition of the kind contained in Section 49-M of the Act is without jurisdiction and void. In a court sale the court does not guarantee the title or the saleable interest of the judgment-debtor. The purchaser, either be he a decree-holder or a stranger, takes it subject to the risk of the property ultimately turning out to be that of a party other than the judgment-debtor or the latter having no saleable interest in it. In such a situation, but for the provisions of order 21 Rule 91 of the Code, the purchaser would not have been able to avoid the sale. A special protection and a remedy has been provided in that rule enabling the purchaser to ask the execution court to set aside the sale on that ground at his instance. In terms of Rule 91, the remedy is not available to the judgment-debtor or to a third party for setting aside of such sale. The sale is a nullity in so far as the rights of the third party are concerned. The sale cannot affect the rights of the third parties. They need not ask for setting aside the sale or declaring it void.

If their possession is disturbed, they can simply get a declaration that the sale does not affect their right and that they cannot be dispossessed: vide Kedar Nath Goenka v. Ram Narain Lal MANU/PR/0082/1935 : AIR 1935 PC 139. That explains the reason why in the Full Bench decision of this Court in AIR 1938 Pat 87 : ILR Pat 308 it was held :

> "(a) A sale of Immovable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing Court or void as between the judgment-debtor and the decree-holder or auction purchaser (b) the decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not

> in fact satisfied his decree to the extent of the sale-price, unless he has the sale set aside by applying under Order 21 Rule 91."

I would like to point here that, if the sale itself decides the saleability of the property in the sense that the judgment-debtor had a saleable interest in it, the remedy for setting aside the sale provided in Order 21 Rule 91 would not have been available to the decree-holder auction-purchaser in the view that the sale itself operates as constructive res judicata. But that is not so. It is well established that the bar of res judicata is mutual; if it operates, it operates against both parties.

83. Mr. Prem Lall placed very great reliance upon the Full Bench decision of the Madras High Court in Veeraraghavayya v. Venkataraghavareddi MANU/TN/0163/1947 : AIR 1948 Mad 226 (FB) in support of his argument that the present application for setting aside the sale is barred under Article 166 of the Limitation Act. But counsel had to concede, in view of the decision of the Supreme Court in (S) MANU/SC/0079/1955 : AIR 1956 SC 87 that, if the sale in question is void, it has got to be held that the present application is not barred by limitation as it would be governed by Article 181 and not Article 166 of the Limitation Act. Eminent Judges were parties to the Full Bench decision of the Madras High Court and yet, with utmost respect, I say, I find it difficult to follow their reasoning for arriving at the conclusion that an application for setting aside such a sale would be governed by Article 166 of the Limitation Act on the parity of the reasoning that if such an application would have been filed under Order 21 Rule 91 of the Code by a purchaser for setting aside the sale, it would have been governed by the said Article.

Gentle C. J. has definitely held that in such a situation the sale is void. He has observed at page 228(1) :

> "When, as in the present case, a person is the holder of land in respect of which there is a statutory prohibition against it being transferred or attached or sold in execution, that person has no saleable interest in the property. If such property is purported to be sold in execution the sale does not confer a title to it upon the purchaser nor divest the holder of the properly and the sale is void."

I may state my difficulty in accepting the reasoning of the Full Bench that, even if the sale is void, the application for declaring it so would be governed by Article 166. Firstly as I have said above, there is no question of declaring such a sale void at the instance of the purchaser, be he a decree-holder or a stranger. The purchaser has to ask the executing Court to set aside the sale under Order 21 Rule 91 of the Code. A judgment-debtor, if the sale has taken place against the statutory prohibition, can ask the court to declare the sale void. If the sale is set aside or declared void at the instance of the judgment-debtor, the satisfaction of the decree does not remain and the Full Bench decision reported in MANU/BH/0123/1935 : ILR 15 Pat 308 : AIR 1936 Pat 97) does not affect the right of the decree-holder to levy fresh execution if it is not otherwise barred.

It is also obvious that the order passed on a purchaser's application under Rule 91 is subject to only one appeal under Order 43 of the Code while that passed on a judgment-debtor's application on the same ground is subject to two appeals as the order will be a decree within the meaning of Section 47 read with Section 2(2) of the Code.

84. On the authority of numerous decisions, referred to earlier in my judgment and

in the two Full Bench decisions of the Andhra Pradesh and Madras High Courts, taking the view that the decree directing the sale against a statutory prohibition is a nullity, a view with which I have also substantially differed on the ground of res judicata, I feel no difficulty in taking the view that. if the plea is not barred by res judicata in the instant case, the sale held in direct contravention of the provisions of Section 49M of the Act is void. For this purpose, I also rely upon the case of MANU/WB/0159/1923 : AIR 1924 Cal 638. No contrary decision was cited before us. Mr. Prem Lall contended on the authority of AIR 1942 Lah 153 and Ramsagar Singh v. Ramajodhya Mahton MANU/BH/0092/1942 : AIR 1943 Pat 75 that the sale in question is voidable and not void. I am unable to accept this contention. Both these cases were concerned with the sale of a property which was not saleable under Section 60 of the Code.

There is a vital distinction between selling a property which is not saleable under Section 60 of the Code and one, sale of which is prohibited by the statute on grounds of public policy; in the former case private alienation is not prohibited while in the latter even the owner of the property is not allowed to sell it except under certain circumstances and by following certain procedure of law, as in the instant case. I, therefore, hold that the sale in question is void and the application filed by the respondent for declaring it so was not barred by limitation.

85. Before I proceed to consider the question of constitutionality of Section 49M of the Act, I would like to refer to a few cases wherein it has been held or observed that an order confirming the sale decides the saleability of the property and operate as res judicata. In this connection, first, it is necessary to notice the decision of the Supreme Court in Manual Mohanlal Shah v. Sardar Sayed Ahmed. MANU/SC/0005/1954 : AIR 1954 SC 349, wherein it has been held at page 351 (column. 2)---

> "Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent. of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent. of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can he no question of material irregularity, in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullify. The very fact that the court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case, there was no sale and the purchaser acquired no rights at all."

In the case in hand, the sale being against the mandatory provision of law was a complete, nullity, and, by confirming it under Rule 92 of Order 21 of the Code, the court was purporting to confirm a nullity and not deciding afresh any question as to the saleability of the property in so far as the rights of the judgment-debtor are concerned. It is manifest that, if the sale is a nullity, its confirmation is no better. In that view of the matter, if the holding of the sale and the order accepting its bid do not operate as res judicata as has been held by me, it is obvious that the order

confirming the sale in this case cannot operate as such.

86. In MANU/TN/0052/1925 : AIR 1926 Mad 12, the facts were that Perumal, owner of the property, had mortgaged it to the defendant. It was, then an unenfranchised inam. In execution of a money decree obtained against Perumal, the property was sold in court auction. Even then it was an unenfranchised inam. The plaintiff's vendor became the purchaser at the said sale and thereafter instituted the suit giving rise to the appeal before the High Court to redeem the mortgage in favour of the defendant. The defence of the mortgagee was that the sale conveyed no title to the plaintiff as the property was inalienable. On this hypothesis the defendant had to concede that the mortgage in his favour was invalid but he relied upon a sale made to him of the property by Perumal subsequent) to the enfranchisement of the property. On these facts, a question was posed as to what was the effect of the court sale, in other words, as to whether Perumal or the defendant claiming through him could plead that the property was in fact inalienable on the date of the court sale.

Venkatasubba Rao, J. answered the question thus--

> "The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold."

In support of this view, the learned Judge placed reliance upon MANU/WB/0296/1905 : 9 C WN 972. In this case; Mitra J. decided the matter in the first instance and his decision was upheld by the Letters Patent Bench. The question discussed before the learned Judge referred 'to the effect of the defendant not objecting to the attachment and sale during the pendency of the execution proceedings on the ground of the holding being non-transferable by custom or local usage'. The answer was--

> "There can be no doubt upon the authorities that the defendant could under Section 244 C. P. C., object to the attachment and sale on the ground that he had no saleable interest in the holding.... and it may seem doubtful whether the defendant may afterwards object to the delivery of possession to the purchaser after confirmation of the sale."

In support of this view, Mitra J. placed reliance upon the case of ILR Cal 727, wherein it has been held at page 732--

> "An order for sale was made, and in furtherance of that order, the property was sold, whatever may he the effect of that sale. If the judgment-debtors were parties to that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order, and consequently of the sale that has taken place under that order. They say, however, in their application, to which We have already referred, that they were not aware of the proceedings in attachment of this property, nor of the proceedings in connection with the sale thereof, clearly indicating that they were not parties to the order for sale; and they say that this was owing to the fraud on the part of the decree-holders. The Courts below have not gone into this question. In the view we take of this case it would be necessary to enquire into the matter and determine whether the judgment-debtors were parties to the order for sale or were aware of it. If this question be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place."

The passage just quoted from the case of Durga Charan Mandal ILR Cal 727, which forms the basis of the Madras case in MANU/TN/0052/1925 : AIR 1926 Mad 12, clearly supports the view taken by me in my judgment on the point of res judicata. It is to be noticed that in the Madras case also in execution of the money decree the order for sale must have been made at a time when the property was unenfranchised inam as it was so on the date of the sale, and, in that view of the matter the decision, if I may say so with respect, was correct on the following (sic) that the order for sale decided that the land could be alienated and, perhaps, in that context, the expression used was 'the effect of the order confirming the sale is that the land can be alienated'.

Some such", expression has been used by Subba Rao C. J. in the Full Bench decision of the Andhra Pradesh High Court wherein the learned Chief Justice has said at page 3 of AIR 1958 A P 1

> "When a decree was made, the Court must be deemed to have decided that the said property was alienable property and, therefore, the said decree would operate as res judicata in a subsequent suit. The same reasoning would also apply, to the order of the confirmation of sale made in execution proceedings. The plaintiffs ought to have raised the plea that the items being carpenter service mains were not liable to be sold. By confirming the sale, the Court must be deemed to have held that the property was alienable and that order would operate as res judicata."

Having said so, the learned Chief Justice has further observed--

> "To put it differently, a decision of a Court either actual or constructive, on an issue that arises in a suit or in execution proceedings would operate as res judicata in subsequent proceedings between the same parties, and, on the basis of that principle, the decree obtained against the plaintiffs in the mortgage suit as well as the 'order of sale' made in execution proceeding would be binding on the plaintiffs in the present suit." (The above underlining (here in ' ') is mine).

The decision, therefore, in effect and substance, is that either a decree for sale or an order of sale made in execution proceeding, operates as res judicata as to the saleability of the property.

87. In view of my decision on the points of res judicata, and limitation being against the decree-holder appellant, I am obliged to decide the point of the constitutional validity of the impugned section, namely, Section 49M of the Act. Mr. Prem Lall's submission is that under Article 15 (1), of the Constitution 'the State shall not descriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them' and under Clause (4) of the said Article the State is not prevented 'from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'. Under Articles 341 and 342, the President or the Parliament may 'specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes' and 'the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes. ....'.

These Articles do not speak about the specification of the backward classes and

Article 15(4) does not prevent the State from making any such provision for the advancement of any socially or educationally backward classes of citizens. Therefore, the type of the protection which has been given to the members of backward classes under Section 49M of the Act is, learned counsel submitted, hit by Article 15(1) and violates the fundamental rights of the decree-holder to proceed against the property of a member of the backward classes. It was also pointed out that, even the directive principles of State policy as contained in Article 48 provide that 'the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled tribes, and shall protect them from social injustice and all forms of exploitation'. In reply the learned Government Advocate submitted that a holder of a decree for realisation of money has no fundamental right to acquire the property of a judgment-debtor alienation or sale of which is prohibited by law. Different considerations may arise if the holder of the decree is one holding a mortgage decree for sale.

The right of a member of the backward class to sell the property is not being curtailed by Section 49M and different considerations may arise if he comes and makes a grievance of the curtailment of his right to alienate his property as has been provided in Section 49C. Reliance has been placed upon the decision of the Supreme Court in Express Newspaper (Private) Ltd. v. Union of India MANU/SC/0157/1958 : AIR 1958 SC 578, in support of the contention that it is only legislation directly dealing with the right mentioned in Article 19(1) that was protected by it and, if the legislation was not a direct legislation on the subject the said Article would have no application, the test being not the effect or result of the legislation but its subject matter. A similar argument advanced in the Supreme Court by the learned Attorney General is dealt with at pages 618 and 619 of the Report and has been accepted. Finding myself alone under the necessity of deciding this point and, as at present advised, I accept the argument of the learned Government Advocate and hold that in the present case at the instance of the decree-holder it cannot be held that Section 49M is unconstitutional and violates any fundamental right of the decree-holder.

88. In the result, I would dismiss both the appeal and the Civil Revision but would make no order as to costs.

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