

CHAPTER - VII

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An abridged account of the study relating to changing dimensions of the doctrine of *res judicata* and the Procedure of the courts is put up in order to deduce some general conclusions and suggestions. The chapter wise conclusions are submitted as follows.

This principle was also known to Roman law as 'exceptio *res judicata*'. Generally the plea of former Judgment is a bar whenever the same question of right is renewed between the same parties by whatever form of action. This doctrine was adopted by the countries on the European continent which had modelled their civil law on the Roman pattern. In France, the doctrine is known as '*Chose jugee*' 'thing adjudged'. This principle of preclusion of re-litigation, or the conclusiveness of Judgment, has struck deep roots in Anglo-American jurisprudence and is equally well-known in the Commonwealth countries which have drawn upon the rules of Common law. The doctrine of *res judicata* is recognised as a principle of

universal jurisprudence forming part of the legal systems of all civilised nations.

The doctrine of *res judicata* is based on two theories : (1) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of community as a matter of public policy and (ii) the interests of the individual that he should be protected from multiplication of litigation. It, therefore, serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for the otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the court to recognize that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot, therefore, survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of *res judicata*.

The rule of *res judicata* contained in Section 11 of the Code has some technical aspects, the general doctrine is founded on considerations of high public policy to achieve two objects namely (i) that there must be a finality to litigation and (ii) that individuals should not be harassed twice over with the same kind of litigation.

The general principle of *res judicata* is embodied in its different forms in three different Indian major statutes--Section 11 of the Code of Civil Procedure, Section 300 of the Code of Criminal Procedure, 1973 and Sections 40 to 43 of the Indian Evidence Act, yet it is not exhaustive. Here, we are concerned only with Section 11 of the Code of Civil Procedure. Following conditions must be proved for giving effect to the principles of *res judicata* under Section 11:

- (a) that the matter directly and substantially in issue in the subsequent suit must be same which was directly and substantially in issue in the former suit,
- (b) that the parties are same,
- (c) that the parties are litigating under the same title,
- (d) that the matter in issue was decided by a Court of competent jurisdiction

(e) that the matter in issue has been heard and finally decided earlier,

If any one or more conditions are not proved, the principle of *res judicata* would not apply.

Thus, the doctrine of *res judicata* is a fundamental concept based on public policy and private interest. It is conceived in the larger public interest which requires that every litigation must come to an end. It, therefore, applies to civil suits, execution proceedings, arbitration proceedings, taxation matters, industrial adjudication, writ petitions, administrative orders, interim orders, criminal proceedings, etc.

Chapter –I is introductory. It explains that the doctrine of *res judicata* is a common law principle and based on public policy which aims that the decision of a court should be given finality for an end to litigation and no person should be vexed twice for the same cause. Thus, the doctrine of *res judicata* intends to protect a person from multiplicity of litigation and avoid conflicts of decisions.

In **Chapter – II** it has been discussed that the doctrine of *res judicata* is origin of Latin maxim “*Res judicata pro verities accipiter*” and evolved from then English common law system

wherefrom it got included in the Civil Procedure. As a whole it was adopted by the Indian legal system.

Res judicata comprises two words 'res' and 'judicata'; res means thing and judicata means already decided. Thus *Res judicata* means a case or suit which involves a particular issue between two or more parties, is already decided by a court.

Res Judicata is the Latin term for "a matter already decided", any may refer to two things in both civil law and common law legal systems, firstly, a case in which there has been a final judgment and is no longer subject to appeal; and the secondly, the term is also used to refer to the legal doctrine meant to bar or preclude, continued litigation of such cases between the same parties, which is different between the two legal systems. In this latter usage, the term is synonymous with "preclusion."

The term is also used to mean as to 'bar re-litigation' of such cases between the same parties, which is different between the two legal systems. Once a final judgment has been announced in a suit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the *res judicata* doctrine to preserve the effect of the first judgment. This is to prevent

injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources and time of the Judicial System. And, therefore, the same case cannot be taken up again either in the same or in the different Court of India. This is just to prevent them from multiplying judgments.

In ancient India, the concept of *res judicata* is also found in the name of *purvnyay* or *prangnyay* meaning thereby the previous judgment in the Dharma Shastras. The Indian ancient jurists had evolved and developed the concept of *res judicata* under the title of *prangnyay* wherein if a person who has been defeated in a suit according to law files his plaint once again he must be told that he has been defeated already. Thus, the party was prevented from re-agitating a dispute which had already been decided between the parties. Therefore, the doctrine of *res judicata* was a judicial concept wherein the court did not allow a case to be filed in the same or the other court.

The doctrine of *res judicata* holds that a litigation must be final and a litigant should not be tried twice over on the same cause. The doctrine of *res judicata* is pre-eminently a principle of equity, good conscience and justice. It would neither be equitable nor fair nor in accordance with the principle of justice that the issue concluded earlier ought to be permitted to be

raised later in a different proceeding. Thus, the doctrine of *res judicata* comprises rules of equity and justice.

The doctrine of *res judicata* is based on public policy that there should be an end to a litigation being accepted as correct and no one should be vexed twice for the same cause. Therefore the doctrine of *res judicata* involves private and public interest that a decision of a court should be given a finality for an end to a litigation and protection for life or personal liberty of a person. Thus, the doctrine of *res judicata* is a fundamental concept based on public policy and private interest.

The doctrine of *res judicata* is the legislative explanation of the common law maxim, "*nemo debet bis vexari pro una eadem causa*", i.e. no man should be vexed twice for the same cause or the same offence which as a principle has long been recognised in India, even before the enactment of the Civil Procedure, 1859, which tacitly recognised the rule in Section 2 which was held, however, not to exclude operation of general law relating to *res judicata* as settled in England. The present Code of Civil Procedure has adopted the border rule of bar by verdict, that is to say that a decision of every issue in a suit is *res judicata* in every subsequent suit. Thus, the doctrine of *res*

judicata has been imported almost from the common law system in this country.

The doctrine of *res judicata* contained in Section 11 of the Code of Civil Procedure, 1908 is applicable in areas governed by the rules of administration of justice, although the letter of the Code is not applicable in the State of Jammu and Kashmir and the State of Nagaland and the Tribal areas.

Section 11 of the Code of Civil Procedure, 1908 deals with this concept. It embodies the doctrine of *res judicata* or the rule of conclusiveness of a judgement as to the points decided either of fact or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a court, neither the party nor the persons claiming there under can be allowed to reopen the matters in a subsequent litigation. Thus, the doctrine of *res judicata* is applied to preserve the effect of first judgement so as to prevent injustice to the parties of a case supposedly finished.

Section 11 does not affect the jurisdiction of the court but it operates as a bar to trial of the suit or issue, if the matter in the suit was directly and substantially in issue and finally decided in the previous suit between the same parties litigating under the same title in a court which is barred in the subsequent suit

wherein such issue has been raised. Thus, the doctrine of *res judicata* is based on finality of judgments.

The doctrine of *res judicata* is not confined to what is contained in Section 11 but is of more general application. *Res judicata* could be as much applicable to different stages of proceedings in the same suit as it is applicable to findings or issues in different suits. Thus, the doctrine of *res judicata* has wider application on the basis of wider principle of the finality of decisions of the courts of law.

The doctrine of *res judicata* also includes two related concepts of claim preclusion, and issue preclusion that is also called collateral estoppels. The claim preclusion bars a suit from being brought again on a legal cause of action that has already been finally decided between the parties. Issue preclusion bars the re-litigation of factual issues that have already been necessarily determined by a judge as a part of an earlier claim. Thus, the doctrine of *res judicata* is applicable to legal well as factual issues previously decided between the parties by the competent court.

Chapter – III has contained the matters relating to the doctrine of *res sub judice* and the Code of Civil Procedure wherein the section 10 provides for *res sub judice* and makes a

bar on the power of the concurrent courts to try a subsequent suit if the previously instituted suit is pending in the same court. Thus, the doctrine of *res sub judice* as contained in Section 10 of the Code of Civil Procedure differs in meaning and scope to the doctrine of *res judicata*.

The doctrine of *res judicata* contained in Section 11 of the Code has some technical aspects. The general doctrine of *res judicata* is founded on considerations of high public policy that there must be a finality to litigation and the individuals should not be harassed twice over with the same kind of litigation. The doctrine of *res sub judice* or stay of suit as contained in Section 10 of the Code aims to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties relating to same matter in issue and to avoid the conflicting decisions of two competent courts in respect of the same relief. Thus, the doctrine of *res judicata* is related to finality of judicial decisions whereas the principle of *res sub judice* avoids contradictory judgments of one and the same court in respect of the same matter in issue.

Chapter- IV has covered the study as to what the Code of Civil Procedure has provided for the doctrine of *res judicata* and the scope of *constructive res judicata*.

The doctrine of *res judicata* contained in Section 11 of the Code is a rule of procedure and a special rule of estoppel called estoppel by record. The previous judgement creates an estoppel which merely means that what has been decided must be taken to be established as a fact, that the decided issue cannot be reopened by those who are bound by the judgment. Hence, such an estoppel savours of an equity or justice created by actions of parties, the result of which have become recorded formally behind which they are not allowed to go. Thus, the doctrine of *res judicata* is a domain of procedural law.

The concept of constructive *res judicata* has been incorporated in explanation IV of Section 11 of the Code of Civil Procedure, 1908. The basis on which the rule of constructive *res judicata* is founded on consideration of public policy whereupon the foundation of the general principle of *res judicata* is based that the finality should attach to the binding decisions of the courts. The explanation refers to any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially is issue in such suit. The principle underlying the explanation is that if a party had an opportunity to raise a matter in a suit that should be considered to have been

raised and decided. Thus, a plea which might and ought to have been taken in the earlier suit shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit, such plea is constructively barred by the doctrine of *res judicata*.

Prior to the Amendment Act, 1976 there were conflicting views whether the provisions of Section 11 of the Code of Civil Procedure, 1908, is applicable to the execution proceedings. After insertion of explanation VII to Section 11 in the Code vide Amendment Act, 1976 it has been made clear in the explanation Vii that the provisions of the Section 11 are now applicable to a proceeding for the execution of a decree, and references in the section to a suit, issue or former suit shall be construed as references respectively to a proceedings for the execution of a decree, question arising in such proceedings and former proceeding for the execution of that decree. Thus, now it is clear that not only general principal of *res judicata* but also constructive *res judicata* would apply to execution proceedings.

For application of the doctrine of *res judicata* it is essential that the court which decided the former suit was competent to try the subsequent suit prior to induction of explanation VIII to Section 11 of the code, the views of some of the courts were

where the former court was court of limited jurisdiction and was not competent to try subsequent suit, the finding of the former court on any issue did not bind the subsequent court on that issue. This anomaly has been removed by insertion of explanation VIII to Section 11 by providing that the prior decision rendered on the issue concerned by a court of limited jurisdiction, competent to decide such issue shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit. Thus, the determined of *res judicata* has now been made more effective by ^{cert} ~~inserting~~ explanation VII and VIII to Section 11 of the Code of Civil Procedure, 1908 and the doctrine of *res judicata* is now applicable to changing circumstances.\

Chapter – V refers to various synonymous provisions contained in other Acts relating to bar the further litigations. The Constitution of India under Article 20 (2) provides that no person shall be prosecuted and punished for the same offence more than once and, thus, provides protection to an accused person against double jeopardy known as in Anglo- American jurisprudence. Article 20 (2) affords protection against a second trial after conviction of the same offence. This constitutional guarantee is available only if the accused is convicted or

prosecuted and punished. Thus, if the first prosecution results in acquittal, the second prosecution is not prohibited under Article 20(2) of the Constitution.

It is necessary to bar further litigation that the proceedings which have been taken for an offence must constitute a 'prosecution', otherwise Article 20(2) will not be attracted if the proceedings do not constitute a prosecution. Thus, the protection extended to an accused person under clause (2) of Article 20 of the Constitution of India is narrower than the American doctrine of 'double jeopardy' as well as the English Common Law rule which comprises both *autrefois convict* i.e. previous conviction and *autrefois acquit*, the previous acquittal.

The Code of Criminal Procedure, 1973 under Section 300 also bars a second trial for the same offence for which a person who has once been tried by a court of competent jurisdiction for an offence, convicted or acquitted of such offence and such conviction or acquittal remains in force. Thus, the rule of *autrefois convict* or *autrefois acquit* has received recognition in the section 300 of the Code of Criminal Procedure, 1973 whereas the Constitution of India under clause (2) of Article 20 only recognises the counter part of the rule *autrefois convict*. Hence the Section 300 of the Code of Criminal Procedure has

widened the protection by debarring a second trial against the same accused on the same facts, even to the extent that some more allegations were not made in the first trial.

The similar protection to an offender has also been provided under Section 26 of the General Clauses Act, 1897 where an act or omission constitute an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or only of these enactments, but shall not be liable to be punished twice for the same offence.

Section 12 of the Code of Civil Procedure, 1908 also put a bar to file a further suit where a plaintiff is precluded by rules from instituting a further suit in respect of any other particular cause of action and he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies. Thus the said Section restricts the institution of further suit statutorily.

So far as the applicability of the doctrine of *res judicata* in criminal proceedings is concerned, the doctrine of *res judicata* says that the verdict of a competent court shall be conclusive even as between the prosecution and the accused in all subsequent proceedings. It can not be excluded by the fact that

the rule against double jeopardy has been confide in Section 300 of the Code of Criminal Procedure and also guaranteed by Article 20 (2) of the Constitution, because the scope of the two principle is not identical. Since the doctrine of *res judicata* rests on the identity of issues at the two trials, the general rule of *res judicata* also applies to criminal cases.

In Chapter – VI, the judicial trends relating to the doctrine of *res judicata* and comparative aspects in different laws have been discussed in details. The courts in India have recognised the doctrine of *res judicata* in their various judgement in positive sense and enlarged the scope of the doctrine by applying the general rule of *res judicata*. As the doctrine of *res judicata* is wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations. The doctrine of *res judicata* has been applied by the courts with condition that there should be no unnecessary litigation and whatever claims and defences are open to parties shall all be put forward at the same time so that the finality should attach to the binding decision of the courts and the individuals should not be vexed twice over with the same kind of litigation.

Thus, the doctrine of *res judicata* under the provisions of section 11 of the Code of Civil Procedure has its narrower application than the common law concept of the general rule of *res judicata* has also been enlarged and given broader explanation with pace of time and changing circumstances as submitted supra.

In the last **Chapter- VII**, the researcher has made a benign effort to deduce some conclusions as submitted above and now, the researcher would like to submit the following **suggestions** in the subject relating to changing dimensions of the doctrine of *res judicata* and the provisions of Civil Procedure.

1. The scope of section 11 should be extended in the basis of public policy and not be limited to the decree passed by the court under the Code of Civil Procedure. As the doctrine of *res judicata* has been incorporated under Section 11 of the Code of Civil Procedure and hence it is a statutory principle. Where the court is dealing with a suit the only ground on which *res judicata* can be urged against such a suit would be the provisions of Section 11 of the Code and no other any matter in controversy is decided after full contest or after affording fair opportunity to the parties to prove their case by a competent court, the

general principle underlying the rule of *res judicata* will operate as *res judicata* in the subsequent regular suit as the nature of the former proceeding is immaterial. The principle of *res judicata* may not be applied strictly in bar of a suit as well in appeals arising out of suits, otherwise great injustice might be done by confining it the four corners of Section 11 of the Code:

2. The matter or issue decided by the court collaterally, the doctrine of *res judicata* should be made applicable so that there may not be useless litigation between the parties in dispute. As the doctrine of *res judicata* has no application where the matter in suit has not been “directly and substantially” but only incidentally or collaterally in issue. The Section 11 not only bars the suit itself but also bars an issue. It is not necessary to constitute a matter “directly and substantially” in issue, it is sufficient that the matter was in issue in substance. The doctrine of *res judicata* may be applied where the matter in suit is incidentally or collaterally in issue being in issue in substance.
3. The section 11 should be given liberal interpretation for application of general principles of the Common Law doctrine of *res judicata* as the doctrine comprises rules of

equity and justice which preclude a litigant to raise the issue later in different proceedings. It is, undoubtedly acknowledged that the doctrine of *res judicata* is wide import and it has been held in number of cases that the Section 11 is not exhaustive and the application of the rule by the courts in India should be influenced by no technical consideration of forms but by matter of substance within the limits allowed by law. The principle of conclusiveness of judgement is also much wider and is a part of the general principles of *res judicata*. These principles have been held by the authorities to be good principles apart from the provisions of Section 11. The Principle which prevents the same cause being twice litigated is of general application and it should not be limited to the specific words of the Code in this respect. Thus, the general principle of the doctrine of *res judicata* may be applied to prevent the same cause being twice litigated.

4. The doctrine of *res judicata* should be applied in case of compromise decree if it is passed fraudulently. Even the doctrine of *res judicata* under the section 11 is not strictly applicable to compromise or consent decrees as the section applies in terms only to what has been heard and finally

decided by the court. When the parties are intended to deciding the matter in issue finally and such compromise or agreement is super added for seal of the court, the same may be treated as decree finally decided by the court for the purpose of bar of general rule of *res judicata* and giving effect to the provision of Section 89 inserted by the Amendment Act of 1999 in the Code of Civil Procedure.

5. The scope of constructive *res judicata* should be extended in general proceedings and even to cover decisions in claim proceedings. The decision in claim proceedings under Rule 58 of Order XXI becomes conclusive and operates as *res judicata* in subsequent proceedings. But it can be challenged in a suit brought under rule 58 (5), or it may also be challenged by bringing a regular suit without taking recourse to the provisions of order XXI, Rule 58. Such suit should be barred by the doctrine of Constructive *res judicata* to avoid multiplicity of litigation and to bring about finality of the decision and also dealing with the possibility of abuse of process of law that is clearly opposed to the considerations of public policy on which the doctrine of *res judicata* is based.

6. The doctrine of *res judicata* should be made applicable in acquittal proceedings also through the principles of double jeopardy even under Article 20 (2) of the Constitution of India. The Article 20 (2) bars a subsequent criminal case if a person is indicted again for the same offence. It incorporates the principle which in Anglo-American jurisprudence is known as the principle of double jeopardy. The constitutional guarantee embodies the principle only of *autrefois convict* i.e. previous conviction and does not include the principle of *autrefois acquit*, the previous acquittal. The clause (2) of Article 20 of the Constitution is, thus, narrower than the American doctrine of double jeopardy as well as the English common law rule which comprises both *autrefois convict* and *autrefois acquit*. An amendment to Article 20 (2) may be solicited by substituting term 'prosecuted and punished' with the term 'double jeopardy' as is in the American constitution, so as to extend protection of the principle of *autrefois acquit* to an accused already acquitted in previous proceedings.
7. The scope of section 12 of the Code should explicitly be extended to the cases covered under rule 2 of Order 2, rule

9 of Order 9, rule 9 of Order 22 and rule 1 of Order 23 of the Code of Civil Procedure, 1908. As the bar created under section 12 does not extend to the suits barred under section 11 of the Code.

8. The doctrine of res judicata should be applied in case of writ petition passed by the High Courts and the Supreme Court of India. As the doctrine of *res judicata* is not confined to the issues which the court is actually asked to decide but to covers those issues or facts which from so clearly the part of the subject-matter and they could have been so clearly raised. It would be an abuse of the process of the court if such issues or facts are allowed in a new proceeding and it is also in the public interest that a decision should be given finality and no one should be vexed twice over with the same kind of litigation.

9. The doctrine of *res judicata* should be applied in the decisions made in summary proceedings. As it is the law that the doctrine of *res judicata* is not confined to decisions in a suit and that the doctrine applies even to decisions rendered in proceedings which are not suits. But how, far the decision which is rendered in original proceedings will bind the parties, depends upon the

considerations. A decision given in a proceeding other than a suit may still operate as *res judicata* if substantial rights of the parties are determined. But if the decision is given in a summary proceeding, it does not operate as *res judicata*. Thus, the doctrine of *res judicata* may be extended to cover decisions in summary proceedings also.

10. The doctrine of *res judicata* may not only be limited to the provisions contained in Section 11 of the Code of Civil Procedure but the general principles of *res judicata* being derived from the common law may be given effect to principle of the finality of decisions, so as to implement the doctrine of *res judicata* more effectively.

Thus, the fact of matter is that there is a serious laying invited of the doctrine of *res judicata* as provided under the provisions of Section 11 of the Code of Civil Procedure, 1908. Such a lacuna concavely be removed only with the application of *res judicata*, a common law principle wherein generally the plea of former judgment is a bar whenever the same question of right is removed between the same parties by whatever form of action. Doctrine of *res judicata* should be interpreted and applied liberally. Since long the doctrine is based on high public policy and upon the need of giving finality to judicial decisions,

a strict and technical construction would not serve its real purpose which requires that all litigation must, soever than later, come to an even century ago the Privy Council in **Sheoparson Singh (1916)** had held that in deciding whether the doctrine would apply, its substance and not the form should be considered.

The doctrine of *res judicata* has been held to be of wider application on the basis of the wider principle of the finality of decision by court of law. The scope of the doctrine of *res judicata* is not confined to what is contained in Section 11 but is of more general application and it includes a lot of things which even includes public interest litigation. The doctrine should apply to all decisions passed by the High Courts and the Supreme Court of India so as to avoid the abuse of the process of the court. The scope of the doctrine of *res judicata* has also been enlarged by the Amendment Act, 1976 by inserting Explanation VII and VIII to make the *res judicata* more effective and extended even to execution proceedings. But challenging the decision in claim proceedings in execution by bringing a regular suit is still out of the scopes of the *res judicata*. It is clearly approved to the consideration of public policy on which the doctrine of *res judicata* is based.

In India the Constitutional guarantee embodies the principle of only of 'autrefois convict' and does not include the principle of 'autrefois acquit' wherefrom it reason that this has been left to be regulated by the general law of the land. The Supreme Court has also viewed this likewise in its judgements. It is, therefore, the present clause i.e. Article 20(2) of the out constitution is narrower than the American doctrine of 'double jeopardy' and the English Common Law rule of '*autrefois convict*' and '*autrefois acquit*' and also the protection afforded by Section 300 of the Code of Criminal Procedure. Which combines both '*autrefois convict*' and '*autrefois acquit*'. The constitutional guarantee should be extended by soliciting an Amendment so Article 20(2) so as to give effect to the general rule relating to *res judicata*.

Therefore, with the above discussion and judicial views, the doctrine of *res judicata* should be made more effective by extending its scope to writ petitions, summary proceedings general and claim proceedings in execution, consent or compromise decree, acquittal proceedings and also by giving liberal interpretation for application of general principles of the Common Law doctrine of *res judicata* which is need in the present setup of the society exist in India.
