



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

R.S.A. No. 464/2006

Reserved on: 22.8.2019

Decided on: 28.8.2019

Asha Devi

...Appellant

Versus

Dau Dayal (deceased) through his LRs

....Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting ?¹ Yes

For the appellant: Mr. Rajiv Rai, Advocate.

For the respondents: Mr. Sunil Mohan Goel, Advocate.

Tarlok Singh Chauhan, Judge

On 27.4.2007, this appeal came to admitted on the following substantial questions of law:

1. Whether a decision rendered under the provisions of Order 17 Rule 3 CPC is a decree and will operate as res judicata and bar a second suit for the same relief. It so, whether the findings of the learned courts below that the case is not hit by res judicata are sustainable in the eyes of law?
2. Whether the learned courts below have arrived at a right conclusion by holding that the order dated

¹ *Whether reporters of Local Papers may be allowed to see the Judgment ?Yes*

25.3.2000 (Ext. DW1/A) will not bar a second suit oblivious of the fact that the issues No. 1& 2 framed thereof have been decided against the plaintiff in the subsequent suit inter se the parties regarding the same subject matter and cause of action?

The parties shall be referred to as the “plaintiff” and “defendant”.

2 The un-controverted facts are that the plaintiff/respondent prior to filing of the instant suit had filed a civil suit (C.S. No. 83/2000, titled as Dau Dayal vs. Asha Devi) for permanent and mandatory injunction against the defendant/appellant before the learned Senior Sub Judge, Kullu and the same was dismissed under Order XVII Rule 3 CPC on 25.3.2000 when the plaintiff failed to lead any evidence despite several opportunities.

3 It is thereafter that the instant suit qua the same property bearing Khasra No. 2552/2303, Khata/Khatauni No. 1013/1020, situated in Phatti Balh, Kothi Maharaja, Tehsil and District Kullu, H.P. came to be filed. The plaintiff claimed mandatory injunction directing the defendant to remove, pull down and demolish the shed measuring 111.92 sq. feet as shown in the site plan in pink colour marked by letters ‘ABCDEF’ raised by the defendant in absence and

without the consent of the plaintiff wrongly and illegally over the slab of the plaintiff and further directing the defendant to put the suit land into its original position and in the alternative, suit for possession.

4 It was averred that the suit land was originally owned and possessed by one Ikadshi Dass, who had raised single storied lintel roof measuring 16' x 6" in length and 26' in breadth over the suit land and the same was purchased by the plaintiff vide sale deed, dated 12.9.1995. It was further averred that the plaintiff was basically resident of Mandi Town and earlier he was in possession of the structure, which was in the nature of a shop as a tenant and after purchasing the same in the year 1995, he became its absolute owner in possession along with land underneath to it existing over Khasra No. 2552/2303. It was further averred that the plaintiff after purchasing the suit property also raised one shed over the slab of the shop measuring 112.50 sq. feet, as shown in the site plan in green colour marked by letters 'EDNM'. Lastly, it was averred that the defendant despite having no right, title and interest over the suit property in the beginning of January 2004 when the plaintiff along with his family members had gone to his native place in

Mandi, encroached upon the aforesaid slab of the plaintiff wrongly and illegally by raising the shed as shown in the site plan marked by letters 'ABCDEF'. The defendant was requested several times to admit the claim of the plaintiff, but she refused to do so, hence, the instant suit.

5 The defendant contested the suit by filing written statement *inter alia* taking preliminary objections regarding the suit being barred by limitation, *res judicata* and estoppel. On merits, it was admitted that the plaintiff was owner in possession of the suit land, but it was denied that the whole of the ground floor of the plaintiff was existing over the suit land by alleging that part of the house standing over the suit land, which was about 1/3rd portion of the house, was owned and possessed by the defendant, which had been illegally encroached by the plaintiff in absence of the defendant. It was further alleged that in the year 1993, when the defendant had gone to her native place in Lahaul, the plaintiff by taking undue advantage of the absence of the defendant encroached upon the aforesaid adjoining land of the defendant and raised part of single storied on it. On return, when the defendant proceeded against the aforesaid act of the plaintiff, he entered into a settlement with the

defendant and it was agreed that the plaintiff would be allowed to retain the ground floor of the house existing on the land of the defendant and the defendant would be at liberty to raise building over her aforesaid land and make use of the slab of the house as existing on the land of the defendant. But when the defendant started raising her building over the slab as per the settlement, the plaintiff backed out and filed Civil Suit No. 83/2000, which as observed above, came to be dismissed under Order XVII Rule 3 CPC. It was further alleged that after dismissal of the aforesaid suit, the parties again entered into settlement and it was finally settled between the parties that the plaintiff would be allowed to retain the ground floor of the house as existing on the land of the defendant and the defendant may raise and complete her building and use such portion of the slab of the house as existing on the land and the plaintiff would have no objection to the same. It is only thereafter that the defendant completed construction of one story on the slab of the plaintiff, which was roughly shown by letters 'ABCDEF' and the said construction was completed in the year 2000. Similarly, the plaintiff also raised one shed on the aforesaid slab on the ground floor of his house and since the defendant

had raised her shed over the slab in the presence of the plaintiff by spending about Rs. 1 lac, therefore, the plaintiff was estopped from filing the suit by his own act and conduct.

6 The plaintiff filed replication to the written statement, wherein he re-asserted his claim as put forth in the plaint and denied the defence of the defendant.

7 On the pleadings of the parties, the learned trial court on 17.3.2005 framed the following issues:-

1. *Whether the plaintiff is entitled for relief of mandatory injunction for demolition of shed raised by defendant over the suit land as prayed for? OPP*
2. *Whether the suit of the plaintiff is within time? OPP*
3. *Whether suit of the plaintiff is barred by principle of res judicata ? OPD*
4. *Whether suit of the plaintiff is not maintainable in the present form? OPD*
5. *Relief*

8 After recording the evidence and evaluating the same, the learned trial court vide judgment and decree dated 7.3.2006 decreed the suit filed by the plaintiff and the appeal against the said judgment and decree came to be dismissed by the learned first appellate court vide judgment and decree

dated 19.8.2006 constraining the defendant to file the instant appeal.

9 I have heard the learned counsel for the parties and have also gone through the records of the case carefully.

SUBSTANTIAL QUESTIONS OF LAW NO. 1 & 2

10 Since both the substantial questions of law are intrinsically interlinked and interconnected, therefore, these were taken up together for consideration and are being answered by common reasoning.

11 In order to appreciate the controversy, it would be necessary to first refer to the judgments of both the learned courts below as to see how and in what manner they have dealt with these questions.

12 The learned trial court had framed specific issue No.3 as to whether the suit of the plaintiff is barred by principle of *res judicata* and while answering the said issue, the learned trial court in para 17 has observed as under:-

“The learned counsel for the defendant contended with vehemence that as it is proved on record that earlier the plaintiff has also filed the suit for injunction as well as for mandatory injunction against the defendant qua the suit property and the said suit of the plaintiff was dismissed and as the matter has finally been heard and decided between the parties as is clear from order

dated 25.3.2002 through which the suit of the plaintiff was dismissed under Order 17 Rule 3 CPC, the present suit of the plaintiff is barred by principle of res judicata. In support of his argument the learned counsel for defendant relied upon the copy of order, Ext. DW1/A copy of issues Ext. DW1/B, copy of plaint, Ext. DW1/C, copy of written statement, Ext. DW1/D, copy of replication, Ext. DW1/E filed in the earlier suit, but there is no force in the contention of learned counsel for defendant as it is clear from pleadings of the parties in the earlier suit that earlier suit was filed by the plaintiff for permanent injunction by alleging that the defendant is threatening to interfere over the suit property and in the alternative he filed the suit for mandatory injunction by alleging that in case the defendant succeeded in raising any sort of construction over the suit property the same be ordered to be demolished as is clear from Ext. DW1/C copy of plaint and further when the defendant has specifically alleged in para No. 7 of the earlier statement copy of which is Ext. DW1/D that the defendant is not raising any sort of construction over the suit property and further the matter in controversy in the present case i.e. defendant has encroached upon the suit property, it is unsafe to hold that the suit of the plaintiff is barred by principle of res judicata as the present suit has been filed by the plaintiff on the cause of action which arose to him subsequently after the decision of the earlier suit. Accordingly issue No.3 is decided in negative.”

13 The learned first appellate court answered issue No.3 in para 13 of its judgment, which reads as under:-

“Now, if coming to the findings recorded on issues No.2, 3 and 4 firstly it would not be improper to hold that the Court below has not committed any illegality and irregularity while holding that the suit is well within the period of limitation and even not barred by the principles of res judicata also because the plaintiff has categorically stated while in the witness box as PW1 that the defendant has constructed the disputed shed over the slab of his house some where in January 2004 when he was away along with other members of his family to his native place at Mandi. Not only this, but as per his further version he requested to pull down the shed so constructed by her but of no avail. It is thereafter, he has filed the present suit in the trial court on 11.8.2004, hence the same is well within the period of limitation and objections to the contrary raised to the contrary by the plaintiff is without any substance. The plea of res-judicata raised by the defendant in preliminary has also been discarded by the learned trial court because in the previous suit No. 83/2000 filed by the plaintiff against the defendant and dismissal thereof on 25.3.2002, the cause of action was absolutely different. As per the copy of plaint Ext. DW1/C and written statement Ext. DW1/D and also replication Ext. DW1/E, it is crystal clear that the previous suit was filed by the plaintiff for the decree of permanent prohibitory injunction against the defendant on the grounds that she had been

threatening to raise construction over the suit property and in the alternative for mandatory injunction directing thereby the defendant to pull down the construction, if any raised by her during the pendency of that suit. In the written statement, it was the case of the defendant that she is not raising any sort of construction over the suit property. Thus, it lies ill in her mouth to claim that the subject matter directly and substantially in issue in the present suit was directly and substantially in issue in the previous suit also. The present suit as a matter of fact has been filed completely in changed circumstances because now the plaintiff has admittedly raised construction of a shed over the slab of the building belonging to the plaintiff. This suit has thus been filed on a different cause of action. Thus issue No.3 has been rightly decided against her. In view of the defendant has raised construction of shed over slab of the house of the plaintiff, therefore, the suit is maintainable as he has every right to assail such act on her part in accordance with law.”

14 In this background, the moot question is as to whether the decree passed in the earlier suit under Order XVII Rule 3 CPC would operate as *res judicata*.

15 The learned trial court has simply referred to para 7 of the written statement to conclude that the suit was not barred by *res judicata* as the defendant had stated therein that she was not raising any construction over the suit land,

whereas the learned first appellate court has simply stated that the suit was not barred by *res judicata* on the ground that the cause of action in both the suits was different.

16 In my considered opinion, the reasoning given by both the learned courts below is contrary to law.

17 It would be necessary to first refer to the prayer made in Civil Suit No. 83/2000, which reads as under:

“It is, therefore, requested that the defendant herself and through her agents and servants may be restrained through a decree of permanent prohibitory injunction from raising any sort of construction on the slab of the suit property as described in para No. 2 of the plaint and from raising the unauthorized construction of her building in such a manner so that the rainy water of her building under construction may not fall on the suit property and in case if it is found that the defendant has succeeded in raising any sort of construction over the suit property, the same may be ordered to be removed, demolished and pull down at the costs and expenses of the defendant and the suit property may be ordered to be restored into its original position by way of mandatory injunction and a decree to that effect together with costs of the suit may be passed in favour of the plaintiff and against the defendant in the interest of justice.”

18 It is in dispute that the subject matter in both the suits is the same and in para 5 of the plaint in the earlier suit, the plaintiff had clearly averred that the defendant was raising construction over the suit land and it was for this reason that the relief of mandatory injunction had also been sought.

19 It would be apposite to refer to para 5 of the plaint, which reads as under:-

“That the plaintiff is the permanent resident of Mandi Town, and he generally resides there. On 6.6.2000, when the plaintiff visited the suit property, he came to know that the defendant has started raising the additional construction of some structure on the aforesaid vacant land, by constructing the walls of the hollo-blocks and while doing so, she had threatened to raise the proposed construction on the slab of the suit property by encroaching upon the same and also to deprive the plaintiff from raising further construction on his existing building. Not only so, the defendant is also threatening to keep the slope of the roof of her building under construction, so that rainy water may fall on the building of the plaintiff. Further the proposed building is being constructed by the defendant unauthorizedly without the prior permission and sanction of building plan from the Town and Country Planning Department as well as from the Municipal Council, Kullu, which is mandatory for which the defendant has go no right

and in case if the defendant is not restrained from doing so, then it will cause an irreparable loss and substantial injury to the plaintiff, which cannot be compensated otherwise by any costs.”

20 Now, in case the written statement is seen, even though the learned trial court has only relied upon para 7 of the same, but what was more important and has been conveniently ignored is the averments made in para 4 thereof, which reads as under:-

“That para No.4 of the plaint is not admitted to be correct.

The true facts are that the replying defendant is owner in possession of land measuring 0-2-0 bigha comprised in Khasra No. 2304/1813 of Khata No.758, Khatauni No. 1026, incorporated in Jamabandi for the year 1993-94 of Phati Balh Kothi Maharaja Tehsil and District Kullu. After that the replying defendant had purchased land measuring 0-1-10 bigha comprised in Shikmi, Khasra No. 1813/ 2/ 2/ 2/ 2/ 2/2/2/2/2/2/2/2/1 vide registered sale deed No. 1796, dated 28.11.1990 contained in Khata Khatauni No. 520 min/792 min and as such she is owner in possession of the and measuring 0-3-10 Bigha. The plaintiff despite the protest has encroached the land of the replying defendant and this encroachment was made by the plaintiff in the year 1993. Not only so, the plaintiff had raised unauthorized construction over the land of the replying

defendant by making unauthorized encroachment. The plaintiff has suppressed the true facts and filed the suit on false and frivolous allegations without having any cause and suit is just the counter blast to the claim of the replying defendant. The plaintiff has no legal right to encroach upon the land of the replying defendant. Therefore, the replying defendant reserve her right to claim the possession of the vacant plot by removing the encroachment by way of demolition of the construction over dispute . The value of the land which is unauthorizedly encroached upon by the plaintiff is Rs.1,00,000/- on which a court fee has been paid. Cause of action accrued in favour of the replying defendant firstly in the year 1993 and then on 4.6.2000 when lastly the plaintiff refused to admit the claim of the replying defendant.

It may be mentioned here that the land in dispute situated in the Shastri Navar Market on N.H.way 21, it the same is rented out then it fetch a monthly income of Rs.1000/- per month and as such the replying defendant is also entitled for the last 3 year for mesne profit for use and occupation at the rate of Rs.1000/- per month till the date of vacant possession is delivered to the replying defendant by removing of the illegal encroachment made by the plaintiff over the land of the replying defendant.”

21 It was on the basis of the pleadings of the parties that the court of the then Senior Sub Judge, Kullu, on 6.10.2000 framed the following issues:

- “1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed for? OPP*
- 2. Whether in the alternative, plaintiff is entitled to the relief of mandatory injunction as prayed for? OPP*
- 3. Whether the suit is not maintainable in the present form? OPD*
- 4. Whether the plaintiff has no enforceable cause of action to file the present suit? OPD*
- 5. Whether the plaintiff has encroached upon the land of the defendant, if so, its effect? OPD.*
- 6. Relief.”*

22 Admittedly, the plaintiff failed to lead any evidence, and, therefore, the suit was dismissed under Order XVII Rule 3 on 25.3.2000 by observing as under:-

“Heard. I am satisfied that sufficient opportunities have been afforded to the plaintiff to produce plaintiff's evidence but to no avail.

Heard. In view of no evidence on record, the issue No.1 and 2 are decided against the plaintiff and issue No. 3 to 6 are decided against the defendant as having not pressed. Accordingly, the suit of plaintiff is dismissed under Order 17 Rule 3 CPC. File, after completion, be consigned to records.”

23 Failure to adduce the evidence to prove the allegation of fact has to be held as a dismissal on merits under Order XVII Rule 3 CPC. The dismissal of the suit for want of evidence was a judicial order and admittedly, the same was not assailed in appeal and has, therefore, attained

finality and cannot be permitted to be reopened and the said order is binding not only on the parties, but on this court as well.

24 Order XVII Rule 3 CPC reads as under:-

“3 . Court may proceed notwithstanding either party fails to produce evidence, etc.— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under rule 2].”

25 ***In Rama Rao vs. Suriya Rao and anr., 1876***

I.L.R. (1) Mad. 84, it was observed by the Division Bench of Madras High Court that where the relief sought for in respect of certain property in a suit is different from the relief sought for in respect of the same property in a prior suit (between the same parties or their privies), but the title on which the relief sought for is based is the same in both suits, the dismissal of the formal suit for failure to establish such title is a bar to the second suit. Dismissal of a claim for failure on part of plaintiff to produce evidence to substantiate

it, is of the same effect as a dismissal founded upon evidence, for the purpose of barring a subsequent suit as res judicata.

26 In **Venkatachalam vs. Mahalakshamma, 1887 (10) Mad. 272**, it was held by another learned Division Bench of Madras High Court that the plea of res judicata ordinarily presupposes an adjudication on the merits; but Section 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.

27 In **Govindoss Krishnadoss vs. Rajah of Karvetnagar and anr., AIR 1929 Madras 404**, the Hon'ble Madras High Court held as under:-

"The question of law that is for decision is whether already the lower Court has not gone more than once beyond its jurisdiction in entertaining further petitions on matters which it had already finally decided. It appears to me that in this discussion two general principles have to be kept in mind; (1) that a party who

has objections to a proceeding before the Court must put these forward at the earliest opportunity and must put all of them forward and not keep back any of them for subsequent presentation, and (2) that when a Court of law has, in any proceeding before it, decided upon evidence or in the absence of evidence, a question of fact, it is not competent to it to allow that question to be again reopened except on the very restricted terms laid down by the provisions for review of judgment. The learned advocate for respondent 1 argues at large that since there is no specific provision in the Civil Procedure Code laying down such principles, these are not the law. He would and does contend that it is open, for example, for a judgment-debtor who has several objections to the execution of a decree against him to put forward only one of them at a time and hold the others in reserve until that one has been disposed of, then to put forward another, holding the rest again in reserve and so on. It is a sufficient answer to that contention to repeat the old principle which Courts of law are bound to obey and respect, even if parties before them do not, that there must be an end to litigation and it is intolerable that a Court should encourage a judgment-debtor to protract the execution of a decree against him in such a fashion. It is a well-recognized principle and settled practice that a party must put forward his case at the earliest opportunity and as a whole. All the objections he has to state to a proceeding against him must be put forward at once on peril of his being estopped from putting them forward

at a later stage. A party cannot be allowed to put forward his case piecemeal. Each party to a legal proceeding is entitled to have a fair outline of the whole of his opponent's case at the earliest opportunity, and is not to be defeated by his opponent withholding part of it from him in order to bring it forward later. Any other principle is merely turning the machinery for the disposal of cases into a machinery for not disposing of them."

28 Relying upon the judgment in **Govindoss Krishnadoss's case** *supra*, the Lahore High Court in **Nila vs. Punun AIR 1936 Lahore 385** observed as under:-

"As to the second point, viz. that the decision was not on merits, the ruling cited by the learned counsel for the appellant viz. 1929 Mad 404(1), supports his contention that a decision under O.17 R. 3, Civil.P.C., in circumstances like those of the previous suit by Kartar Singh, is to be deemed on merits, and such a decision falls within the scope of S.11, Civil. P.C.; ref. also 40 All 590."

29 Similar issue came up before the learned Division Bench of Oudh High Court in **Har Dayal vs. Ram Ghulam, AIR (31) 1944 Oudh 39**, wherein the Court was dealing with a suit that had been dismissed for non payment of costs on

adjournment and whether the same falls under Order 7 Rule 3 and not Rule 1 and it was observed as under:-

“In order that the provisions of R.3 should apply with full force and effect it is not necessary that there should be actual decision on the merits. The words “to comply with any previous order’ in O. 17 Rule 3 are sufficiently general to include the order for payment of costs occasioned by an adjournment. An order that non-payment of the costs of adjournment (to enable the plaintiff to implead a certain person as a necessary party) the suit shall stand dismissed falls within the purview of O. 17 Rule 3 and not R. 1. The Court in dismissing the suit in consequence of that order, must, therefore, be deemed to have decided it on merits. As the order falls within O. 17 R. 3, the dismissal of the suit operates as a bar to the maintainability of the second suit.”

30 In **Bhagwan Dass (Died) through his LRs. vs.**

Ramesh Kumar, (2000-1) 124 P.L.R.110, Punjab and

Haryana High Court was dealing with a case wherein the eviction petition had been dismissed under Order XVII Rule 3

CPC as the landlord had failed to produce any evidence and

the same was closed. What would be the effect of said order

was duly considered and after relying upon judgments in

Nila and Har Dayal’ cases (*supra*), it was held as under:-

“7. Learned counsel for the petitioners urged that earlier also inter se parties an eviction petition was filed by the respondent-landlord. The ground of eviction was the same that the property has been sublet by Bhagwan Dass to his son Raj Kumar. The said petition for eviction was contested and was dismissed under Order 17 Rule 3 of the Code of Civil Procedure (for short “the Code”). According to the learned counsel, the said decision operates as *res judicata* and the ground of subletting is not available to the respondent-landlord.

8. As mentioned above, learned Appellate Authority expressed the opinion that this is decision was not on merits and that the provisions of the Code of Civil Procedure will not strictly apply to these proceedings.

9. To appreciate the said contention, it must be at the outset restated that the earlier petition for eviction was dismissed under Order 17 Rule 3 of the Code. It was respondent-landlord who had failed to produce any evidence which was closed. Thus, the said decision had become final inter se parties. When a person is given an opportunity to lead evidence and he does not produce any evidence in the Court, it would be taken as a decision on merits. The learned Appellate Authority was patently in error in coming to the conclusion to the contrary.

10. Reference in this connection can well be made to the decision of the Lahore High Court in the case of *Nila v. Punun*, A.I.R. 1936 Lahore 385. It was held that if the earlier decision is under Order 17 Rule 3 of the

Code and had been conducted without any negligence then it is a decision on merits and would operate as *res judicata*. Same opinion was expressed by a Division Bench of Oudh High Court in the case of *Har Dayal v. Ram Ghulam*, A.I.R. 1944 Oudh 39. It was held that once the suit is dismissed under Order 17 Rule 3 of the code, it must be taken to be a decision on merits.”

31 What would be the effect of dismissal of the suit under Order XVII Rule 3 CPC is no longer *res integra* insofar as this Court is concerned as legal position has been elaborately dealt with by this Court (Coram: Justice Arun Kumar Goel, as his Lordship the then was) in ***Prem Raj Sharma vs. Baldev Verma, 2002 (2) Shim.LC 74***. The relevant observation reads as under:-

“[17] Before adverting further in the case provisions of Order 17 Rule 3 and Section 11 of the Code of Civil Procedure need to be extracted:

Order XVII Rule 3”

3. Court may proceed notwithstanding either party fails to produce evidence, etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, (the Court may, notwithstanding such default,

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.

Section 11 Res-Judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I, II, III, IV xxxxx.

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

[23] As per provisions of Order 17 Rule 3(a), trial Court had no option but for proceeding in accordance with law when evidence was not produced by the parties before it. In accordance with the mandate of law, it has chosen to proceed to decide the suit forthwith. This resulted in passing of the judgment Ex. PZ. In this context, it may be noted that provisions' of Order 17 Rule 3 Code of Civil Procedure were amended vide Act 104 of 1976. Defendant, failed to produce his evidence as was necessary to the further progress of the suit for which time had been allowed. Had the Court adjourned the case and/or in case Defendant was not present in

his suit *supra*, situation would have been different. Therefore, there is nothing wrong in the matter having been decided forthwith. What is the affect of earlier decision as well as of the provision of Section 11 Explanation (V) Code of Civil Procedure *supra* will be dealt with hereinafter.

[24] A plain reading of Explanation (V) extracted above clearly shows that the relief which was expressly claimed by the Defendant in the suit filed by him on the issues whereon they were at variance, relief could be determined by the Court. It has not been expressly granted. Thus for the purpose of Section 11 Civil Procedure Code, the same shall be deemed to have been refused. In the face of this position, the plea of Mr. Gupta learned Senior Counsel appearing for the Defendant that since issue had not been determined on merits, as such, does not operate as *res judicata* cannot be accepted.

[25] In this context, it may be noted that the doctrine of *res judicata* is founded on equity, justice, fair play and good conscience. It is based partly on the maxim of Roman Jurisprudence "*interest reipublicae ut sit finis litibus*", which means that concern the State that there be an end to law suits; and partly on maxim *nemo debet bis vexari pro una eadem causa*", which means that no man should be vexed twice over for the same cause. The principle is founded on ancient precedents, has been held to have been dictated by the wisdom and is applicable for all times.

[26] It may appropriately be observed in this behalf that besides above, principle of res judicata is based on public policy also. It is aimed at judicial verdict attaining finality at some stage.

[27] In case the argument of the learned Senior Counsel is taken to its logical end then there would be no end to the litigation and an unsuccessful litigant like Defendant can keep merrily going on with the filing of cases one after the other till and so long he is unable to get desired results. In this behalf, it may also be appropriately noted that the primary requirement of res judicata is title to the property. It was a question which was directly in issue in the suit filed by the Defendant referred to hereinabove. Court at Solan before whom it was filed was competent to have adjudicated the same. Parties were also the same in the earlier suit of the Defendant as well as the present suit. Thus, simply because decision on merits had not been given will not defeat Ex. PZ, whereby the earlier suit of the Defendant stood dismissed for non production of evidence, this fact coupled with the Explanation (V) supra, clearly shows that the relief claimed by the Defendant in his suit was declined to him.

[28] Needless to point out in this behalf that when language is simple and meaning is clear nothing needs to be read down in the provision nor external aids are required for interpreting such a provision of law. Once this conclusion is arrived at, what follows is that Section 11 Explanation (V) of the Code of Civil Procedure clearly covers the present case.

[29] On behalf of the Defendant, Mr. Bhupender Gupta, learned Senior v. Advocate, referred to some precedents, to which a reference will be made hereinafter.

[30] First decision relied upon was in case *Salo v. Munshi Ram and Ors.*, 1985 AIR(HP) 85. What was held in Paras 17 and 18 in it was in the following terms:

17. *Sheikh Habibulla v. Jamuna Singh*, 1958 AIR(Pat) 95 it was held that the dismissal of a suit on the ground of abatement cannot operate as *res judicata* though a second suit on the same cause of action will of course be barred, the reason being that *resjudicata* essentially arises out of a decision given on merits while a bar against fresh action is founded on the provision of law as laid down in the Code of Civil Procedure and not necessarily on an order which is tantamount to a final decision on merit though it is true that for certain purposes that order may operate as judgment.

18. In *Sheodam Singh v. Daryao Kumuar*, 1966 AIR(SC) 1332 it was held that if the decision in the former suit is not on merits, then the case cannot be said to have been heard and finally decided. The examples of such cases could be that the former suit was dismissed by the trial Court for want of jurisdiction, or for default of Plaintiff's appearance, or on the ground of non-joinder of parties or mis-joinder of parties or multifarious ness or on the ground that the suit was badly framed, or on the ground that a technical mistake, or for failure on the

part of the Plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the Plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit.

This decision does not improve the case of Defendant in view of the discussion in this judgment.

[31] In *Ram Nagendra Tiwary and Ors. v. Jagdamba Ojhian and Ors.*, 1984 AIR(Pat) 316, plea of res judicata was negatived because the court trying prior suit was not competent to try the same, as such it was held that Section 11 is in-applicable. This is not the situation in the present appeal. Moreover, such an argument was not raised on behalf of Defendant.

[32] Similarly, reliance placed on behalf of the Defendant on *State of Maharashtra and Anr. v. National Construction Company, Bombay and Anr.*, 1996 AIR(SC) 2367, is also ill founded. In this case the suit was filed by the State of Maharashtra invoking the bank guarantee furnished by National Construction Company earlier against the Bank only. This was a short cause suit in the Bombay High Court. This was dismissed for want of non joinder of party holding that the contractor was a necessary party. Thereafter, suit was filed by imp leading the Bank as well as

Contractor. In this background, after placing reliance on the decision of *Sheodam Singh v. Daryao Kunwar* supra and on *Inacio Martins v. Narayan Hari Naik*, 1993 3 SCC 123, what was held and is relevant in the present case is as under para 8.

[33] "This statement of the law by the High Court is, with respect incorrect of the decision of this Court in *Sheodhan Singh v. Daryo Kunwar*, 1966 AIR(SC) 1332 at p. 1336 ; (1966) 3 SCR 300 at 307, where, while considering the meaning of the words "heard and finally decided", used in Section 11 of the Code, it was held:

Wherefor example, the former suit was dismissed by the trial Court for want of jurisdiction or on the ground of non-joinder of parties and the dismissal is confirmed in appeal (if any), the decision not being on the merits, would not be *res judicata* in a subsequent suit.

(Emphasis supplied)

[34] This Court in its recent decision, *lilac to Martins v. Narayan Hari Naik*, 1993 3 SCC 123, has reiterated this propositions. It is, therefore, clear that the dismissal of the Short Cause Suit and the subsequent appeal could not have operated as a bar to Spl. Civil Suit No. 27/83. The plea based on the principle of *res judicata* fails."

[35] A reference to this decision clearly shows that it does not in any manner advance the case of the Defendant.

35. A case nearer to the facts of the present case is *Chamaru v. Chippal*, 1973 SLJ 146. In this case order

passed by the Court in the earlier suit was in the following terms:

Counsel for the parties present. Neither the Plaintiff nor his evidence present. Nor any summoned through Court. The suit is accordingly dismissed under Order 17, Rule 3, Code of Civil Procedure, Announced. The file after completion be consigned.

Sd/-C.S. Sauhta, Sub Judge, 1st Class, Kangra.

In this background, what was held in the second appeal by this Court was as under:

9. It is next contended by the Appellant that as no evidence had been led it was not possible to try the suit on its merits and, therefore, also the suit could not have been dismissed under Order 17 Rule 3. Now, merely because the parties have led no evidence in a suit does not mean that the suit cannot be dismissed. A Plaintiff may file a suit and then be unable to produce any evidence in support of his case. It is open to the court to dismiss the suit on its merits. Dismissal on the merits implies in the circumstances, that the allegations contained in the plaint were not made out, and the trial Court, therefore, has dismissed the suit.

[36] In case Mahalingeshwara Devaru and Anr. v. Seetharama Bhatta and Anr., 1978 AIR(Kar) 213, what was observed and is relevant in the present case is as under:

The principle of res judicata is not affected by a subsequent contrary view taken by a superior Court in any other case. A wrong decision by a Court having jurisdiction is as much binding between the parties as

a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. Therefore, even if a decision happens to be wrong in view of the later judgment of the High Court, it is binding between the parties and its legal effect remains the same whether the reason for the decision was sound or not. , AIR 1966 SC 1061, Rel. on.

[37] In *C. Chennaiya Naidu v. Panchayat Board, Vennkadathampatti*, 1979 AIR(Mad) 135, while drawing distinction in a order passed under Order 17 Rules 2 and 3, it was held that when both the parties and their counsel were present in Court. The case was called. Order 17 Rule 2 Code of Civil Procedure would not apply and the case would be covered under Order 17 Rule 2 Code of Civil Procedure. In this background, it was held that the District Judge was right in coming to the conclusion that the appeal was competent.

[38] In *Sushil Kumar Mehta v. Gobind Ram Bohra (dead) through his L.Rs.*, 1990 1 SCC 193, it was held as under:

Thus it is settled law that normally a decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a court without

jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a coram-non-judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the Court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea as its inception or in appellate or revisional forums, provided law permits. The doctrine of res judicata Under Section 11 Code of Civil Procedure is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not

operate "as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. "But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata. Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, V-is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a Court. Therefore, the doctrine of resjudicata does not apply to a case for decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the Court inherently lacks jurisdiction.

[39] It is no body's case that decision in the suit of Defendant is a nullity. Rather Defendant has given reasons for not prosecuting the said suit.

[40] A Full Bench of Kerala High Court in *Kadapurath Mam Khalid v. Beemapura Palamkakkada Sulekha and Ors.*, 1986 AIR(Ker) 251, held as under:

To press into service the doctrine of *res judicata* or estoppel by record it is enough if the party concerned shows that the parties to both the suits were the same, and are persons whose names are on the record at the time of the decision, even if a party may be a person who got intervened in the suit.

Where two tarvards were the parties in both the earlier and subsequent suits the judgment in the earlier suit will not cease to operate as *res judicata* merely because a finding is recorded in the earlier suit that the power holder of the *Karanavan* of the tar wad, could \ not have filed the suit on behalf of the tar wad as the properties did not belong to the tar wad. The parties being the same the subsequent suit will not be maintainable.

14 What is required to be proved or established, to hold that there is bar of *res judicata* for the subsequent suit, is that in both the suits, the title of the parties agitated, is identical, but not the identity of the actual properties involved in the two litigation. It has been so declared by the Supreme Court in *Ram Lakshmi Dasi v. Banamali Sen*, 1953 AIR(SC) 33. The dictum reads:

The test of *resjudicat* is the identity of title in the two litigations and not the identity of the actual property involved in the two cases.

[41] In *Nikunja Bihari Das v. Jatindra Nath Kar and Ors.*, 1956 AIR(Cal) 613, while considering Section 11

of the Code of Civil Procedure, it was observed as under:

A decision by necessary implication is as much *res judicata* as an express decision. That this is so in the case where Explanation IV of Section 11, Code of Civil Procedure, has to be considered, there can be no doubt, but even in other cases where a matter has been raised in the pleadings but there is no express decision but there is a decision by necessary implication, the Courts have, always held that the principle of *res judicata* is applicable.

47. Law declared by this judgment squarely covers the facts of the present case and is thus applicable to all fours.

A Division Bench of Oudh High Court in *Har Dayal v. Rain Ghulam*, 1944 AIR(Oudh) 39, held as under:

In order that the provisions of Rule 3 should apply with full force and effect it is not necessary that there should be actual decision on the merits. The words "to comply with any previous order" in Order 17, Rule 3 are sufficiently general to include the order for payment of costs occasioned by an adjournment. An order that upon non-payment of the costs of adjournment (to enable the Plaintiff to implied a certain person as a necessary party) the suit shall stand dismissed falls within the purview of Order 17, Rule 3 and not Rule 1. The Court in dismissing the suit in consequence of that order, must, therefore, be deemed to have decided it on merits. As the order falls within Order 17, Rule 3, the

dismissal of the suit operates as a bar to the maintainability of the second suit.

48. Examining the present appeal in the light of the facts as enumerated hereinabove as well as on the basis of the decisions of different courts including Supreme Court of India, I am of the considered view that the relief having been not expressly allowed in the earlier suit filed by the Defendant shall be deemed to have been declined to him and thus mere non decision of all of those issues as was urged on his behalf of the Defendant does not stop the operation of Section 11 Explanation (V) of the Code of Civil Procedure. Once the judgment was passed under Order 17 Rule 3 Code of Civil Procedure particularly when identity of title to property in both the suits was/is the same, parties were/are the same and Court was competent to have adjudicated; then on the basis of the legal position explained above it can be safely said that the claim of the Defendant stood negatived in the earlier suit. Therefore, questions No. 1 and 6 are decided against the Defendant."

32

It is, thus, clear from the aforesaid exposition of law that a decision rendered under the provisions of Order XVII Rule 3 CPC will operate as *res judicata* and bar a second suit for the same relief i.e. mandatory injunction. Therefore, the suit out of the present appeal emanates clearly not maintainable and barred by *res judicata*.

33 To be fair to the learned counsel for the plaintiff, it needs to be noticed that in support of his plea that the present suit is not barred by *res judicata* has placed reliance on the following judgments:

- (i) Rameshwar Dayal vs. Banda, (1993) 1 SCC 531;
- (ii) Krishan Lal vs. State of J & K, (1994) 4 SCC 422 and
- (iii) Balraj Taneja vs. Sunil Madan, (1999) 8 SCC 396.

34 In ***Rameshwar Dayal vs. Banda, (1993) 1 SCC 531***, the facts before the Hon'ble Supreme Court were that the appellant therein claimed to be the owner of 'Gher' (property in dispute) in the town of Shameili and in that capacity, according to him, he had let out the property to one Habib as long ago as in 1966. He had filed suit No. 591/66 against Habib for recovery of rent and the suit was decreed. According to the appellant, Habib sublet the property to one Banda. In 1974, the appellant filed a suit for eviction of both Habib and the subtenant Banda in the Court of Small Causes. This suit was decreed against both Habib and Banda. Thereafter, Banda, filed an application for setting

aside the said decree. His application was dismissed. The revision filed by him before the Additional District Judge was also dismissed on 26th September, 1977. Thus, according to the appellant, the eviction decree against both Habib and Banda became final on that date. However, Banda filed the present suit on the basis of his title as the owner of the property which has given rise to the present appeal. In the suit, he claimed two reliefs, viz., that the decree passed by the Small Causes Court in Suit No. 45/1974 was nullity, and an injunction restraining the defendant in the suit, namely, Rameshwar Dayal the present appellant, from dispossessing him of the property. The Trial Court dismissed the suit on 7th May, 1979 by recording a finding that plaintiff Banda was not the owner but it was the appellant before us, viz. Rameshwar Dayal who was its owner. In support of its conclusion, the Trial Court relied on a registered rent deed dated 7th December, 1956 under which the present appellant had let out the property in dispute to some other tenant, earlier. The judgment of the Trial Court was set aside in appeal by the Civil Judge, District Muzaffarnagar by his decision dated 13th December, 1985 the effect of which was to decree the suit filed by the respondent Banda. The second

appeal filed by the appellant was dismissed by the High Court by the impugned order.

35 Two contentions were raised before the Hon'ble Supreme Court. The first was that the decree passed by a court of competent jurisdiction could not be declared as not binding on a person who was a party to the suit, and the second was that the view taken by the lower appellate court that the judgment of the Small Causes Court did not operate as *res judicata* between the parties because the Small Causes Court had no jurisdiction to decide the title to the suit property, is erroneous in law.

36 It was in this background that the Hon'ble Supreme Court observed as under:-

"15. We are, therefore, more than satisfied that the bar of res judicata is not applicable to the determination of the issue with regard to the title to the property in the present suit. It is for these reasons that we do not think it necessary to discuss in detail the decisions cited on both sides. However, we may refer to a decision of this Court Gangabai w/o Rambilas Gilda v. Chhabubai who Pukharajji Gandhi [1982] 1 SCR 1176, which has a direct bearing on the question as to when a finding on the question of title to immovable property rendered by a Small Causes Court would operate as

res judicata. After discussing various decisions on the point, this Court has held there as follows :

"when a finding as to title to immovable property is rendered by a Court of Small Causes *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*. A question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised."

This is a sufficient answer to the contention that when Small Causes Court incidentally determines the question of title, it operate as *res judicata*. The contention ignores that to operate as *res judicata* the first finding must be on an issue which has been directly and substantially in issue in the former suit. If the finding is given incidentally while determining another issue which was directly and substantially in issue, such finding cannot be said to be on an issue which was directly and substantially in issue in the former suit. However, it is not necessary for us to

discuss this point at length since we have come to the conclusion that not only the Small Causes Court has not given any finding on the issue even incidentally, it has not even referred to the said issue in its so-called decision.

16. The next question is whether the decision of the Small Causes Court is binding on the respondent Banda. In order to be binding, the order of the Court disposing of the suit must amount to a decree. Section 2 (2) of Code of Civil Procedure (the 'Code') defines decree as follows :

"(2) 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final....."

17. The definition of 'Order' given in Section 2 (14) of the Code is as follows:

(14) "Order' means the formal expression of any decision of a Civil Court which is not a decree."

However, neither the order nor the decree should be confused with judgment' which is defined by Section 2 (9) of the Code as "the statement given by the Judge of the grounds of a decree or order'. The definitions of decree, order and judgment given in the Code show that decree or order as the case may be, can come into existence only if there is an adjudication on the relevant issues, which conclusively determines the rights of the parties.

18. We have already pointed out earlier that the Small Causes Court has not even noticed the matters in controversy between the appellant and the respondent, and consequently, there has been no adjudication or decision on the said matters. There is thus no 'formal expression of adjudication..... conclusively determining the rights of the parties with regard to..... the matters in controversy in the suit'.

19. It must be remembered in this connection that Rules 4 (1) and 5 of order XX of the Code are applicable to the judgments of the Small Causes Court. The Rules are as follows :

"4. Judgment of Small Causes Courts (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

(2) Judgments of other Courts Judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

"S. Court to state Its decision on each issue. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit."

'Points for determination' referred to in Rule 4(1) are obviously nothing but 'issues' contemplated by Rules 1 and 3 of Order XIV of the Code. The present decision of the Small Causes Court which has not even stated the points for determination and given finding thereon, is

obviously not a judgment within the meaning of [Section 2 \(9\)](#) of the Code. Since the matters were in controversy between the parties, it is only a judgment which could have given rise to a decree. The so-called decision of the Small Causes Court, therefore, does not amount to a decree within the meaning of [Section 2 \(2\)](#) read with [Section 2\(9\)](#) and Rules 4(1) and 5 of Order XX of the Code.

20. It is not disputed that in view of the provisions of [Section 17 \(1\)](#) of the [Provincial Small Causes Court Act](#), the Code is applicable to Small Causes Court except where it is otherwise provided either by the Code or the said Act. Apart from Rules 4 (1) and 5 of Order XX of the Code, on this count also, it was obligatory for the Small Causes Court, in the present case, to state the points for determination and give its finding or decision on each of the said points. Hence the present decision of the Small Causes court is not a judgment and a decree in the eye of law and is, therefore, *non est* as far as the respondent is concerned.”

37 The ratio of the aforesaid judgment obviously cannot be applied to the facts of the instant case as it was categorically held that the decision of the small causes court was not a judgment and decree in the eyes of law and, therefore, *non est* as far as the respondent therein is concerned.

38 In **Krishan Lal vs. State of J & K, (1994) 4**

SCC 422, the facts before the Hon'ble Supreme Court were that the appellant therein had filed an appeal by special leave against the judgment dated 19.4.1990 rendered by the Jammu and Kashmir High Court, whereby the High Court allowed the appeal filed by the respondent-State and set aside the judgment of District Munsif, Poonch by which suit of the appellant challenging his order of dismissal passed on 31.1.1978 had been decreed, which order had come to be upheld by the District Judge. Thereafter, a separate writ petition was directly filed before the Hon'ble Supreme Court regarding grievance of the illegal termination of service and seeking a declaration that dismissal was void and non est. The High Court dismissed the suit of the appellant on two grounds: (1) the civil court has no jurisdiction to entertain the suit; and (2) the suit was barred by res judicata.

39 It was in this background that the Hon'ble Supreme Court observed as under:-

"5. Let us first deal with the question of jurisdiction. To decide this reference may be made to skeletal facts. These are that the conduct of the appellant while serving as a clerk in the office of Commandant, Home

Guards at Poonch came to be enquired in the year 1972 by Anti-Corruption Commission setup" under the provisions of Jammu & Kashmir (Government Servant) Prevention of Corruption Act, 1962 (hereinafter referred to as the 'Act'). The Commission vide its order dated 14.3.74, recommended to the Governor the dismissal of the appellant from service. After receipt of this recommendation the appellant was called upon on 4.7.74 to show cause as to why he should not be dismissed from service. By communications of 13.8.74 and 4.1.76 the appellant approached the concerned officer to supply copy of the proceedings of the inquiry including the report of the Commission to enable him to submit his explanation. This not having been done, the appellant challenged the action by approaching the High Court in W.P. No.413 of 1978 which came to be disposed of on 15.3.78 with the direction to the authorities to make available a copy of the proceedings of the inquiry. Before that order had come to be passed, the appellant had been dismissed from service by an order dated 31.1.78 which came to be challenged in Writ petition No. 23 of 1978. That petition was dismissed by judgment dated June 1, 1979 on the ground that a very complicated question of fact was involved. A Letters Patent Appeal being preferred the Bench also took the view that "a disputed question of fact of complicated nature was involved." The Bench, however, observed that its order will not "prevent the appellant from pursuing whatever other remedy may be available to him under law".

6. Thereafter started the present proceeding, which consists of filing of a suit by the appellant on 26.7.80 challenging the order of dismissal as void and illegal. The trial court decreed the suit principally on the ground that the appellant had not been supplied with a copy of enquiry proceedings and the dismissal order was passed in violation of the mandatory provision of section 17(5) of the Act. The District Judge dismissed the State's appeal as being barred by limitation. The High Court dismissed the revision application, whereupon this Court was approached and it directed the District Judge to hear the appeal on merits by its order dated 25.4.85. The District Judge thereafter took the appeal on his file and upheld the decree of the trial court on the ground that dismissal order having been passed in violation of section 17(5) of the Act was null and void. On the High Court being approached in second appeal, it allowed the same on the grounds mentioned above.

7. Let us now examine whether the view taken by the High Court that civil court's jurisdiction was barred is tenable. In taking this view the High Court has relied on section 20 of the Act which has provided that "Nothing done or purporting to have been done under this Act shall be called in question in any Court."

8. Shri Mehta urges that the finality given by section 20 of the Act could not have ousted the jurisdiction of civil court in the present case inasmuch as the dismissal order being a nullity, court's jurisdiction did

not get barred because of the aforesaid provision. To bring home this submission of law, we are referred by the learned counsel to the Constitution Bench decision of this Court in *Ram Swaup v. Shikar Chand*, AIR (1966) SC 893 in which case the Bench while considering the effect of section 3(4) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 which had provided that "the order of the Commissioner under sub-section (3) shall, subject to any order passed by the Commissioner under section 7(F), be final" opined in paragraph 13 that the bar created by the aforesaid provision would not operate in cases where the plea raised before the civil court goes to the root of the matter and this would be so where the impugned order be a nullity.

9. Shri Mehta contends that as provision of section 17(5) of the Act was held to be mandatory by a Full Bench of Jammu & Kashmir High Court in *State of Jammu & Kashmir v. Abdul Ghani Patwari*, AIR (1979) J & K 17, the dismissal order has to be regarded as nullity. This submission is buttressed by referring to one of the illustrations given in paragraph 13 of *Shikar Chand's* case, which is that if a statute were to grant permission to a landlord to sue tenant after issuance of notice, non-issuance of the notice would render the impugned order completely invalid. It is urged that section 17(5) of the Act having provided:-

"After the Commission submits its recommendation and after the Governor arrives at a provisional conclusion in

regard to the penalty to be imposed, the accused shall be supplied with the copy of proceedings of the inquiry and called upon to show cause by a particular date why the proposed penalty should not be imposed upon him.

(Emphasis supplied) the order of dismissal passed without supplying copy of the proceedings of the inquiry, which provision was held as mandatory in the aforesaid Full Bench, has to be regarded as invalid; and so, because of what was stated by the Constitution Bench in *Ram Swarup's case*, civil court's jurisdiction cannot be held to have been barred.

10. In support of his submission, Shri Mehta has also relied on *Shiv Kumar Chadha v. Municipal Corporation of Delhi*, [1993] 3 SCC 161, in which a three-judge Bench of this Court speaking through N.P. Singh, J., while examining the question of bar of civil courts' jurisdiction because of the provision contained in Delhi Municipal Corporation Act, 1957, held that the order being nullity in the eye of law, the same amounted to "jurisdictional error" because of which civil courts' jurisdiction was not barred as the impugned order was outside the Act.

11. We may not labour much on this point because of the aforesaid legal proposition and also because of what was pointed out by a Constitution Bench in *Dhulabhai v. State of MP.*, AIR (1969) SC 78 that exclusion of jurisdiction of the civil court should not be readily inferred. So we agree with Shri Mehta that the

High Court erred in law in holding that the civil courts' jurisdiction was barred, in as much there being violation of mandatory provision as contained in section 17(5) of the Act, it can well be said that the respondents had no jurisdiction to pass the impugned order and by doing so they committed a "jurisdictional error".

12. In so far as the second ground given by the High Court? the same being bar of resjudicata- it clear from what has been noted above, that there was no decision on merits as regards the grievance of the appellants; and so, the principle of resjudicata had no application. The mere fact that the learned single judge while disposing of the Writ Petition No. 23 of 78 had observed that:-

"This syndrome of errors, omissions and oddities, cannot be explained any hypothesis other than the one that there is something fishy in the petitioner's version....."

which observations have been relied upon by the High Court in holding that the suit was barred by resjudicata do not at all make out a case of applicability of the principle of resjudicata. The conclusion of the High Court on this score is indeed baffling to us, because, for resjudicata to operate the involved issue must have been "heard and finally decided". There was no decision at all on the merit of the grievance of the petitioner in the aforesaid Writ Petition and, therefore, to take a view that the decision

in earlier proceeding operated as resjudicata was absolutely erroneous, not speak of its being uncharitable.”

40 Obviously, there can be no quarrel with the exposition of law as aforesaid, however it would be noticed that the suit filed by the appellant therein had been dismissed primarily on the grounds that the civil court had no jurisdiction to entertain the suit and that the suit was barred by res judicata.

41 Insofar as the first plea was concerned, the Hon'ble Supreme Court after placing reliance upon the decision of the Hon'ble Constitution Bench in ***Dhulabhai vs. State of M.P. AIR 1969 SC 78*** held that the High Court erred in law in holding that the civil courts' jurisdiction was barred. As regards second contention regarding suit being barred by res judicata, it was clearly held that there was no decision on merits qua the grievance of the appellant and, therefore, the principle of res judicata had no application. Therefore, the aforesaid judgment is clearly distinguished and is not applicable to the facts of the instant case.

42 Now, adverting to the judgment passed by the Hon'ble Supreme Court in ***Balraj Taneja vs. Sunil Madan, (1999) 8 SCC 396***. The facts therein were that respondent No.1, Sunil Madan, filed a suit in the Delhi High Court against the appellants and respondent No.2 for specific performance of an agreement for sale in respect of property No.W-118, First Floor, Greater Kailash-II, New Delhi. The suit was filed in May, 1996. Summons which were issued to the appellants and respondent No.2 were duly served upon them and in response thereto, they put in appearance before the Court on 20th September, 1996 and prayed for eight weeks' time to file written statement which was allowed and the suit was adjourned to 22nd January, 1997. Written Statement was not filed even on that date and an application was filed for further time to file the written statement which was allowed as a last chance and the written statement was directed to be filed by 7th February, 1997. The suit was fixed for 10th February, 1997. Since the written statement was still not filed, the Court decreed the suit for specific performance in favour of respondent No.1 under Order 8 Rule 10 C.P.C. Respondent No.1 was directed to deposit a sum of Rs.3 lakhs, being the balance amount of sale consideration, within six

weeks and on the amount being so deposited, he was given the liberty to apply to the court for appointment of a Commissioner for executing the sale deed in his favour. The review application filed by the appellants including respondent No.2 was dismissed by the High Court on 13th of May, 1997. An appeal, which was filed by the appellants, including respondent No.2, thereafter, before the Division Bench (R.F.A.(OS) NO.36/97) was dismissed on 29.4.1998. It is in these circumstances that the appeal was filed before the Hon'ble Supreme Court.

43 It was in this background that the Hon'ble Supreme Court observed as under:-

"27. In view of the above, it is clear that the Court, at no stage, can act blindly or mechanically. While enabling the Court to pronounce judgment in a situation where no Written Statement is filed by the defendant, the Court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the Court can either pronounce judgment against the defendant or pass such order as it may think fit.

28. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the

defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub- rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

41. There is yet another infirmity in the case which relates to the "judgment" passed by the Single Judge and upheld by the Division Bench."

44 It would be noticed that it is on account of non-filing of the written statement despite repeated opportunities that the suit filed by the plaintiff came to be decreed for specific performance under Order 8 Rule 10 CPC and against the said order, a review petition was filed. It was dismissed by the High Court on 13.5.1997 and the appeal filed before a Division Bench of the High Court also came to be dismissed on 29.4.1998. It was against the order of the Division Bench that the matter was carried to the Hon'ble Supreme Court. Whereas, in the instant case, the order passed by the then learned Senior Sub Judge, Kullu, admittedly has attained finality and cannot, therefore, be re-opened either by the parties or for that matter even by this Court.

The substantial questions of law are answered accordingly.

45 In view of aforesaid discussion, I find merit in the instant appeal and the same is accordingly allowed. Consequently, the impugned judgments and decrees passed

by both the learned courts below are set aside and the suit filed by the plaintiff is dismissed. Pending application(s), if any, also stands dismissed. The parties are left to bear their own costs.

28.8.2019

(pankaj)

(Tarlok Singh Chauhan)
Judge

High Court Order