PANDURANG RAMCHANDRA MANDLIK (SINCE DEAD) BY HIS LRS. AND ANR. A

v.

SMT. SHANTABAI RAMCHANDRA GHATGE AND ORS.

SEPTEMBER 12, 1989

B

[M.N. VENKATACHALIAH AND K.N. SAIKIA, JJ.]

Bombay Tenancy and Agricultural Lands Act, 1948—Sections 2(2), 2(5), 2(8), 2(17), 2(18), 25(2), 29(2), 70(b), 85A—Mamlatdar's court—Whether Civil Court—'Or was at any time in the past a tenant' in Section 70(b)—Interpretation of—Jurisdiction of Civil Court to decide issues—When excluded. C

Code of Civil Procedure, 1898—Section 11—Res judicata—'Heard and finally decided'—Essentiality of—What operates as res judicata is the ratio of what is fundamental to the decision.

D

The appellants-landlords leased out their land, situate at Kolhapur, to respondents Nos. 1 and 2 and the husband of respondents Nos. 3 and 4 on 12.10.1950 for a period of ten years. After the expiry of the lease period, they initiated proceedings under the Bombay Tenancy and Agricultural Lands Act, 1948, for obtaining possession of the lands but the application was dismissed *ex parte*, as it was held that the provisions E **of the Act were not applicable to the land inasmuch as only grass grew thereon naturally. Thereupon the appellants terminated the tenancy under the provisions of the Land Revenue Code and filed a Civil Suit against the respondents for possession mesne profits and for damages. Respondents 1 and 2 contested the suit condtending *inter alia* that the civil court had no jurisdiction to try the suit inasmuch as the Act was** F **applicable to the land and that they having been in rightful possession, the notice of termination of tenancy was invalid. The trial court tried the issues amongst others relating to the applicability of the Act, jurisdiction of the civil court and estoppel and after going through the evidence led by the parties, decreed the suit. The respondents appeal against the said decree having failed before the first appellate court,** G **they preferred Second Appeal to the High Court of Bombay. The High Court set aside the judgment and order of the trial court as affirmed by the first appellate court and remanded the case back to the trial court with a direction that it should raise the necessary issues on the pleadings of the parties and should make a reference to the competent authority under Section 85A of the Act in regard to the issues which are required** H

A to be determined by the competent authority under the Act and on receipt of findings, dispose of the suit according to law. Being dissatisfied with the said order, the appellants moved application for leave to appeal under the Letters Patent but the same having been dismissed, they have filed this appeal after obtaining special leave.

B The appellants' principal contention, amongst others, before this court is that the appellants' application under Section 29(2) read with section 25(2) of the Act having been dismissed on the ground that the Act was not applicable and thus the authority had no jurisdiction to deliver possession is a finding which would operate as *res judicata*; hence the High Court's direction making a reference to the competent authority under s. 85A of the Act, now would be barred. According to C them the civil court itself has jurisdiction to decide the issues. Respondents' contention is that the direction of the High Court is consistent with the provisions of the Act and that the earlier proceedings under the Act initiated by the appellants having been determined *ex parte,* it could not operate as *res judicata*.

D Dismissing the appeal, this Court,

HELD: After the amendment of s. 70(b) of the Act by inserting the words 'or was at any time in the past, a tenant', the position has changed. The Civil Court has now no jurisdiction to decide an issue E arising incidentally in a civil suit which is to be specifically decided by a competent authority under the Act. Civil Court in such a case shall refer the issue to that authority and dispose of the suit in accordance with the decision of the authority. [11F]

(See *G.S. Shinde* v. *R.B. Joshi,* [1979] 2 SCC 495;)

F The High Court in the instant case has rightly sent back the suit to the trial court with the direction to refer issues, if raised to be determined exclusively by the competent authority, to that authority. [13G]

G If a matter directly and substantially in issue in a former suit has been adjudicated upon by a court of exclusive jurisdiction, the adjudication will bar the trial of the same matter in a subsequent suit. [15E]

In the instant case, the Mamlatdar having decided the appellants' application for possession, the appellants themselves went to the Civil H Court and filed the suit. It does not now lie in their mouth to say that

the decision of the Mamlatdar would act as *res judicata* for the trial court. [15F] A

The Mamlatdar's Court is a civil court for the purpose of Section 85A of the Act. [15F]

In its comprehensive sense the word 'suit is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but if a right is litigated between parties in a court of justice the proceeding by which the decision of the court is sought may be a suit. But if the proceeding is of a summary nature not falling within the definition of a suit it may not be so treated for the purpose of Sec. 11. [15H; 16A] B

Besides, assuming the Mamlatdar in deciding the application in 1962-63 to have been a court of exclusive jurisdiction for the purpose of s. 11 C.P.C., its decision rejecting the application would not be an evidence on the question of tenancy merely because it could be inferred from that decision. [16B] C

The expression 'heard and finally decided', in s. 11 means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided. What operates as *res judicata* is the ratio of what is fundamental to the decision but it cannot be ramified or expanded by logical extension. [16F-G] D E

(See *Vithal Yaswant* v. *Shikander Khan Mutumukhtan,* AIR 1963 SC 385.)

The law is well settled that a court which had no jurisdiction to try a cause cannot by its own erroneous decision confer on itself competence to decide it and its decision on the question of jurisdiction cannot operate as *res judicata*. Conversely the decision relating to jurisdiction cannot be said to constitute the bar of *res judicata* where by an erroneous interpretaton of a statute it holds that it has no jurisdiction. [17B] F

(See *Pandurang Mahadeo Kavade & Ors.* v. *Annaji Balwant Bokil & Ors.,* [1971] 3 SCC 530;) G

Shivappa Satawappa Ashtekar v. *Gajanan Chintaman Desh Pande,* [1953] 55 Bom. Law Reporter, 843; *Dhondi Tukaram* v. *Dadoo Piraji,* [1952] 55 Bom. L.R. 663; *Bhimaji Shanker Kulkarni* v. *Dundappa Vithappa Udapudi and Anr.,* [1966] 1 SCR 145; *Mussamiya* H

Imam Haidar Bax Razvi v. *Rabari Govindhai Ratnabhai & Ors.*, [1969] 1 SCR 785; *Trimbak Sopana Girme* v. *Gangaram Mhatarba Yadav*, 55 Bom. L.R. 56; *Ishverlal Thakorelal Almaula* v. *Motibhai Nagjibhai*, [1966] 1 SCR 367; *Pandurang Hari Jadhav* v. *Shankar Maruti Todkar*, 62 Bom. L.R. 873; *Kalicharan Bhajanlal Bhayya* v. *Rai Mahalaxmi*, 4 Guj. L.R. 145; *Neminath Appayya Hanammannaver* v. *Jambu Rao Satappa Kocheri*, AIR 1966 Mys. 154; *Jambu Rao Satappa Kocheri* v. *Neminath Appayya Hanammannaver*, [1968] 3 SCR 706; *Noor Mohd. Khan Ghouse Khan Soudagar* v. *Fakirappa Bharmappa Machenahalli*, [1978] 3 SCC 188; *Ramchandra Rao* v. *Ramchandra Rao*, [1922] 49 I.A. 129 and *Bhagwan Dayal* v. *Mst. Reoti Devi*, [1962] 3 SCR 440, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1582 of 1973.

From the Judgment and Order dated 27.3.72 of the Bombay High Court in Appeal No. 983 of 1966.

S.B. Bhasme and V.N. Ganpule for the Appellants.

Mrs. C.K. Sucharita for the Respondents.

The Judgment of the Court was delivered by

SAIKIA, J. This plaintiffs' appeal by special leave is from the Judgment of the High Court of Bombay in Second Appeal No. 983 of 1966 setting aside the Judgment of the courts below and remanding the case to the trial court for hearing with a direction to refer the issue regarding tenancy to the tenancy authorities.

The appellants are the owners of land bearing R.S. No. 1442 and 1445, situate at Kasba Karvir, within the municipal limits of Kolhapur. The said land was leased out to the father of respondent Nos. 1 and 2 and the husband of respondent Nos. 3 and 4 on October 12, 1950 for a period of ten years. The appellants had filed Revision Civil Suit No. 298 of 1964 against the respondents for possession thereof, mesne profits and for damages. It was averred in the plaint that the appellants had earlier initiated proceedings under the Bombay Tenancy and Agricultural Lands Act, 1948, hereinafter referred to as 'the Act', and in the said proceedings it was held that the provisions of the Act were not applicable to the land inasmuch as only grass grew thereon naturally. It was further averred that on expiry of the period of lease the

appellants terminated the tenancy under the provisions of the Land Revenue Code and filed the aforementioned suit. The respondent Nos. 1 & 2 contested the suit contending, *inter alia*, that the civil court had no jurisdiction inasmuch as the Act was applicable to the land; and that they having not been in wrongful possession thereof, the notice of termination was invalid. The learned trial court tried the issues regarding the applicability of the Act, jurisdiction of the civil court, and estoppel, out of the issues framed, as preliminary issues and by order dated March 16, 1965 fixed the date for hearing of the other issues and on that date the respondent Nos. 1 & 2 being absent, after recording the appellants evidence, by Judgment dated July 17, 1965 decreed the suit in favour of the appellants. The respondents' appeal therefrom having been dismissed by the District Judge, they took Second Appeal No. 983 of 1966 to the High Court of Bombay, and the learned Single Judge has set aside the Judgment of the trial court as affirmed by the lower appellate court, and remanded the case back to the trial court with a direction that it should raise the necessary issues on the pleadings of the parties and should make a reference to the competent authority under s. 85A of the Act with respect to those issues which are required to be decided by the competent authority under the Act and on receipt of the findings, dispose of the suit according to law. The appellants' application for leave to appeal under the Letters Patent having been rejected by the High Court, they have obtained special leave to appeal.

Mr. S.B. Bhasme, the learned counsel for the appellants submits, *inter alia*, that the appellants' application under s. 29(2) read with s. 25(2) of the Act, being case No. 184 of 1962-63 having been dismissed by the tenancy authorities on the ground that only natural grass grew thereon and therefore the authority had no jurisdiction to deliver possession thereof under s. 29(2) of the Act, that finding should act as *res judicata*, wherefore, remitting of the case by the High Court to the trial court for hearing and deciding after making a reference to the competent authority, unde s. 85A of the Act with respect to those issues which are required to be decided by the competent authority under the Act, would be barred; and that in the facts and circumstances of the case the civil court itself has jurisdiction to decide the issues which have been directed to be referred to the civil court.

Mrs. C.K. Sucharita, the learned counsel for the respondents submits that under s. 85A in a civil suit involving any issues which are required to be decided or dealt with by any authority competent to settle or decide such issues under the Act, the civil court is to settle the

A issues and refer those to such competent authority for determination; that the High Court's direction in the impugned Judgment is consistent with this provision; and that the appellant's earlier proceedings under the Act before the tenancy authority having been dismissed *ex parte*, it could not operate as *res judicata*.

B The question to be decided, therefore, is whether the High Court was correct in directing the trial court to refer the issues relating to tenancy to the competent authority under the Act. To decide it, we may conveniently refer to the relevant provisions of the Act. The Act has amended the law which governs the relations of landlords and tenants of agricultural lands. As defined in s. 2(8) of the Act, "land" C means—(a) land which is used for agricultural purposes or which is so used but is left fallow, and includes the sites of farm buildings appurtenant to such land. This definition is as amended by Bom. 15 of 1957. The amendment is not material for the purpose of our case. As defined in s. 2(1), "Agriculture" includes horticulture, the raising of crops, grass or garden produce, the use by an agriculturist of the land D held by him or a part thereof for the grazing of his cattle, the use of any land, whether or not an appanage to rice or paddy land, for the purpose of rab manure but does not include allied pursuits, or the cutting of wood only. This definition is after amendments by Bom. 13 and 15 of 1956 and 1957, respectively. As defined in s. 2(2), "Agriculturist" means a person who cultivates land personally. As E defined in s. 2(5), "to cultivate" with its grammatical variations and cognate expressions means to till or husband the land for the purpose of raising or improving agricultural produce, whether by manual labour or by means of cattle or machinery, or to carry on any agricultural operations thereon; and the expression "un-cultivated" shall be construed correspondingly. The explanation thereunder says: F A person who takes up a contract to cut grass, or to gather the fruits or other produce of trees on any land, shall not on that account only be deemed to cultivate such land. This definition is as substituted by Bom. 13 of 1956. As defined in s. 2(17), "Tenancy" means the relationship of landlord and tenant; and as defined in s. 2(18), "tenant" means a person who holds land on lease and includes (a) a person who G is deemed to be a tenant under s. 4; (b) a person who is a protected tenant; and (c) a person who is a permanent tenant; and the word "landlord" shall be construed accordingly. This definition is as substituted by Bom. 13 of 1956.

H The High Court has found that the appellants had leased out the land on October 12, 1950 for a period of 10 years under a Kabulayat at

an annual rental of Rs. 1000 and that period expired on October 11, 1960. The appellants submitted an application under s. 29(2) of the Act, being case No. 2068 of 1957 but that application was dismissed. Thereafter, they moved another application under s. 88C of the Act being case No. 285 of 1961 and that application was also dismissed on the ground that the lands were governed by s. 43C of the Act, but the Act did not apply as the lands were within the limits of the municipal borough. Thereafter, they started the third proceeding being application under s. 29(2) read with s. 25(2) of the Act being case No. 184 of 1962-63. That application also came to be dismissed by the tenancy authorities on the ground that the lands in dispute were lands growing natural grass and, therefore, the authority under the Act had no jurisdiction to deliver possession under s. 29(2) of the Act. The High Court noticed that the application was decided *ex parte* but the Court did not know under what circumstances, the competent authority proceeded *ex parte*. The effect of that decision was that the application filed by the appellants as landlords for possession of the lands treating the opponents thereof as tenants was dismissed. It was only thereafter that the appellants served the respondents with a notice terminating the tenancy and demanding possession, and the defendants having not complied with the notice, the appellants filled the instant suit.

Considered in the light of the above definitions and the provisions of s. 85A of the Act there arises no doubt that some of the issues involved in the suit may be such as have necessarily to be decided by the competent authority under the Act and to that extent the jurisdiction of the civil court to decide those issues may be excluded.

In *Shivappa Satawappa Ashtekar* v. *Gajanan Chintaman Desh Pande,* [1953] 55 Bombay Law Reporter 843; AIR 1954 Bombay 107, in the landlord's suit for possession of lands filed in civil court, the defendants having contended that the lands were agricultural lands and that the defendants were protected tenants, interpreting the then s. 85(1) it was held:

> "*Ex facie,* by the operation of s. 70 and s. 85 of the Bombay Tenancy and Agricultural Lands Act, 1948, the jurisdiction of the civil court to decide whether the defendants were tenants or protected tenants must be regarded as excluded and the Mamlatdar alone must be regarded as competent to decide that question. That is the view which has been taken by a division bench of this Court in *Dhondi Tukaram* v. *Dadoo Piraji,* [1952] 55 Bom. L.R. 663."

A Section 70(b) of the Act then provided:

> "For the purposes of this Act the following shall be the duties and functions to be performed by the Mamlatdar:
>
> (a) .....
>
> B
>
> (b) to decide whether a person is a tenant or a protected tenant."

Section 85(1) provided:

> C "No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Bombay Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of cotrol."

D

This Court in *Bhimaji Shanker Kulkarni* v. *Dundappa Vithappa Udapudi and Anr.*, [1966] 1 SCR 145, considering the decision in *Dhondi Tukaram's* case (supra) which held that the Mamlatdar had exclusive jurisdiction to decide those issues though they arose for decision in a suit properly cognisable by a civil court, observed:

E

> "The result was somewhat startling, for normally the Civil Court has jurisdiction to try all the issues arising in a suit properly cognisable by it. But having regard to the fact that the Bombay Legislature approved of *Dhondi Tukaram's* case and gave effect to it by introducing s. 85A, we must
> F hold that the decision correctly interpreted the law as it stood before the enactment of s. 85A. It follows that independently of s. 85A and under the law as it stood before s. 85A came into force, the courts below were bound to refer to the Mamlatdar the decision of the issue whether the defendant is a tenant."

G

Section 70 of the Act now provides:

> "For the purposes of this Act the following shall be the duties and functions to be performed by the Mamlatdar:
>
> H (a) to decide whether a person is an agriculturist;

(b) to decide whether a person is, or was at any time in the past, a tenant or a protected tenant or a permanent tenant;

XXXXX XXXXX XXXXX

XXXXX XXXXX XXXXX

(n) to take measures for putting the tenant or landlord or the agricultural labourer or artisan or person carrying on as allied pursuit into the possession of the land or dwelling house under this Act;

(o) to decide such other matters as may be referred to him by or under this Act."

The words "person is, or was at any time in the past, a tenant", and the words "or a permanent tenant" were substituted for the words "person is a tenant" by Mah. 49 of 1969. Section 85 and s. 85A as inserted by Bombay Act 13 of 1956 provide:

85. (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation—For the purposes of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906."

"85A. (1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt

A with by any authority competent to settle, decide or deal with such issues under this Act (hereinafter referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to such competent authority for determination.

B (2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

C Explanation—For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906."

This section was inserted by Bombay Act 13 of 1956.

D Before the amendment of s. 70(b) by Maharashtra Act 49 of 1969, when the question as to whether a party was in the past tenant or not for the purpose of acquiring some other right, that is, not as main issue but as a subsidiary issue, Civil Court's jurisdiction to decide such subsidiary issue could not be said to be barred. Section 70(b) of the E Act imposed a duty on the Mamlatdar to decide "whether a person is a tenant" and not "whether a person was or was not a tenant in the past". In *Mussamiya Imam Haider Bax Razvi* v. *Rabari Govindhai Ratnabhai & Ors.*, [1969] 1 SCR 785, the appellant filed a suit on July 11, 1958 for recovery of possession of the suit lands and mesne profits averring that the lease was fraudulently obtained by the respondents. F The respondents contended that they became statutory owners u/s. 32 or s. 88 of the Act and the Civil Court had no jurisdiction to decide the suit. The trial court decreed the suit and on appeal the High Court held that fraud was not proved; the respondents failed to prove that they were statutory owners before the date of the suit; that the Civil Court had jurisdiction to decide whether defendants were tenants on the G relevant dates namely, July 28, 1956 or May 11, 1958; and that the Civil Court had no jurisdiction to decide whether the defendants were tenants on date of the suit and that question was to be referred to the Mamlatdar. This Court on consideration of the provisions of s. 70 and s. 85A with other relevant provisions held at page 797:

H "We are accordingly of the opinion that s. 85 read with

s. 70 of the Act does not bar the jurisdiction of the Civil Court to examine and decide the question whether the defendants had acquired the title of statutory owners to the disputed lands under the new Act. In this context, it is necessary to bear in mind the important principle of construction which is that if a statute purports to exclude the ordinary jurisdiction of a Civil Court it must do so either by express terms or by the use of such terms as would necessarily lead to the inference of such exclusion. As the Judicial Committee observed in *Secretary of State* v. *Mask & Co.*, 67 I.A. 222, 236.

'It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied.'

In our opinion, there is nothing in the language or context of s. 70 or s. 85 of the Act to suggest that the jurisdiction of the Civil Court is expressly or by necessary implication barred with regard to the question whether the defendants had become statutory owners of the land and to decide in that connection whether the defendants had been in the past tenants in relation to the land on particular past dates. We are also of the opinion that the jurisdiction of the Civil Court is not barred in considering the question whether the provisions of the Act are applicable or not applicable to the disputed land during a particular period."

It may be noted that after the amendment of s. 70(b) of the Act by inserting the words "or was at any time in the past, a tenant", the position has changd. The Civil Court has now no jurisdiction to decide an issue arising incidentally in a civil suit which is to be specifically decided by a competent authority under the Act. Civil Court in such a case shall refer the issue to that authority and dispose of the suit in accordance with the decision of the authority. In *G.S. Shinde* v. *R.B. Joshi*, [1979] 2 SCC 495, the appellant filed the suit for specific performance of a contract for sale of land dated December 15, 1965 coupled with a supplementary agreement dated April 26, 1966 for sale of agricultural land. The suit was resisted by the defendant, contending, *inter alia*, that the provisions of the Act were applicable to the land and the appellant not being an agriculturist, s. 63 of the Act was a bar to his purchase of the land, and the agreement being contrary to law could not be specifically enforced. The plaintiff (appellant) sought

A to repel that contention by producing a certificate, Ext. 78, issued by the Mamlatdar certifying that the plaintiff was an agricultural labourer and the bar of s. 63 was not operative. If that Ext. 78 was not taken note of, the issue would arise whether the plaintiff was an agriculturist and in view of the provisions s. 70(a) read with s. 85 and s. 85A of the Act, the issue would have to be referred to the Mamlatdar for decision B as the civil court would have no jurisdiction to decide the issue. The trial court and the High Court held that Ext. 78 had no evidentiary value and the issue whether the plaintiff was an agriculturist being an incidental issue, main issue being that of specific performance, Civil Court had jurisdiction. Allowing the appeal therefrom and remanding the suit to the trial court this Court speaking through Desai, J. held at para 10:

C

> "Now, if Section 85 bars the jurisdiction of the Civil Court to decide or deal with an issue arising under the Tenancy Act and if Section 85A imposes an obligation on the Civil Court to refer such issue to the competent authority under D the Tenancy Act, it would be no answer to the provisions to say that the issue is an incidental issue in a properly constituted civil suit before a Civil Court having jurisdiction to entertain the same. In fact Section 85A comprehends civil suits which Civil Courts are competent to decide but takes note of the situation where upon a contest an issue may E arise therein which would be required to be settled, decided or dealt with by the competent authority under the Tenancy Act, and, therfore, it is made obligatory for the Civil Court not only not to arrogate jurisdiction to itself to decide the same treating it as a subsidiary or incidental issue, but to refer the same to the competent authority F under the Tenancy Act. This is an inescapable legal position that emerges from a combined reading of Sections 85 and 85A. ..... In a civil suit nomenclature of the issue as principal or subsidiary or substantial or incidental issue is hardly helpful because each issue, if it arises, has to be determined to mould the final relief. G Further, Sections 85 and 85A oust jurisdiction of Civil Court not in respect of civil suit but in respect of questions and issues arising therein and Section 85A mandates the reference of such issues as are within the competence of the competent authority. If there is an issue which had to be settled, decide or dealt with by competent authority under H the Tenancy Act, the jurisdiction of the Civil Court,

notwithstanding the fact that it arises in an incidental manner in a civil suit, will be barred and it will have to be referred to the competent authority under the Tenancy Act. By such camouflage of treating issues arising in a suit as substantial or incidental or principal or subsidiary, Civil Court cannot arrogate to itself jurisdiction which is statutorily ousted. This unassailable legal position emerges from the relevant provisions of the Tenancy Act."

After considering the precedents in *Trimbak Sopana Girme* v. *Gangaram Mhatarba Yadav*, 55 Bom. L.R. 56=AIR 1953 Bom. 241; *Dhondi Tukaram Mali*, (supra); *Bhimaji Shanker Kulkarni*, (supra); *Ishwerlal Thakorelal Almaula* v. *Motibhai Nagjibhai*, [1966] 1 SCR 367=AIR 1966 SC 459; *Pandurang Hari Jadhav* v. *Shankar Maruti Todkar*, 62 Bom. L.R. 873; *Kalicharan Bhajanlal Bhayya* v. *Rai Mahalaxmi*, 4 Guj. L.R. 145; *Neminath Appayya Hanammannaver* v. *Jambu Rao Satappa Kocheri*, AIR 1966 Mysore 154; *Jambu Rao Satappa Kocheri* v. *Neminath Appayya Hanammannaver*, [1968] 3 SCR 706=AIR 1968 SC 1358; *Mussamiya Imam*, (supra) and *Noor Mohd. Khan Ghouse Khan Soudagar* v. *Fakirappa Bharmappa Machenahalli*, [1978] 3 SCC 188=1978 3 SCR 789, their Lordships observed at para 19:

"Thus, both on principle and on authority there is no escape from the conclusion that where in a suit properly constituted and cognizable by the Civil Court upon a contest an issue arises which is required to be settled, decided or dealt with by a competent authority under the Tenancy Act, the jurisdiction of the Civil Court to settle, decide or deal with the same is not only ousted but the Civil Court is under a statutory obligation to refer the issue to the competent authority under the Tenancy Act to decide the same and upon the reference being answered back, to dispose of the suit in accordance with the decision of the competent authority under the Tenancy Act."

In the instant case, applying the settled law as enunciated above, and in view of the certainty of the questions involved, we are of the view that the High Court has rightly sent back the suit to the trial court with the direction to refer issues, if raised any, to be determined exclusively by the competent authority, to that authority.

We now deal with the submission of Mr. Bhasme that the order

A of the tenancy authority in case No. 184 of 1962-63 dismissing his application under s. 29(2) read with s. 25(2) of the Act holding that it had no jurisdiction to deliver possession of the land on the ground that the natural grass grew thereon, should act as *res judicata*, wherefore, referring of issues to the Mamlatdar in the suit remitted by the High Court would be barred. Counsel submits that the Mamlatdar in deciding the aforesaid application acted under the Mamlatdar's Courts Act, 1906 (Bom. Act No. II of 1906) and would be a Court competent to determine the issue as to whether the act was applicable to the appellants' land under the lease, and it already decided that the Act was not applicable as on that land only natural grass grew, which meant that it was not 'land' and the defendants were not 'tenants' as defined in the Act.

Section 11 of the C.P.C. which deals with *res judicata* provides:

> "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."

(Explanations I to VIII are not so relevant for the purpose of this case)

In Duchess of *Kingston's* case Sir William de Grey said:

> "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter, directly in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a Court, of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally

> cognizable, nor of any matter to be inferred by argument from the judgment."

Section 11 bars the trial of a suit or issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit. This Section applies in terms to cases where the matter in issue in a subsequent 'suit' was an issue in a "former suit". A 'suit' is a proceeding which is commenced by a plaint. As provided in Section 26 of the C.P.C. every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. In the instant case admittedly the appellants submitted an application to the Mamlatdar under s. 29(2) read with s. 25(2) of the Act. Sub-section (2) of s. 29 provides:

> "Save as otherwise provided in sub-section (3A), no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him."

This sub-section is as amended by Mah. 39 of 1964. It does not speak of a plaint, a suit or a decree. The appellants did not call its application a plaint or the case a suit.

If a matter directly and substantially in issue in a former suit has been adjudicated upon by a Court of exclusive jurisdiction, the adjudication will bar the trial of the same matter in a subsequent suit. In the instant case the Mamlatdar having decided the appellants' application for possession, the appellants themselves went to the Civil Court and filed the suit. It does not now lie in their mouth to say that the decision of the Mamlatdar would act as *res judicata* for the trial court. We have seen that now the Mamlatdar's Court is a Civil Court for the purpose of s. 85A of the Act.

It is true that s. 11 is now made applicable by the Explanations and interpretation to certain proceedings giving more extensive meaning to the word 'suit'. In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between

A parties in a court of justice the proceeding by which the decision of the Court is sought may be a suit. But if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of s. 11. In the absence of the details of the proceeding concerned in the instant case, it has not been possible for us to hold that it was of the nature of a suit and not a summary B proceeding. Besides, assuming the Mamlatdar in deciding the application in 1962-63 to have been a court of exclusive jurisdiction for the purpose of s. 11 C.P.C., its decision rejecting the application would not be an evidence on the question of tenancy merely because it could be inferred from that decision.

C Admittedly the appellants' application was decided *ex parte*. It is true that *ex parte* decrees operate to render the matter decided *res judicata*, and the defendants' failure to apper will not deprive the plaintiff of the benefit of his decree. But in the case of a suit in which a decree is passed *ex parte*, the only matter that can be 'directly and substantially in issue' is the matter in respect of which relief has been D claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed cannot be 'directly and substantially in issue' in a suit in which a decree is passed *ex parte* though the Court may have gone out of its way and declare the plaintiff to be entitled to relief in respect of such matter. In the instant case applying the above principle the order having been passed *ex parte*, assuming the doctrine of *res* E *judicata* applied, it could be only to the extent of the appellants having been not entitled to possession at the relevant time; and it could not be extended logically to the issue whether the defendants were tenants under the Act.

F The expression 'heard and finally decided' in s. 11 means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided. What operates as *res judicata* is the ratio of what is fundamental to the decision but it cannot be ramified or expanded by logical extension. In *Vithal Yaswant* v. *Shikandar Khan Mutumukhtan*, AIR 1963 SC 385, it G has been held by this Court that when a court bases its decision on more than one point, each of which would by itself be sufficient for the ultimate decision, the decision on each one of those points would be *res judicata*. In the instant case what were the points specifically urged and decided are not clear. In *Pandurang Mahadeo Kavade & Ors.* v. *Annaji Balwant Bokil & Ors.*, [1971] 3 SCC 530 it was held that in H order to operate as *res judicata* it must be established that the previous

decision was given by a court which had jurisdiction to try the present suit, and there would be no *res judicata* if the previous decision was by a court having no jurisdiction. Of course that was a case of pecuniary jurisdiction, but there is no reason why the same principle should not apply in other cases of courts without jurisdiction. The law is well settled that a court which had no jurisdiction to try a cause cannot by its own erroneous decision confer on itself competence to decide it and its decision on the question of jurisdiction cannot operate as *res judicata*. Conversely the decision relating to jurisdiction cannot be said to constitute the bar of *res judicata* where by an erroneous interpretation of a statute it holds that it has no jurisdiction. It is stated that there was no appeal filed by the defendants from the order of the Mamlatdar. That is not material. In *Ramchandra Rao* v. *Ramchandra Rao,* [1922] 49 I.A. 129, the Privy Council decided that where the suit as to the title for compensation had been referred to the Court, a decree thereon was not appealed from, the question of title would be *res judicata* in a suit between the parties to the dispute.

In *Bhagwan Dayal* v. *Mst. Reoti Devi,* [1962] 3 SCR 440, a dispute arose as to proprietary title. A suit was filed in a Revenue Court under the U.P. Tenancy Act. The Revenue Court framed an issue thereon and referred it to the Civil Court as required by the Act. The Civil Court held that the respondent had a half share in the villages and on the basis of this finding the Revenue Court decreed his suit. Thereafter, the appellant filed a suit in Civil Court for a declaration that he was the absolute owner of all the property in the suit. The defendants contended that the suit was barred by *res judicata*. This Court held that a subsequent suit was not barred by *res judicata* by the Judgment of the Revenue Court, as it was not within the exlcusive jurisdiction of the Revenue Court and suit was maintainable in the Civil Court. The Judgment of the Revenue Court on the issue of proprietary title could not operate as *res judicata* as a Revenue Court was not competent to try the subsequent suit.

In the instant case, the Mamlatdar declined to exercise jurisdiction holding that the Act did not apply. If an issue is referred to it by the trial court under the Act, the question of jurisdiction would not arise and there could be no question of *res judicata* as to jurisdiction of the Mamlatdar on reference.

Bearing in mind the above provisions and the principles of law, we are of the view that there could arise no question of *res judicata* in the instant case. Section 11 would not be a bar to the trial court in

A referring issues which are to be exclusively determined by a competent authority under the Act, to that authority. Nor should arise any such question of *res judicata* in the competent authority deciding those issues when referred to by the trial court.

In the result, we find no merit in this appeal which is accordingly
B dismissed, but without any order as to costs.

Y. Lal Appeal dismissed.