



## RES JUDICATA: A LEGITIMATE EXCLUSION IN REJECTION OF A PLAINT

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*“Nemo debet bis vexari pro una et eadem cause”<sup>1</sup>*  
- *Imperium Romanum*

### ABSTRACT

*The present paper aims at providing a summary analysis of the recent Supreme Court decision in Srihari Hanumandas Totala v. Hemant Vithal Kamat & Ors. Further, reference has been made to the facts of the case, arguments advanced by both the sides, the issues framed by the Court, the ratio of the said decision of the Supreme Court, and distinguishing factors that differentiated the judgment from previous authorities on the point Supreme Court. While the aforesaid judgment is bound to raise a few eye brows and might go under the perceived interpretation of Order VII Rule 11 (d) of CPC, especially qua the expression “barred by any law”. Nonetheless, the judgment is a proper interoperation of the said order as Res Judicata as a ground for depriving jurisdiction of a Civil Court cannot be based upon a mechanical reading of merely the averments made in the plaint (as required by the language of the said order).*

**KEYWORDS:** Res Judicata, CPC, Order VII Rule 8, Barred by any law, Supreme Court.

### INTRODUCTION

Section 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC 1908) enumerates the principle of Res Judicata. However, it is not an absolute limitation in any litigation, and its applicability will depend upon facts and circumstances of each case. Nothing exemplifies this more than the recent judgment of the Hon’ble Supreme Court in *Srihari Hanumandas Totala v. Hemant Vithal Kamat*<sup>2</sup>. The facts of the case are as follows: In 1996, one Leela Vithal Kamat, a resident of Karnataka, died intestate leaving her ancestral property to devolve upon to her two children. The said property was not partitioned was held jointly by both the siblings. Subsequently one of the brothers (hereinafter referred to as the mortgagor) decided to mortgage the property in order to obtain loan, for establishing a CT Scan Center on the said land. The Karnataka State Financial Corporation (hereinafter referred to as KSFC) was the mortgagee under the said contract. In 2006, as the mortgagor failed to repay the loan amount the mortgagee foreclosed the said property and sold it through an auction to the predecessor-in-interest of the present appellant (hereinafter referred to as the predecessor) as he had furnished the highest bid of Rs. 15 Lakhs. The mortgagor and his brother (the respondent in the present appeal) refused to deliver the possession of the property to the predecessor. The predecessor therefore instituted a suit for possession in 2007. The primary issue to be decided in the said suit was whether the predecessor was entitled to the said possession after purchasing the property in the sale in 2006. The defendant in the said suit (present respondent) contended

<sup>1</sup> Latin maxim for “No person should be twice sued upon the same set of facts if there has been a final decision of a competent court.”

<sup>2</sup> *Srihari Hanumandas Totala v. Hemant Vithal Kamat*, 2021 S.C.C. OnLine S.C. 565.



that the mortgagor was not entitled to mortgage the property in the first instance, since the said property was joint property and hadn't been partitioned. Thereby the mortgage agreement was absolutely void and liable to be set aside along with the said sale. During the continuance of the trial of the said suit in 2007 (former suit), the respondent instituted another suit 2008 (subsequent suit) whereby the title of the predecessor over the property was challenged. Both the suits had been tried indecently and were not clubbed together. In 2009, the former suit was decreed in favour of the predecessor as the court held that he had validly acquired the property in the auction sale. The defendant appealed against the judgment, which was confirmed by the Karnataka High Court in favour of the predecessor. Subsequently the predecessor sold the said property to the appellant. The appellant moved an application under Order VII Rule 11 (d) of the CPC 1908 in the court trying the subsequent suit on the ground that the said suit is barred by *Res Judicata* under Section 11 of the CPC, as the dispute in question had been finally settled in the former suit and as the issue that was raised was directly and substantially similar. However the trial court rejected the said application on the ground that an application under Order VII Rule 11 (d) cannot rely upon *Res Judicata* as a ground for the dismissal of plaint. The Karnataka High Court affirmed the rejection of the said application in a revision petition filed by the appellant against the order of the trial court. The appellant thus filed an appeal before the Hon'ble Supreme Court of India against this decision of the Karnataka High Court.

## RELEVANT PROVISIONS UNDER THE CPC 1908

The matter involved the interpretation of the following legal provisions under the CPC 1908:

### 1. Section 11 of the CPC 1908 (*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.—the expression “former suit” shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.*

*Explanation II.—for the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*

*Explanation III.—the matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation IV.—any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*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.*

*Explanation VI.—where persons litigate bona fide in respect of a public right or of a*



private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

*Explanation VII.—the provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*

*Explanation VIII. —An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.<sup>3</sup>*

## 2. Order VII Rule 11 (d) of the First Schedule of the CPC 1908

*Rejection of plaint. — The plaint shall be rejected in the following cases:—*

*(d) Where the suit appears from the statement in the plaint to be barred by any law;<sup>4</sup>*

## ARGUMENTS ADVANCED BY THE APPELLANT

1. The appellant submitted that the dispute between the parties had been already resolved by the decree in the former suit whereby the Civil Court had determined in the 2007 that the KSFC had validly transferred the property to his predecessor in interest, through the auction sale. Therefore, the question of title over the said property had already been determined in his favour (being

the valid transferee of the property after the transfer by the predecessor).

2. Further as both former and subsequent was suit directly and substantially the same, the rule of *Res Judicata* under Section 11 would be applicable, barring the jurisdiction of the court hearing the subsequent suit. Thus, the application that had made by him under Order VII Rule 11 (d) for the dismissal of the plaint should be accepted and the plaint in the subsequent suit should be dismissed since it is barred by law.
3. Moreover if the application would not be accepted it would lead to unnecessary hardship to the appellant as he would have to re-litigate again, especially as the decree of the former court has been affirmed by the Karnataka High Court as well.

## ARGUMENTS ADVANCED BY THE RESPONDENT

1. The respondent submitted that *Res Judicata* under Section 11 of the CPC, cannot be used as a ground for dismissal of the plaint under Order VII Rule 11 (d) of the CPC as the expression “plaint” had been used by the said sub-rule which indicated that the “barred by law” cannot be interpreted to mean *Res Judicata*, as for application of Section 11 of CPC, the Court would have to rely upon both the plaint and written statement i.e., the Pleadings and not merely plaint. Therefore, the Trial Court and the Karnataka High Court were proper in rejecting the application of *Res Judicata* under Order VII Rule 11 (d).
2. The issue involved in the former and subsequent suit was not directly and substantially the same as the former was concerned with the possession of the suit property while the latter was concerned with the title over the suit property.

<sup>3</sup> The Code of Civil Procedure, 1908, §11, No. 05, Acts of Parliament, 1908 (India).

<sup>4</sup> The Code of Civil Procedure, 1908, O VII R 11 (D), No. 05, Acts of Parliament, 1908 (India).



3. Further, at the time of institution of the subsequent suit in 2008 itself, the ground of *Res Judicata* could not have been used by the predecessor as the former suit was only determined in 2009.

### ISSUES FOR DETERMINATION BEFORE THE HON'BLE SUPREME COURT

The following issues were to be determined by the Hon'ble Supreme Court:

1. Whether the expression "barred by law" as used in Order VII Rule 11 (d) includes *Res Judicata*?
2. Whether the expression "plaint" as used in Order VII Rule 11 (d) should be interpreted as "pleadings"?
3. Whether Order VII Rule 11 (d) of the CPC 1908 allows the dismissal of plaint on the ground of *Res Judicata*?
4. At what stage can the defense of *Res Judicata* be raised by a party to a suit?

### JUDGMENT OF THE HON'BLE SUPREME COURT

A Division Bench comprising of Dr. D.Y. Chandrachud and M.R. Shah, JJ upheld the order of the Karnataka High Court and thus the application under Order VII Rule 11 CPC (Rejection of plaint) filed by the appellant was dismissed. Thus it was held that the Court at the time of considering an application under Order VII, Rule 7 of the CPC, shall confine itself to the averments made in the plaint and the documents annexed thereto. It shall not look into the defence of the defendants in order to find out as to whether the suit is barred by law. Therefore, the plaint cannot be rejected on the plea of being barred by principle of *res*

*judicata* upon invocation of the provision contained under Order VII, Rule 11 (d) of the CPC. While deciding the appeal, the Supreme Court summarized the guiding principles for deciding an application under Order VII Rule 11(d) of CPC.<sup>5</sup> The Hon'ble S.C. observed "*The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case.*"<sup>6</sup>

### RATIO DECIDENDI

Considering the material on record, the Supreme Court upheld that the decision of the Karnataka High Court and held that *Res Judicata* is not a ground for rejection of a plaint under Order VII Rule 11 (d) of the CPC. The Court held that Order VII Rule 11 (d) mentioned in clear terms that only averments contained in plaint will be used to determine as to whether the plaint is barred by any law. Thus, any application to succeed must prove that the said plaint is barred on the basis of the material and elements contained in the plaint itself. Whereas in case of determination of applicability of *Res Judicata* the Court had to determine the same on the basis of the statements contained in the pleadings as a whole (plaint and written statement) and the previous history of the parties in the context of litigation. *Res Judicata* being a procedural limitation upon the jurisdiction of the Court, cannot be determined merely on the basis of the statements contained in the plaint itself. Thus the Court interpreted the provision as

<sup>5</sup> Tejaswi Pandit, Conundrum of *res judicata* and rejection of plaint, S.C.C. Online Blogs, (Aug.31, 2021, 9:21 PM),

<https://www.S.C.C.online.com/blog/post/2021/08/10/conundrum-of-res-judicata-and-rejection-of-plaint/>

<sup>6</sup> Ibid.



contained in Order VII Rule 11 (d) in a strict manner. The Court held that “*It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.*” Thus, the Court held that as the expression plaint has been clearly mentioned in the aforesaid, it cannot be substituted by the expression “pleadings”. Thus, *Res Judicata* cannot be a ground for making an application to reject the plaint and therefore decision of the Karnataka High Court and the Court trying the subsequent suit in rejecting the said application is valid. Thus the appellant is not entitled to the dismissal of the plaint on the basis of application under Order VII Rule 11 (d). The appellant was not able to establish that there existed an averment in the respondent (plaintiff in the subsequent suit) that barred the plaint under the said rule and thus the essentials required by the Order VII Rule 11 (d) are not fulfilled in the said case. Moreover at the time of the institution of the subsequent suit, the former suit was still being heard and the defense of *Res Judicata* could not have been taken at that time. However, as per Explanation 1 to Section 11, the former suit having been decided now the appellant can use *Res Judicata* as contention as the defendant in the subsequent suit. *Res Judicata* as a ground can be availed as a ground to limit the jurisdiction of the court at any stage after the issue which has finally settled by a competent court between the same parties is made subject of a subsequent suit (when the issue is directly and substantially the same between the parties in the subsequent suit). Therefore even though the appellant may suffer hardship in the instant matter, he is free to raise the plea of

*Res Judicata* under Section 11 of the CPC before the Trial Court hearing the subsequent suit (though not as a ground for making an application under Order VII Rule 11 (d) of the CPC) at any stage, if even if the said court frames it as a preliminary question.

### GUIDING PRINCIPLES FOR DECIDING AN ORDER VII RULE 11(D) APPLICATION

The Hon’ble Supreme Court summarised the guiding principles for deciding an application under Order VII Rule 11(d) of CPC:

- (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;
- (ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;
- (iii) To determine whether a suit is barred by *res judicata*, it is necessary that (a) the ‘previous suit’ is decided, (b) the issues in the subsequent suit were directly and substantially in issue in the former suit; (c) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (d) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and
- (iv) Since an adjudication of the plea of *res judicata* requires consideration of pleadings, issues and decision in the ‘previous suit’, such a plea will be beyond the scope of Order VII Rule 11(d), where only the statements in the plaint will have to be perused.<sup>7</sup>

### JUDICIAL PRECEDENTS CITED:

The Hon’ble Supreme Court cited the following judicial precedents in arriving at its decision:

<sup>7</sup> Tejaswi *supra* note 5.



1. ***Soumitra Kumar Sen v. Shyamal Kumar Sen***<sup>8</sup>: The Supreme Court held that the Trial Judge correctly came to the conclusion that the application filed under Order VII Rule 11(d) on the ground of *res judicata* could not be decided merely by looking into the averments in the plaint. In the view of the High Court, a plaint could be rejected under Order VII Rule 11 only if it was not maintainable on the basis of the averments contained in the plaint. The said view was affirmed by the Supreme Court while observing that “*In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit.*”
2. ***V. Rajeshwari v. T.C. Saravanabava***<sup>9</sup>: A 2-Judge Bench of the Supreme Court discussed the plea of *res judicata* and the particulars that would be required to prove the plea. It was held that it is necessary to refer to the copies of pleadings, issues and judgment of the ‘former suit’ while adjudicating on the plea of *res judicata*.
3. ***Syed Mohammad Salie Labbai v. Mohammad Hanifa***<sup>10</sup>: The Supreme Court held that the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit

and then to find out as to what had been decided by the judgment which operates as *res judicata*. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.

4. ***Gurbux Singh v. Bhooralal***<sup>11</sup> : The Constitution Bench of the Supreme Court whilst placing on a par the plea of *res judicata* and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings.
5. ***Kali Krishna Tagore v. Secy. of State for India in Council***<sup>12</sup>: The Lordships of the Privy Council pointed out that the plea of *Res Judicata* cannot be determined without ascertaining what the matters in issue were in the previous suit and what was heard and decided.
6. ***Kamala & others v. KT Eshwara Sa***<sup>13</sup>: The Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. In appeal to the Supreme Court, it was observed

<sup>8</sup> Soumitra Kumar Sen v. Shyamal Kumar Sen, (2018) 5 S.C.C. 644.

<sup>9</sup> V. Rajeshwari v. T.C. Saravanabava, (2004) 1 S.C.C. 551.

<sup>10</sup> Syed Mohammad Salie Labbai v. Mohammad Hanifa, (1976) 4 S.C.C. 780.

<sup>11</sup> Gurbux Singh v. Bhooralal, A.I.R. 1964 S.C. 1810.

<sup>12</sup> Kali Krishna Tagore v. Secy. of State for India in Council, ILR 16 Cal 173.

<sup>13</sup> Kamala v. KT Eshwara SA, (2008) 12 S.C.C. 661.



that “Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another. The principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage” Thus, the said suit was barred by principles of estoppel, waiver and acquiescence.

7. ***Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust***<sup>14</sup>: The Supreme Court observed that “It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the

<sup>14</sup> Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 S.C.C. 706.

time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.”

8. ***Saleem Bhai v. State of Maharashtra***<sup>15</sup>: The Supreme Court while considering Order 7 Rule 11 of the Code, held that a perusal of Order VII Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.

9. ***Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another***<sup>16</sup>: The Supreme

<sup>15</sup> Saleem Bhai v. State of Maharashtra, (2003) 1 S.C.C. 557.

<sup>16</sup> Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another, 2020 S.C.C. OnLine S.C. 482.



Court observed it is clear that in order to consider Order VII Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment.

#### JUDGMENT ANALYSIS AND CONCLUSION

The said judgment is bound to raise a few eye brows and might go under the perceived interpretation of Order VII Rule 11 (d) of CPC, especially *qua* the expression “barred by any law”. Nonetheless, the judgment is a proper interoperation of the said order as *Res Judicata* as a ground for depriving jurisdiction of a Civil Court cannot be based upon a mechanical reading of merely the averments made in the plaint (as required by the language of the said order). In fact the application of *Res Judicata* requires an appreciation of the contents of both the plaint and the written statement i.e., the pleadings as a whole, and not merely plaint. Thus, the intention of legislature is clear, whereby Order VII Rule 11 (d) was designed to deal with only those instances the averments contained in the plaint alone would be sufficient to indicate that plaint is barred by any law. Thus as the word plaint has been used and not pleading, the Hon’ble Supreme Court has properly prevented the appellant from relying on the plaint of the plaintiff (in the subsequent suit i.e., the respondent in the

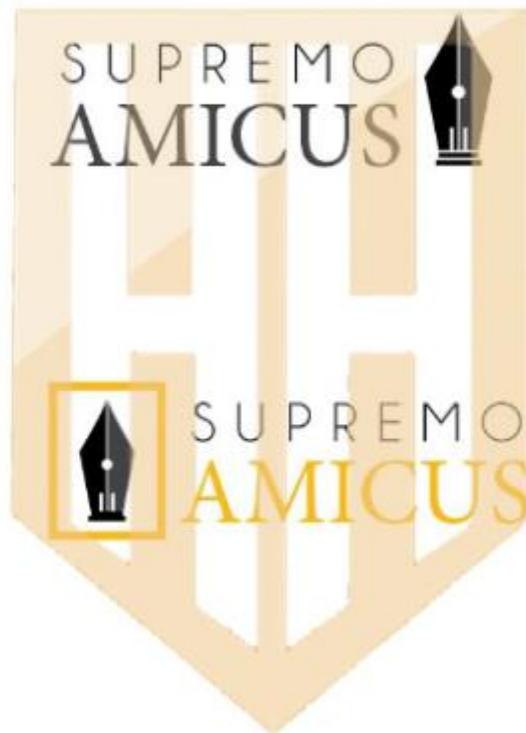
instant appeal) to bar the subsequent suit. Whilst the appellant is likely to suffer some hardship from the said decision, the court said that the plea of *Res Judicata* can be raised by him at any stage in the subsequent proceedings and therefore he can obtain a decree in his favour by using *Res Judicata* as defense, but not as a ground to for filling an application under Order VII Rule 11 (d). Further it is evident from the facts of the said case that all the parties were at fault. The KSFC without proper due diligence as to the title of the property, became a mortgagee with respect to the said property. The predecessor-in-interest who purchased the said property in the auction sale could have used the defense of *Res Sub-Judice* under Section 10 of the CPC to ensure stay of the subsequent suit filed in 2008 by the respondent, as the prior suit filed in 2007 involved issues that were directly and substantially the same. The court trying the prior suit filed in 2007 also framed the issues improperly, as it should have as a preliminary question determined the title over the property and not merely whether the predecessor was entitled to the possession of the said property which he had purchased in the said auction. The predecessor could have applied for clubbing of suits under appropriate rules. Finally, after the former suit was decreed in his favour, he or the appellant could have used *Res Judicata* in their written statements, instead of filing the application for dismissal of the plaint itself. Finally while the appellant suffered with the rejection of the said application, it is a cardinal principle of law that it assists only those who are vigilant, and not those who sleep over their rights (*Vigilantibus Non*



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*Dormeintibus Jura Subveniunt*).<sup>17</sup>  
Nonetheless the Court recognized the objectives behind *Res Judicata* as well and promptly held that dismissal of the present appeal is no bar to its application during the trial of a civil suit itself.

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<sup>17</sup> Latin Maxim for “Law assists only those who are vigilant”.