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We will, therefore, set aside the decision both of the trial Court and of the lower appellate Court and send the matter down to the trial Court with a direction to the learned Judge to take accounts under s. 15D of the Dekkhan Agriculturists' Relief Act of the mortgage which the plaintiff wants to redeem. The appellant will get the costs of the second appeal in this Court and the costs of the lower appellate Court, and the costs of the trial Court will be costs in the cause.

Appeal allowed.

K. B. S.

APPELLATE CIVIL

FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Dixit, and Mr. Justice Shah.

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Jan. 7

THE STATE OF BOMBAY (ORIGINAL DEFENDANT), APPELLANT *v.* THE MUNICIPAL CORPORATION OF AHMEDABAD (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), s. 11—Res judicata—*Actual decision of Court and not reasons behind it which become conclusive—Decision on question of law when operates as* res judicata—*Distinction between* res judicata *and precedent.*

The first and the primary consideration in applying s. 11 of the Civil Procedure Code, 1908, is to decide what is the *res* which has been determined, for it is only *res* so determined that becomes *res judicata.* Where the *res* is a question of law, it may become *res judicata;* where the *res* is a finding of fact or facts, then what becomes *res judicata* is only the fact or facts so found, and not the interpretation of the law which led the Court to find the fact or facts.

Only the material facts necessary for the party to allege in order to establish his right in the suit can become a matter directly and substantially in issue, and the decision of the Court with regard to that matter becomes *res judicata.* What constitutes *res judicata* is the matter which is decided and not the reason which leads the Court to decide the matter. But it is not that a question of law can never operate as *res judicata.* If certain facts had to be determined on an application of the law to those facts or on an interpretation of the law with regard to those facts, then the law applied to or interpreted with regard to those particular facts would constitute *res judicata* and it would not be open to a party to say that the law was different either in its applicability or in its interpretation with regard to those facts from what had been decided in the earlier suit. But if law is interpreted as a mere reasoning which leads ultimately to the final decision, then that decision of

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* Letters Patent Appeal No. 36 of 1948.

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law does not become *res judicata* in subsequent suits when the facts which fall to be determined are entirely different.

There is a distinction between *res judicata* and a precedent established by Court. When a Court interpretes the law, when it construes a statute or determines what the position in law is with regard to a particular matter, that constitutes a precedent set up by that Court and that Court may well follow that precedent when similar cases come before it where the same law has to be considered and interpreted. But a decision given by a Court on a question of law does not bind the same parties when those parties are litigating with regard to an entirely different right. The decision of law would only be binding between the same parties as *res judicata* if the right that a party claimed was the same in the former suit and in the later suit. If certain facts were determined on an interpretation of the law and it was held that a party had a certain right or that he was not entitled to a particular right, then it would not be open to that party in a subsequent suit to challenge the interpretation of the law and ask the Court to decide that he had the right nor would it be open to the other party to allege that he did not have the right.

Mahadevappa Somappa v. *Dharmappa Sanna*,[1] and *Santosh Kumar* v. *Nripendra Kumar*,[2] followed.

Keshav v. *Gangadhar*,[3] *Savitri* v. *Holebasappa*,[4] *Chhaganlal* v. *Bai Harkha*,[5] and *Hub Lal* v. *Gulzari Lal*,[6] distinguished.

Ragho Ravji v. *Gopal Janardan*,[7] *Sunderabai* v. *Devaji*,[8] *Sitaram Sakharam* v. *Laxman Vinayak*,[9] *Narayan* v. *Subramanian*,[10] *Bindeswari* v. *Bageshwari*,[11] explained.

Alison's case[12] *Hoystead* v. *Commissioner of Taxation*,[13] and *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*,[14] referred to.

The Ahmedabad Municipal Corporation having constructed meat shops over 60½ sq. yards of public street vested in it, the Collector of Ahmedabad levied non-agricultural assessment on the land. The Municipality thereupon filed a suit against the State Government for a declaration that the order of the Collector levying the assessment was illegal and should not be enforced. In an earlier suit the Municipality had successfully challenged another order of the Collector levying non-agricultural assessment on 92 sq. yds. of public street which had been converted by the Municipality into a Fish Market. The Municipality contended that that decision operated as *res judicata* in the later suit inasmuch as the common question in both the suits was the right of the State Government to levy non-agricultural assessment in respect of lands which had vested in the Municipality as public street:

(1) (1942) 44 Bom. L. R. 710.
(2) [1949] A. I. R. Cal. 430 (F. B.).
(3) (1931) 33 Bom. L. R. 1443.
(4) (1931) 34 Bom. L. R. 198.
(5) (1909) 33 Bom. 479.
(6) (1927) 49 All. 543.
(7) (1929) 54 Bom. 162.
(8) Civil Appeal No. 128 of 1951 decided by Supreme Court.
(9) (1921) 45 Bom. 1260 (F. B.).
(10) [1937] Mad. 364 (F. B.).
(11) (1935) L. R. 63 I. A. 53.
(12) (1873) 9 Ch. 1.
(13) [1926] A. C. 155.
(14) [1926] A. C. 94.

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Held, that the *res* which was determined in the earlier suit was the validity of the Collector's order concerning a particular land and the assessment levied upon that land whereas the *res* in the subsequent suit was the Collector's order with regard to an entirely different piece of land and an entirely different assessment, and, therefore, the *res* that was decided in the earlier suit could not operate as *res judicata* for the purpose of the subsequent suit.

LETTERS PATENT APPEAL from the decision of Gajendragadkar J. summarily dismissing Second Appeal from the decision of J. Clarance Smith, Esquire, Assistant Judge, at Ahmedabad, reversing the decree passed by M. J. Merchant, Esquire, Joint Civil Judge, Senior Division, at Ahmedabad.

Suit for declaration and injunction.

The Ahmedabad Municipal Borough (plaintiff) constructed 3 meat shops over 60½ square yards of public street vested in it. On March 29, 1941, the Collector of Ahmedabad ordered the said land to be assessed at Rs. 45-6-0 per year.

On September 30, 1944, the plaintiff filed a suit against the State Government (defendant) for a declaration that the order of the Collector was illegal and for an injunction restraining the defendant from levying that assessment.

On October 31, 1946, the trial Court dismissed the suit holding that the Collector had a right under s. 45 of the Bombay Land Revenue Code to levy the assessment on the land.

On appeal, the Assistant Judge at Ahmedabad agreed with the trial Court that the order of the Collector was legal. But he felt that he was bound by an earlier decision on the same point between the same parties in which it was finally held that a piece of 92 square yards which had been converted into a fish Market by the Municipality was not liable to pay non-agricultural assessment. Therefore, on December 9, 1947, he allowed the appeal.

The defendant preferred an (Second) Appeal to the High Court, but the same was summarily dismissed by Gajendragadkar J. on April 2, 1948.

The defendant then appealed under the Letters Patent. The Letters Patent Appeal was heard by a bench consisting of Bavdekar and Vyas JJ. The two learned Judges differed and took contrary views on the question of *res judicata*. The following were the differing judgments:—

BAVDEKAR J.—This is a Letters Patent appeal arising from a suit which had been filed by the Borough Municipality of Ahmedabad in respect

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of 60½ square yards of public street land which had vested in the Municipality as street land. It appears from the evidence that the Municipality converted the piece of land by its incorporation in meat shops, and the Commissioner thereupon assessed the land to payment of non-agricultural assessment and made an order that the amount of assessment should be recovered. The Municipality filed the suit from which the present appeal arises challenging the assessment and contending that they were, as a matter of fact, not liable to pay the assessment which had been imposed. The learned Assistant Judge, who heard the first appeal, came to the conclusion that the decision of the trial Judge that the land was liable to pay non-agricultural assessment under s. 45 of the Land Revenue Code was a correct decision. The trial Judge had dismissed the suit holding that art. 14 of the Limitation Act applied and the suit was barred by limitation. The learned Assistant Judge did not go into that question; but he held that it was not necessary for him to go into the question of limitation, because prior to his decision there had been a final decision in another similar suit between the Borough Municipality of Ahmedabad on the one hand and the Provincial Government of Bombay on the other, holding that in a similar case where a piece of land 92 square yards in extent from another street had been converted to use as a fish market it was not liable to pay non-agricultural assessment. The learned Assistant Judge came to the conclusion that this decision barred the present suit by the doctrine of *res judicata*. The order of the Collector was consequently *ultra vires*.

The Government of the Province of Bombay have come in appeal, and it appears to us, in the first instance, that the learned trial Judge as well as the learned appellate Judge was quite correct in holding that the land in question was liable to pay enhanced assessment. Under s. 45 of the Land Revenue Code all land is liable to pay assessment unless exempted either by a contract or by any particular law. The street land which has been converted to a non-agricultural land in the present case was exempted from any assessment as long as it was a street land under the provisions of s. 128 of the Land Revenue Code. That section continues exemptions which were in existence at the time when it was enacted, and one of the exemptions which was in force at the time when it was enacted was in respect of land in sites of towns and cities like the city of Ahmedabad. In such villages both land which was privately occupied and land which was used as streets were exempt from attachment. The learned advocate, who appears on behalf of the Government, says that there is nothing whatsoever to show that street land was exempt from assessment only as long as it was used as street land. Section 45 says that all land is liable to pay assessment. In case it was the contention of the Borough Municipality that street land was exempt from assessment, whether it was street land or whether it ceased to be a street land, it was necessary for them to show some provision of the law under which it was so exempt. The Borough Municipality of Ahmedabad are unable to show any provision under which the street land could be held to be exempt once it ceased to be used as a street land. It must, therefore, be taken that the land was liable to pay assessment.

Now, the question of the application of s. 45 does not dispose of the whole of the question between the parties. Section 45 merely says that

all land will be liable to assessment; but we find that under rr. 13 and 14 of the Bombay Land Revenue Rules non-agricultural assessment can be levied upon land which is not exempt from assessment and which is included in the area to which a survey is extended under s. 131. It is not in dispute that a survey has been extended to the site of the City of Ahmedabad under the provisions of this section. Under r. 14 of the Land Revenue Rules the Collector is entitled to assess such lands at the same rate and for the same period as if he were altering an agricultural assessment under whichever of rr. 81 to 85 has been applied to the locality. The learned advocate, who appears on behalf of the Borough Municipality of Ahmedabad, says that this assessment is to be made upon the introduction of a survey under s. 131. Some lever is given to this contention, because r. 14 says "the Collector on receipt of a schedule of the lands"; but we do not think that it was the intention that where land was liable to assessment under the provision of r. 13 it should escape assessment merely because no assessment was levied on it either because it was exempted from payment of land revenue as long as it was used as street land or because it had through oversight escaped assessment. In our view, the powers of the Collector could be used at any time after the survey was extended to the site of a town or village under s. 131. Consequently land in the present suit was liable to pay non-agricultural assessment. The only question which then remains to be determined is whether the finding that the present suit was barred by *res judicata* because of the decision in suit No. 907 of 1942 in the Court of the Civil Judge of Ahmedabad is correct.

Now, what had happened in the former case was that the Municipality had converted 92 square yards of street land to the use of a fish market and the Commissioner thereupon, as in the present case, proposed to levy assessment. The Borough Municipality thereupon filed suit No. 907 of 1942 challenging the assessment and claiming that they were not liable to pay any assessment, agricultural or non-agricultural. The trial Court decided the suit in the plaintiff's favour; when the matter went in appeal to the learned appellate Judge, he raised an issue, which is in the following terms:—

"Is the action of the Collector of Ahmedabad in levying non-agricultural assessment on the public street land of 92 square yards utilised by the plaintiff respondent Municipality for the use of the fish market at Ahmedabad legal as contended on behalf of the defendant appellant the Government of Bombay?"

The finding which was given upon the point was in the negative. The learned Assistant Judge relied in support of this contention upon a passage in Mr. Gupte's Bombay Land Revenue Code to the effect that "Lands vesting in a Municipality under s. 50 of the Bombay District Municipal Act, 1901, and s. 63 of the Bombay Municipal Boroughs Act, 1925, and not reserved under r. 53 of the Bombay Land Revenue Rules are exempt from payment of non-agricultural assessment". The learned Judge then went on to observe:

"In view of the circumstance that the defendant appellant, Government of Bombay, has nothing to do with the ownership of the land in

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dispute, I think it is not entitled to levy any non-agricultural assessment on the same under the provisions of s. 45 of the Bombay Land Revenue Code."

He, therefore, dismissed the appeal filed by the Government of Bombay. It is contended by the Borough Municipality of Ahmedabad that, because of the finding recorded in that suit, the present suit is barred by *res judicata*. The finding which was recorded actually was that the action of the Collector of Ahmedabad in levying non-agricultural assessment on the public street land of 92 square yards utilised by the Borough Municipality for the use of the fish market at Ahmedabad was not legal. It is conceded that the land in the present suit was not included in the prior suit. It is also contended that, as a matter of fact, the land forms part of an entirely different street. It is said, however, that the view which was taken in that suit was that the land which had vested in the Municipality under s. 50 of the Bombay District Municipal Act, 1901, and s. 63 of the Bombay Municipal Boroughs Act, 1925, and not reserved under r. 53 of the Bombay Land Revenue Rules are exempt from payment of non-agricultural assessment. No one can quarrel with the proposition if the proposition was understood in the sense that these lands were exempt from assessment if any exemption could be claimed in respect of them; for example, on the ground that the land was street land which had been exempt from revenue at the time of the enactment of s. 128 of the Bombay Land Revenue Code. But the learned advocate, who appears on behalf of the Borough Municipality, says that the view which the learned Judge took of the law was that the lands vesting in a Municipality under s. 50 of the Bombay District Municipal Act, 1901, and s. 63 of the Bombay Municipal Boroughs Act, 1925 and not reserved under r. 53 of the Bombay Land Revenue Code were exempt from payment of non-agricultural assessment, irrespective of whether there could be claimed in regard to them exemption under any of the provisions of the Land Revenue Code or the Land Revenue Rules, and the contention which he makes is that in any suit between the Municipality of Ahmedabad on the one hand and the Government on the other which may arise hereafter for decision, it must be taken, unless there is in the meanwhile a change in the law effected by the Legislature, that the proposition of law enunciated in the decision of the learned Assistant Judge is a correct proposition.

Now, the question as to whether an issue of law is *res judicata, inter partes*, and if so in what circumstances, has been the subject-matter of a large number of decisions, whether of this Court or of other Courts. The matter came up for decision in this Court for the first time in *Chamanlal* v. *Bapubhai*.[1] In that case the plaintiff had brought a suit to recover eleven years' arrears of his share in a certain Government allowance received by the defendants and prayed for an order directing the defendants to pay him and his heirs his proper share in future. The defendants contended that under the Limitation Act (XV of 1877) only three years' arrears could be recovered. In a previous suit brought by the plaintiff in 1874 against the same defendants it was decided by the High Court that twelve years' arrears could be recovered. The lower Court held that this decision continued to bind the parties, and that,

[1] (1897) 22 Bom. 669.

therefore, the present claim should be allowed. It passed a decree accordingly. It was held by this Court that a point of law though decided in a suit between the same parties can never be *res judicata*. This decision has been modified to some extent by cases of this Court where it has been held that even a decision which is confined to a decision of a pure point of law will bar by *res judicata* the agitation of the same question if the cause of action is the same. But apart from this variation, the decision is binding and so far as I am aware it has not been overruled in any particular case.

The learned advocate, who appears on behalf of the Borough Municipality, says that the ratio of this decision is not that the point of law can never be *res judicata*, though that is so stated in the headnote of the judgment. He says that the suit which came up before their Lordships had to be decided under the Limitation Act, 1877, whereas the prior suit which had been filed by the plaintiff was governed either by Act XIV of 1859 or Act IX of 1871. Now, this is quite true; but it does not appear to me that there had been any change of law. It was true that the Act had changed, but art. 131 of Act IX of 1871 which must have been applied was reproduced in the Act of 1877 in the same words. There is nothing whatsoever to show that an article more special than Art. 131 of Act IX of 1871 was enacted by the Act of 1877. It does not appear, therefore, that in *Chamanlal* v. *Bapubhai*,[1] the decision proceeded on the ground that the same article applied but the period was reduced or that the inclusion of a new article in the schedule prescribed a different period of limitation. An argument addressed to us on behalf of the Ahmedabad Municipality is that if the Court decided that a particular suit was barred by limitation on the ground that a particular article applied, the decision as to the application of the article to suits of that kind would always be binding *inter partes;* but *Chamanlal's* case[6] seems to hold that when it was a question of a different suit between the parties, it could not possibly be held that the same article applies and that is, irrespective of there being no change in the law effected by legislation in the meanwhile.

The next case of this Court to which it would be necessary to refer is *Chhaganlal* v. *Bai Harkha*.[2] In that suit one Govind Khodabhai had executed a possessory mortgage of certain Bhagdari land in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for a certain period. Further agreements were executed by Govind, the last being of September 18, 1902, for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow cultivated the land on behalf of herself and her minor son. The plaintiff brought the suit, which came up to this Court in *Chaganlal's* case,[2] for the recovery of the rent of the land for two years namely, 1904-05 and 1905-06. A contention was then taken that the mortgage transaction and the transaction of lease were one and the same transaction and both were invalid under the Bhagdari Act, because the alienation effected was that of an unrecognised portion of a Bhag. The plaintiff met his contention by saying that when he sued Govind for rent

[1] (1871) 22 Bom. 669. [2] (1909) 33 Bom. 479.

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in respect of the years 1902-03 and 1903-04 Govind never took up a contention that the mortgage and the rent note were illegal transactions. It could not, therefore, be contended that they were illegal transactions subsequently by Govind's representatives.

Now, this case does not show that a point of law can be *res judicata* between the parties apart from the facts to which the point of law was applied. In the suit which was decreed *ex parte* against Govind, Govind had failed to take up a contention that the mortgage and the rent note were illegal transactions. It had, therefore, to be taken that those transactions were, as a matter of fact, legal transactions. The effect of the decision was that the provisions of the Bhagdari Act had to be taken as not applying to those transactions. But the case of *Chhaganlal* v. *Bai Harkha,*[1] did not decide that the provisions of the Bhagdari and Narwadari Act could not be applied to any other piece of land which might have been similarly mortgaged by Govind to the Plaintiff by a different mortgage and which was taken on lease by Govind upon a different rent note. What was held was that it must be taken that in the *ex parte* decree a finding had been arrived at that the transactions of the mortgage of 1903 and the rent note of that year were legal transactions, and what the principle of *res judicata* requires is that the same findings must be taken in the suit which the plaintiff filed for the rent of the subsequent years; the findings which were to be taken as unchallengeable in the next suit were not pure findings of law divorced from any fact; the findings were that the mortgage of 1903 and the rent note of 1903 were legal transactions and it was these findings which had to be taken as uncontrovertible in a subsequent suit and not that the Bhagdari Act did not apply to any other transactions which might have been effected by Govind of other Bhagdari land. It is obvious, therefore, that this case is no authority for the broad proposition that a finding of law would bar by *res judicata* the agitation of the same issue of law in a different suit between the same parties. The cases to which it is necessary to refer hereafter are cases of *Ahmed Bhauddin* v. *Babu,*[2] *Keshav* v. *Gangadhar,*[3] *Savitri* v. *Holebasappa,*[4] and *Mahadevappa Somappa* v. *Dharmappa Sanna.*[5]

Now, in the case of *Ahmed Bhauddin* v. *Babu*[2] the plaintiff and defendants Nos. 13 to 15, who were occupancy tenants in a Khoti village, had mortgaged their lands with possession to defendants Nos. 1 to 12, on August 24, 1870. The mortgagors sold their equity of redemption to the mortgagees on October 9, 1882; but the sale was void as contravening s. 9 of the Khoti Settlement Act, 1880, as it then stood. The mortgagees remained in possession of the lands till 1915, when the mortgagors recovered possession by a possessory suit under s. 9 of the Specific Relief Act. In 1918, the mortgagees filed a suit to recover possession from the mortgagors, and succeeded in obtaining possession, the trial Court holding that the mortgagees had acquired a title to the property by adverse possession for more than twelve years since the date of the sale in 1882 which was binding on the mortgagors, and the High Court, leaving open the question whether the mortgagor's right to redeem the mortgage of 1870 was barred by the sale deed. On October 21, 1924, the

[1] (1909) 33 Bom. 479.
[2] (1929) 31 Bom. L. R. 778.
[3] (1931) 33 Bom. L. R. 1443.
[4] (1931) 34 Bom. L. R. 198.
[5] (1942) 44 Bom. L. R. 710.

mortgagors having filed a suit to redeem the mortgage, it was contended that the suit was barred by *res judicata* and that the mortgagors were estopped from denying that they had a right to sell the property. It was held that the mortgagees having recovered possession in the previous litigation on the strength of the sale deed, the plaintiff could not in the second suit seek to recover the possession back on the ground that the sale deed did not convey any rights to the mortgagees as purchasers, and that, therefore, the mortgagors were barred by *res judicata*. This case again is no authority for the proposition that an issue of law determines a legal principle finally between the parties for all time if it is decided in one way between them. It is true that the view which was taken in the decision is that the earlier decision involved a finding that the sale deed which had been executed by the mortgagors in favour of the mortgagees was a valid sale deed, and if the sale deed was a valid sale deed, the suit for redemption could not lie; but what was held as decided between the parties for all time was that the sale deed effected by the mortgagors in favour of the mortgagees on October 9, 1882 was a valid sale deed, not that any particular construction of law which rendered the sale deed a valid sale deed was binding as between the parties in any subsequent suit when the validity of a different mortgage was in dispute. The principle that it does not affect the question of a bar of *res judicata* whether a decision is right or wrong or whether it is right on a question of fact or whether it is wrong on a point of law has any amount of authority in support of it, and the case of *Ahmed Bhauddin* v. *Babu*[1] reiterates the same proposition. What the case has held was that whether the finding which must be taken as recorded in the prior suit that the sale of 1882 was a valid sale deed was a right finding or a wrong finding, or whether it was wrong on a point of law, has no reference to the question as to whether the agitation of the same question would be barred by *res judicata;* but it is no authority for the proposition that the construction of law upon which alone the finding could be said to be correct was binding between the parties in subsequent suits having no connection whatsoever with the former suits. The cases of *Keshav* v. *Gangadhar*,[2] and *Savitri* v. *Holebasappa*,[3] qualify the very broad proposition which was mentioned in *Chamanlal* v. *Bapubhai*,[4] by saying that the decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the previous suit, and that was also said in the case of *Mahadevappa Somappa* v. *Dharmappa Sanna*.[5] A case of their Lordships of the Privy Council, namely, *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*,[6] was followed in the last mentioned case; but it would be convenient to go to the consideration of that case later. Now, all the three cases, namely, the cases in *Keshav* v. *Gangadhar*,[2] *Savitri* v. *Holebasappa*,[3] *Mahadevappa Somappa* v. *Dharmappa Sanna*,[5] are binding upon us, and in case we were inclined to differ from any of them, the only thing to do would be to refer the matter to a Full Bench; but the proposition of law which has been stated in these cases, namely, that if the cause of action is the same then an issue of law which has been decided in determining the previous

(1) (1929) 31 Bom. L. R. 778.
(2) (1931) 33 Bom. L. R. 1443.
(3) (1931) 34 Bom. L. R. 198.
(4) (1897) 22 Bom. 669.
(5) (1942) 44 Bom. L. R. 710.
(6) [1926] A. C. 94.

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suit cannot be agitated by the parties in a subsequent suit upon the same cause of action must be accepted as a correct proposition, though I myself would not put the principle underlying the decisions in these words. It would be an entirely different matter, however, if the decision were to be taken to imply that an issue of law cannot be *res judicata* between the parties, unless the cause of action is the same; but I do not think that that is what the cases themselves decide.

Now, if the cause of action is the same, then either the suit is the same suit or the suit is one which will come within the purview of O. II, r. 2; if the suit is the same suit, then there will be bar under s. 11 of the Code of Civil Procedure, inasmuch as the section says that "no Court shall try any suit.....in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." If, on the other hand, the suit is for a claim arising upon the same cause of action in respect of which the plaintiff has omitted to sue in the earlier suit, or if the suit is in respect of a relief on the same cause of action in respect of which the plaintiff has omitted to sue in the former suit, then the suit would be barred under the provisions of O. II, r. 2. I fail to understand how upon the same cause of action there can be any other kind of suit, unless by law enacted after the decision of the first suit greater or a different kind of relief is provided in respect of the same cause of action, in which case the subsequent suit may not be barred under O. II, r. 2. Consequently, if the cause of action is the same, except in the cases last mentioned, either the suit will be the same and barred under s. 11, or the suit will be for a claim or a relief omitted, when it will be barred by O. II, r. 2, and the proposition laid down in *Ahmed Bhauddin* v. *Babu*[1] and cases following it will be useful only in a limited number of cases. Another reason why I would myself not lay down the proposition in these terms is that in the cases *Ahmed Bhauddin* v. *Babu*,[1] *Keshav* v. *Gangadhar*,[2] *Savitri* v. *Holebasappa*,[3] and *Mahadevappa* v. *Dharmappa*[4] the cause of action in the second suit was really not the same. It has been pointed out in several cases on his subject that it is necessary to be extremely careful when using the words 'cause of action'. A cause of action strictly so called is speaking roughly the same only when the same evidence will sustain both the suits, and a perusal of the cases mentioned just above will show that in none of these was the cause of action the same. Other High Courts both in England and India have had no difficulty in holding that there was a bar when the cause of action was not the same and what was decided in the former case was only a point of law though in England the term *res judicata* is confined to the cases where the *Res* i. e. the cause of action is the same and in other cases the bar is called the bar of estoppel by Record; see *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*,[5] and *Maharaja of Joypore* v. *Rammurty*.[6] If we examine the Bombay cases in which it has been held that there was a bar to the trial of an issue, even an issue of law, it will be found that though the cause of action was different the matter in issue in the issue which it was held could not be tried again was the same; e. g. in *Savitri* v. *Holebasappa*,[3] the

[1] (1909) 33 Bom. 479.
[2] (1931) 33 Bom. L. R. 1443.
[3] (1931) 34 Bom. L. R. 198.
[4] (1942) 44 Bom. L. R. 710.
[5] (1928) 56 Cal. 723, F. B.
[6] (1933) 57 Mad. 73.

matter in issue in the issue was whether a money payment under a deed was dependent upon performance of worship at a certain temple. The true principle of these decisions could, therefore, be stated as the matter in issue in the issues involved being the same. The principle that there can be the bar of *res judicata* even where what was decided in the former suit was a pure issue of law will be found stated in Halsbury's Laws of England, Volume 13, art. 464 last para. (p. 410):

"...And this principle applies, whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact, or one of law, or one of mixed law and fact."

In support of this case Halsbury refers to two cases: *In re Graydon; Ex parte Official Receiver,*[1] and *Jones* v. *Lewis.*[2] It must be mentioned at this stage that the actual point in the case of *Jones* v. *Lewis*[2] was different. It states the principle of law in support of which it is quoted in Halsbury only incidentally as follows (p. 344):

"...No question of fact which was directly in issue between the parties to the action before Bray, J., and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray, J., whether it were a point of law or of mixed law and fact."

I understand these observations to mean that assuming that in an earlier suit it was decided that a particular adoption which it was admitted had taken place was invalid on some legal ground, it could not be said in a later suit that that particular adoption was not invalid, because there had been an error on a point of law committed in holding it as invalid, and what was decided was a pure point of law.

So far as this Court is, therefore, concerned, there is authority in *Chamanlal* v. *Bapubhai,*[3] for saying that a point of law cannot operate as *res judicata* between the parties when it is divorced from the facts to which it was relied early. To make the meaning clear again I would mention that supposing in an earlier suit it was decided that a particular suit was governed by a particular article of limitation it could not be challenged in a later litigation that that suit was governed by a different article; but it could not be said that if a similar suit was filed by the plaintiff against the defendant and the suits were in all respects exactly the same being based on similar but different causes of action that the same article had to be applied because of the principle of *res judicata.*

It is necessary now to examine the present case in order to determine whether, in the first instance, the case will fall within the principle which was enunciated in the cases of *Keshav* v. *Gangadhar,*[4] *Savitri* v. *Holebassappa*[5] and *Mahadevappa* v. *Dharmappa*[6] that is, whether it could be said that the causes of action in the two suits are the same, and in my view it cannot possibly be said that the causes of action in the two suits are the same. The cause of action in the earlier suit was the

[1] (1896) 1 Q. B. 417.
[2] [1919] 1 K. B. 328.
[3] (1897) 22 Bom. 669.
[4] (1931) 33 Bom. L. R. 1443.
[5] (1931) 34 Bom. L. R. 198.
[6] (1942) 44 Bom. L. R. 710.

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levy or the attempted levy by the Collector of non-agricultural assessment upon a different piece of land forming part of a different street. The cause of action for that suit had certainly arisen in that suit at that time. We do not know whether, as a matter of fact, at the time when the cause of action arose in the earlier suit the cause of action in the present suit had arisen or not; but even if it had arisen, it is obvious that where a different piece of land forming part of a different street is used for a different purpose, though it may be that in both the cases the purpose was use as a market, the causes of action in the suits are entirely different.

The learned advocate, who appears on behalf of the Government, says that when the words "cause of action" were used in the cases of *Keshav* v. *Gangadhar*,[1] *Savitri* v. *Holebasappa*[2] and *Mahadevappa* v. *Dharmappa*[3] what this Court meant was the cause of action in the proceedings in which these words were used in the earlier Code of Civil Procedure, and in support of this contention he relies upon the case of *Krishna Behari Roy* v. *Brojeswari Chowdrance*[4] Now, that was a case under Act VIII of 1859, and the section which enunciated the principle of *res judicata* was embodied in s. 2 of that Act which ran as follows:—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

Their Lordships of the Privy Council said (p. 285) that the expression, 'cause of action' cannot be taken in its literal and most restricted sense. But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, again be tried in another suit between them." Now, in my opinion, there is nothing whatsoever to show that when in *Ahmed Bhauddin* v. *Babu*,[5] *Keshav* v. *Gangadhar*,[1] *Savitri* v. *Holebasappa*[2] and *Mahadevappa* v. *Dharmappa*[3] this Court used the expression 'cause of action' it was in the sense in which it was interpreted in the case of *Krishna Behari Roy* v. *Brojeswari Chowdrance*[4]; but if it was used in that sense, then the principle of these cases really is that there is a bar between the same parties even upon a point of law where the facts to which the law is sought to be applied are the same in the former and the later suit.

It would be necessary to consider now whether, apart from this Court, there is any authority for the proposition which has been enunciated before that divorced from the facts of the earlier suit a point of law becomes binding between the parties in any subsequent suits which might arise between them. It would be convenient first to go to the English cases, though it is necessary to mention that in England the word "*res judicata*" is used in a somewhat different sense in which it is used in this country. There cannot be in England a bar of *res judicata* unless the same cause of action is put in issue in the second suit as was put in issue in the first. What the English jurists therefore call the bar

[1] (1931) 33 Bom. L. R. 1443. [2] (1931) 34 Bom. L. R. 198.
[3] (1942) 44 Bom. L. R. 710. [4] (1875) L. R. 2 I.A. 283.
[5] (1929) 31 Bom. L. R. 778.

of "*res judicata*" is the bar created by the use of the word "suit" in s. 11 and also the bar created by O. II, r. 2. Even in England there can be a bar on analogous principles, even though the cause of action is not the same, and Halsbury in volume 13, art. 464 page 409 mentions the bar as the bar of "estoppel". "But, provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established; as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties and their privies. And this principle applies, whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact, or one of law, or one of mixed law and fact." The learned advocate, who appears on behalf of the Borough Municipality, has no quarrel with this proposition of law; but he says, in the first instance, that when the words "point of law" are used in the article, it is intended to mean the point of law as divorced from the facts of the first suit. For example, if the finding in the prior suit is that the suit is barred by a particular article of limitation, he says that the point which has been decided to be taken is, assuming that the former suit is a suit upon a promissory note, what is the article which applies to suits upon promissory notes, whereas I would suggest that the correct interpretation of the words "point of law" is whether the particular suit is governed by a particular article of limitation. It will be necessary now to go to the cases which have been mentioned either by Halsbury or otherwise in support of this proposition of law, and I shall take, in the first instance, the case of *Broken Hill Proprietary Co.* v. *Brogen Hill Municipal Council,*[1] This case has been followed by this Court subsequently in *Mahadevappa Somappa* v. *Dharmappa Sanna,*[2] and it has also been followed recently by the Calcutta High Court in *Santosh Kumar* v. *Nripendra Kumar.*[3] The Local Government Act, 1919, of New South Wales, provided by s. 153, sub-s. 3, that the unimproved capital value of a mine for rating purposes, when ascertained by valuation based on output, shall be a sum equal to twenty per centum of the average annual saleable value of the ore won during the three years next preceding the year in which the valuation was made, or during such part of that time as the mine had been worked. The appellants' mine was worked during the years 1919, 1920 and 1921 during 205 days only owing to strikes and the low price obtainable for ore, though maintenance was continued during the whole period. It was held that the average annual value was to be ascertained by dividing the value of the output during the three years by three, not by multiplying it by 205 and dividing it by 365. It was pleaded on behalf of the respondents that the decision by an earlier suit constituted a bar between the parties as to the question of a previous order. Lord Carson, who delivered the judgment of the Board, said that there could not be a bar of *res judicata.* He said (p. 100):

(1) [1926] A. C. 94.

(2) (1942) 44 Bom. L. R. 710.

(3) [1949] A. I. R. Cal. 430, F. B.

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"...It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and, therefore, the principle of *res judicata* cannot apply."

In my view this case is a clear authority for the proposition that in England a point of law cannot possibly conclude the parties by the principle of *res judicata* in a subsequent litigation not based upon the same cause of action when the facts to which the law is sought to be applied are different. It is true that in England as I have already mentioned, *res judicata* means whether the causes of action are the same, and when Lord Carson used the words "that the principle of *res judicata* cannot apply" what he probably meant was that the principle as it was understood in England did not apply, because in England it could only apply where the cause of action is the same. It has got to be remembered, however, that the dispute between the parties was as regard to the method of taxation whether the output was to be calculated by dividing it by the number of years during which it was derived or by multiplying it by the number of days during which it was derived and dividing it by 365. The issue obviously was not an issue of fact; and was an issue of law, and what was sought to be pleaded on the ground of *res judicata* in the next suit was that the decision as to the method of computation to be applied, which was a matter of law was binding. But even if Lord Carson used the word *"res judicata"* in the sense in which it is used in suits in England, it cannot possibly be that their Lordships of the Privy Council were unaware that there was a bar, namely, of estoppel by record, which could also govern the facts of the case before them and it is hardly conceivable if that contention which is now made on behalf of the Borough Municipality were a correct contention even in England they failed to notice that once the method of computation which was a matter of law was decided between the parties in an earlier case the same method must subsequently be followed in a subsequent case.

Then we come to the case of *Jones* v. *Lewis*.[1] In that case an assistant overseer of the poor had been duly elected by the inhabitants of a certain parish in vestry assembled before the passing of the Local Government Act, 1894. Following the election there was a warrant of justices appointing him an assistant overseer and that appointment was duly made by a proper warrant issued. In 1896 the Local Government Board, acting under s. 33 of that Act, made an order conferring on the council of the urban district in which the parish was situate the power of appointing and, subject as mentioned in art. VI, of revoking the appointment of the assistant overseer of the parish. But by art. VI, nothing in that order was to apply to a person who was appointed in office and he was to continue to hold office upon the same terms as previously. In September 1905 the inhabitants of the parish,

[1] [1919] 1 K. B. 328.

without revoking the plaintiff's appointment and without his resigning, passed a resolution increasing his salary by £ 115 a year , and in August 1906 two justices issued a warrant, which after reciting that the inhabitants had nominated and elected the plaintiff and had fixed the yearly sum of £ 200 as his salary together with such a sum as he might be allowed for work in connection with the registration of voters, proceeded to appoint him assistant overseer to perform the duties and receive the salary fixed by the inhabitants. In an action by the plaintiff against the overseers of the parish, who refused to pay the increased salary, it was held on March 23, 1907, that the plaintiff had not been duly appointed at the increased salary, because among other reasons the power of re-nomination and re-election, which were necessary before the salary of an assistant overseer could be increased, had been vested in the urban district council. In September 1912 the inhabitants, without any resignation of the plaintiff or revocation of his appointment, resolved that he should be paid a salary of £ 250 a year for performing the duties of overseer of the poor with certain exceptions; and in October 1912 two justices issued a warrant which, after reciting that the inhabitants had nominated and elected the plaintiff and had fixed his yearly salary at £ 250, proceeded to appoint him assistant overseer to execute the duties and receive the salary fixed by the inhabitants. Doubts having arisen as to the validity of this appointment, the Local Government Board in 1915 made an order substituting for art. VI of their order of 1896 the following:—"(1). Nothing in this order shall (a) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends; (b) preclude any such person as aforesaid, in the event of his ceasing to hold the said office, from being re-appointed to such office as if this order had not been made. (2). Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made, have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter." In 1916 the inhabitants again, without any resignation of the plaintiff or revocation of his appointment, resolved that the plaintiff should be paid a salary of £ 250 a year for performing the duties of overseer of the poor with the same exceptions as before, and again two justices issued a warrant reciting his nomination and election by the inhabitants and appointing him to be overseer of the poor and empowering him to perform the duties and receive the salary fixed by the inhabitants. In action by the plaintiff against the overseers of the parish claiming a declaration that he was entitled under the warrant of 1912, or alternatively under the warrant of 1916, to salary at the rate of £ 250 a year it was held that the inhabitants in vestry assembled had no power to increase the salary of an assistant overseer unless either he resigned his office, or they revoked his appointment, or it terminated by effluxion of time; and that, as none of these events had happened, the warrants of 1912 and 1916 were inoperative. But the contention which was taken on behalf of the overseer of the parish was that in the earlier suit it was held that the power of re-nomination and re-election at an increased salary had vested in the urban district council and the plaintiff was precluded by the judgment of March 23, 1907 from contending that the power

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of revoking his appointment and re-electing him at an increased salary remained in the vestry after the order of the Local Government Board made in 1896. Bankes, L. J., who dealt with this question, said (p. 344):

"It has been argued that this decision operates as an estoppel between the overseers of the parish for the time being and the respondent, and that it is impossible for the latter in any subsequent dispute with the former to say anything contrary to that decision. I do not take that view. There is no real dispute as to the law of estoppel between parties or privies. No question of fact which was directly in issue between the parties to the action before Bray J., and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J., whether it were a point of law or of mixed law and fact. But the reasons which led the learned judge to his decision upon the precise point do not bind the parties in a subsequent litigation."

He relied in support of his view on *Outram* v. *Morewood*,[1] and *Ballantyne* v. *Mackinnon*.[2] Similarly, Warrington L. J. said (p. 351):—

"...As to the attempt made in 1905 it is only necessary to say that the judgment of Bray J. in the former action is conclusive against the respondent to this extent, that the resolution of the vestry in September 1905 and the warrant of the justices in August 1906 were not effectual to increase his salary. That was the precise point decided in that action, and that point he is estopped from disputing; he does not indeed dispute it in this action. The reasons for the decision and the grounds on which it was based are not binding upon him."

What this case shows is that the law in England is that, if, taking a particular view as to where the power of re-nomination and re-election was vested, a particular appointment was held to be invalid, what was barred by the principle of *res judicata* in subsequent actions is the agitation of the question as to whether that particular appointment was valid. If any question of validity of any subsequent appointment arose, it could not be said that the principle of *res judicata* required that the same view as to where the power of re-nomination and re-election vested must be taken in the subsequent suit as the agitation of the question was barred by *res judicata*. That means, when the Court had to consider the question as to in whom the power of re-nomination and re-election lay, when in 1912 and in 1916 the inhabitants resolved that the plaintiff should be paid a higher salary, the Court in the subsequent suit was entitled to take whatever view it liked of the matter; it could say that the power lay either with the urban district council, or it was with the vestry according to its own views of the laws and the rules upon the subject. This decision, therefore, seems to me directly contrary to the proposition which the learned advocate, who appears on behalf of the Borough Municipality, wants me to accept, and that is, that, if any view was taken as to the effect of any particular Act or an article in any subsequent suits even if the facts to which the law applied in the prior suit differed, the same view of law must be taken. The learned advocate, who appears on behalf of the Borough Municipality, says that in that case in the year 1915 because there were doubts expressed about the

[1] (1803) 3 East 346 at p. 355. [2] [1896] 2 Q. B. 455 at p. 462.

validity of the appointment made by the vestry in 1912 the Local Board made an order substituting for art. VI of the order the words which have been mentioned above; but it does not appear to me that the view which was taken in the case of *Jones* v. *Lewis* that the plaintiff was not barred by *res judicata* proceeded upon the principle that subsequent to the plaintiff's appointment in 1905 there was a change in law. As a matter of fact, such an argument could not be made with regard to the appointment of 1912. The change in law was only in the year 1915, and the plaintiff filed a suit contending that he was entitled to enhanced salary at £ 250 per year both under the warrant of 1912 and under the warrant of 1916. The argument that a change of law rendered the former decision not binding could apply to the warrant of 1916; but the plaintiff claimed salary of £ 250 per year also under the warrant of 1912, and between the decision of March 23, 1907 and the appointment of 1912 there was no change of law, so that if the principle of *res judicata* required that the decision as to where the power of re-nomination and re-election lay arrived at in the suit decided on March 23, 1907 was to be taken in the subsequent suit also, then the warrant would have had to be held to be bad on the ground that the power of re-nomination and re-election before the salary of assistant overseer could be increased had been vested in the urban district council, and that view distinctly was repelled by the learned Judges who disposed of *Jones* v. *Lewis*.[1]

The learned advocate, who appears on behalf of the Borough Municipality, has relied upon another case which is reported in *Hoystead* v. *Commissioner of Taxation*.[2] In that case under a will the annual income from an estate in Australia was divisible by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918-1919 under the Land Tax Assessment Act, 1910-1916, of Australia; they claimed under s. 38, sub-s. 7 of the Act a deduction of £ 5,000 in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (1) whether the shares of the joint owners, or of any and which of them, in the land were original shares within s. 38; (2) How many deductions of £ 5,000 the respondent should make. The Full Court answered these questions as follows: (1) The shares of the six children surviving at the date of the assessment; (2) Six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919-1920 the Commissioner allowed only one deduction of £ 5,000 contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Full Court upheld that view, and held that the Commissioner was not estopped by the previous decision. Their Lordships of the Privy Council held, however that the Commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. In my view this does not support the proposition that a question of law divorced from the facts of a particular case can be taken as *res judicata* in a subsequent litigation between the same parties. What was taken there as having been decided

[1] [1919] 1 K. B. 328. [2] [1926] A. C. 155.

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between the parties was a mixed question of law and fact; that was whether the daughters were or were not joint owners. It may be that that finding proceeded upon an erroneous view, an error having crept in because the reference which was made was on the basis that they were joint owners, which was accepted by every one of the parties to the litigation. But the fact remains that the error was an error upon a question of fact also because the question as to whether certain owners are joint owners or separate owners cannot, by any possible imagination, be said to be a pure point of law.

The next cases which are relied upon are cited not for the sake of what was decided in those cases but because of certain observations which are to be found in them and which, it is said, support the contention that there may be bar of *res judicata* in what is called a pure point of law. I shall go to the extracts from those cases in a minute; but before proceeding it would be just as well to observe that unlike in India in England the doctrine of *res judicata* is not found embodied in any statute but was developed from time to time by Judges as a branch of common law. In the result, therefore, whenever there are to be found remarks in any case the remarks ought not to be interpreted as if they were the words of a statute, but they must be interpreted in connection with the facts of each particular case. I can understand an argument made that if we take the remarks in conjunction with what was actually decided, then, in that case, there could be no other inference possible except that a point of law will be *res judicata* between the parties for all time. It is not, however, contended before me that if we go into what was decided in those cases what will be found is that where a legal principle is enunciated in any particular case that legal principle will affect all cases between the parties subsequently. It has been found in those cases, of course, that where there was any question decided between the parties, for example, a question of a title, or a question of a legal relation, or, to use the expression used by their Lordships of the Privy Council in *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.*,[1] "the legal quality" of a particular fact, then, in that case it was held that those findings with regard to the particular legal relation or the particular title or the legal quality of that particular fact could not be re-agitated again in a subsequent suit.

Lord Ellenborough C. J. for example observed in *Outram* v. *Morewood*[2] (p. 355):—

"The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them."

The learned advocate, who appears on behalf of the Borough Municipality of Ahmedabad, says that the remarks which have been quoted do not make any difference between a point of law and a point of fact

[1] [1926] A. C. 701.

[2] (1803) 3 East 346 at p. 335.

when they say that the parties and privies are precluded from contending to the contrary of that point. Similarly, in *Ballantyne* v. *Mackinnon*,[1] Lord Justice A. L. Smith said (p. 462):—

"...As to a judgment being only conclusive as to the point decided, there is as to this in our opinion no distinction between a judgment in *rem* and a judgment in *personam*, excepting that in the one *the point adjudicated upon* (which in a judgment in *rem* is always as to the status of the *res*) is conclusive against all the world as to that status, whereas in the other the point whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is only conclusive between parties or privies."

Here again it has been pointed out that when the word 'point' had been used, no difference has been made between a point of fact and a point of law. Reliance has been placed upon the remarks of Vice Chancellor Knight Bruce in *Barrs* v. *Jackson*,[2] where, after quoting extracts from Lord Ellenboroughs judgment in *Outram* v. *Morewood*,[3] he proceeded to observe as follows (p. 597):—

"The action, however, in *Outram* v. *Morewood*,[3] raised as to the same property, and for the same purpose, the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English Courts of common law and those of other Courts of justice. But it is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction: that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole I am not at present prepared to say that according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of R. J. S., and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatam* between the parties on a question of distribution."

To my mind in these remarks again there is nothing which would show that a point of law becomes *res judicata* between the parties when the facts to which it is to be applied are different. On the other hand, to some extent, the judgment seems to indicate that, even where there

[1] [1896] 2 Q. B. 455 at p. 462. [2] (1842) 1 Y. & C. Ch. Cas. 585.
[3] (1803) 3 East 346 at p. 355.

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has been a determination of facts between the parties, howsoever necessary the determination of this may be in a subsequent suit, they could litigate them again for any purpose other than that to which they were litigating in the earlier suit. We are not concerned with the latter question in this case.

In the result, therefore, in my opinion, so far as the English law is concerned, there is no doubt whatsoever that a point of law cannot be taken to be *res judicata* between the parties between any future litigations from them divorced from facts in relation to which it was decided.

It is contended on behalf of the Borough Municipality of Ahmedabad that even so in India we have got our own statute, namely, s. 11 of the Code of Civil Procedure. It is true that the section is not exhaustive; but inasmuch as it is a section of a Code of which it is the essence to be exhaustive of that with which it deals, when s. 11 deals with any question it must be taken that the law upon that question is what is laid down in that section, and it is not permissible for any one to say that because the law in England is different it must be taken that that law prevails even in India. That cannot possibly be disputed. But the question will only arise if to the language which has been used in s. 11 an interpretation which is consistent with the view that an abstract principle of law can never be taken to have been decided between the parties in a subsequent litigation cannot be derived from the language of s. 11 without stretching its meaning. Now, so far as the suit is concerned, a subsequent suit which is exactly the same as the former suit, will obviously be barred by *res judicata*. The question before us is about the bar of *res judicata* in regard to an issue. Now, s. 11 deals with the issues which cannot be litigated in the following terms:—

"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....."

Only those issues cannot, therefore, be tried again in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit. What the Court has got to find out before saying that the bar of *res judicata* applies is whether the matter in issue in the issues concerned was directly and substantially in issue in a former suit between the same parties. Now, explanation III to the section says that 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. The learned advocate, who appears on behalf of the Government of the State of Bombay, says that this explanation will show that the matter which cannot be tried again must include facts. It could not possibly be merely a question of law, because under Order 6, rule 2 every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. He says that the word "only" shows that the pleading must not state any law. Issues arise only upon the pleadings, and consequently when s. 11 uses the words "matter substantially in

issue between the parties" what is meant is that the allegations of fact which are made and denied and owing to which an issue arises. It will be difficult, however, to go to this extent, for the reason that in that case if there was a mixed question of law and fact involved between the parties it would be said that what would be the barred by *res judicata* between the parties would be only the decision on the point of fact and not the decision of a point of law. Their Lordships of the Privy Council pointed out in *Hoystead* v. *Commissioner of Taxation*, though that was with reference to a bar which arises by an admission in a prior suit, that what cannot subsequently be agitated again is not only the fact but also where the legal quality of fact was in dispute and decided the legal quality of the fact. They observed in that case (p. 165):

"...In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact, secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

But all the same explanation III uses the words "the matter alleged" and in my opinion this shows that the issue of which the agitation cannot be allowed in the next suit must be a matter which might involve law, but which must involve facts. The word "alleged" is more properly used with regard to facts and not with regard to law. It cannot be said that the word "alleged" can never be used in connection with an issue of law, because it will be found from Order 14, rule 1, rule 1 (2) that the word "alleged" has been used also with regard to proposition of law. That rule says:

"Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence."

But all the same the word "alleged" is used more properly where a question of fact is involved, and in my opinion therefore the words of explanation III are capable of bearing an interpretation that the matter in issue which cannot be re-agitated again in a fresh suit must be a fact or a set of facts or the legal quality of a particular fact or set of facts or the legal effect of the fact or set of facts. The matter would be different if this interpretation could not possibly be given to the words of s. 11; but in my opinion it is not necessary to stretch the meaning of words to give it that interpretation; and if two interpretations are possible, it is obvious that that interpretation should be adopted which will be consistent with the principles which have been derived by Judges in England who have developed the doctrine of *res judicata* as a matter of reasoning, and that is especially so when to hold otherwise would obviously lead to injustice in entirely unconnected fresh case between the parties.

(1) [1926] A. C. 155 at p. 170.

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But even if it was necessary to do some stretching in order to interpret the words "matter substantially in issue" there is authority for stretching it in the decision of their Lordships of the Privy Council in *Krishna Behari Roy* v. *Brojeswari Chowdranee*.[1] That decision interpreted the wording of the old Act of Civil Procedure Code, namely, that of 1859 which stated the doctrine of *res judicata* with the help of the word 'cause of action' and the view which they took was that 'cause of action' there ought not to be taken in its literal and most restricted sense, and in my opinion upon a similar argument even if the strict sense of the words "matter alleged" was a matter whether of fact or of law or of both, it should not be taken in the most literal sense but it should be treated to mean a matter involving fact whether with or without questions of law.

The consensus of opinion in the other High Courts just as in the case of this Court has been against holding that a decision on a pure issue of law governs the determination of subsequent litigation between the parties when the facts to which the legal principle is sought to be applied are different. This question went up to the Full Bench of the Calcutta High Court in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*.[2] The decision actually was that where a matter directly and substantially in issue was also directly and substantially in issue in a previous suit and had been heard and decided the principle of *res judicata* could not be ignored on the ground that the reasoning, whether in law or otherwise, in the previous decision could be attacked on a particular point. But the decision made a quaere as to whether special consideration should apply to decision on questions of law as to jurisdiction, limitation or procedure. Rankin, C. J., who delivered the judgment of the Full Bench of that Court, pointed out in that case, after laying down the principles mentioned above (p. 736):

"...On the other hand, it is plain from the terms of s. 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. *The object of the doctrine of* res judicata *is not to fasten upon parties special principles of law as applicable to them* inter se but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided."

If these remarks are correct, and with respect I think that they are, we must not give to the language of s. 11 interpretation which will make a principle of law binding upon the parties *inter se* for all time divorced from the facts of the particular case. Similarly, a Full Bench of the High Court of Madras considered an analogous question in *Narayan* v. *Subramanian*,[3] and observed that there could be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it had been applied at the time of the former decision. Recently a Full Bench of the Calcutta High Court also in *Santosh Kumar* v. *Nripendra Kumar*,[4] decided that an abstract question of law dissociated from and

(1) (1875) L. R. 2 I. A. 283.
(2) [1928] 56 Cal. 223 F. B.
(3) [1937] Mad. 364, F. B.
(4) [1949] A. I. R. Cal. 430, F. B.

unconnected with the rights claimed or denied as between the parties to the litigation, is of no importance or value to them or to the decision of the case itself and cannot be said to be substantially in issue, and is not *aedem questio* and the principles of *res judicata* cannot apply. They said it is not every decision of a question of law between the parties which is binding but only that decision on such a question which affects the subject-matter or creates a legal relation between the parties or defines the status of either of them, which is binding. The learned advocate, who appears on behalf of the Borough Municipality of Ahmedabad, has pointed out that in this case the view which was taken was that in the first instance s. 11 of the Code of Civil Procedure does not apply, and the remarks must therefore be taken to have reference only when the section does not apply. Now, it is quite true that so far as this particular case is concerned, s. 11 did not apply; but I fail to understand how unless we can say that the language of s. 11 would not bear the interpretation which I suggested above it would be correct to apply a different principle when the question of *res judicata* falls within the purview of s. 11 from the principle applied when it falls within the general law. In any case this argument cannot be applied to the decision in Madras in which obviously if there was to be a bar of *res judicata* disentitling a party to affirm that the law was opposite to what was stated in an earlier case, the conclusion which was actually reached could not have been reached. The only authority which has been pointed out as against this in India as to an erroneous decision on an issue of law being binding is *Hub Lal* v. *Gulzari Lal.*[1] Now, even though the headnote of the case runs: an erroneous decision on an issue of law can be the basis of a plea of *res judicata,* and even though in the body of the judgment their Lordships of the Allahabad High Court after expressing their dissent with the view which was taken in the case of *Mangalathammal* v. *Narayanswami Aiyar,*[2] and observing (p. 544):—

"...we are, however, unable to concur in this expression of opinion," because in the words "No Court shall try any suit in which the matter directly and substantially in issue has . . . "

Held, there is nothing which would limit the matter in issue to an issue of fact, the actual decision in the suit referred to is explicable by the reason that what was decided in the prior suit was question of the title to property in which the plaintiffs were joint owners. This finding was taken as binding in the earlier suit. It was contended that this finding was bad, because there was an error made in law; but as I have already mentioned, whenever there is a finding recorded upon a matter which involves facts, the finding does not cease to be *res judicata* on the ground that the reasoning is bad in law. The actual decision, therefore, was that a finding that was arrived at in the former suit with regard to title of the properties must be taken in a subsequent suit. That is exactly what was said by Lord Ellenborough in *Outram* v. *Morewood.*[3]

In my opinion, therefore, leaving aside the cases in which the cause of action strictly so called is the same, a finding of law arrived at between the parties in a prior suit cannot be taken in a subsequent suit

[1] (1927) 49 All. 543. [2] (1907) 30 Mad. 461.

[3] (1803) 3 East 346.

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between the parties divorced from the facts upon which it was obtained. Some support can be derived for this proposition, apart from the English authorities which I have mentioned above, from a case which went up to their Lordships of the Privy Council in *Bindeswari Charan Singh* v. *Bageshwari Charan Singh*.[1] In that case the owner of an impartible estate, the management of which had been vested in a manager appointed under s. 2 of the Chota Nagpur Encumbered Estates Act, 1876, shortly after its release to him in 1909 executed a maintenance grant in favour of the appellant, one of his sons, yielding an annual income of Rs. 1,300. The sanction of the Commissioner was not obtained under s. 12A of the above Act to that grant. On attaining his majority the appellant instituted proceedings against his father and two brothers claiming a maintenance grant of Rs. 4,000 a year, and maintaining that the sanction of the Commissioner under the Act was not necessary. It was decreed in that suit that he was entitled to a maintenance grant yielding Rs. 4,000 annually, inclusive of the Rs. 1,300 payable under the grant of 1909, and that the grant of 1909 was legally valid. In implement of that decree the appellant's father executed in 1920 an additional maintenance grant up to the value of the decreed sum. The suit which came before their Lordships on appeal in *Bindeswari Charan Singh* v. *Bageshwari Charan Singh*, was filed by Bageshwari, the son of one of the appellant's brothers, who subsequently became owner of the impartible estate among other things for a declaration that the two maintenance grants of 1909 and 1920 were illegal and invalid and not binding on him. It was held that the question of the validity of the 1909 grant in view of s. 12A of the Act of 1876 having been directly and substantially in issue and decided in the maintenance suit, and of the parties being the same or their representative the conditions of s. 11 of the Civil Procedure Code were satisfied and the Court in the respondent's suit was not competent, in view of the provisions of s. 11 of the Civil Procedure Code, to try the issue of the validity of the 1909 grant. It was held further that the decision in the maintenance suit operated as *res judicata* and, in accordance therewith s. 12A did not affect the grant of 1909 or the grant of 1920, as the latter was executed by way of carrying out the order in the judgment and decree in that suit. Both the grants were therefore binding on the respondent. The plea of *res judicata* which was raised in the suit by the appellant was dealt with by their Lordships in this manner (p. 59):

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

[1] (1935) L. R. 63 I. A. 53.

This shows that once the Court has considered the question as to whether a particular section applied to a particular set of facts then no Court could subsequently say between the same parties that that section had not applied to these facts.

When the question of bar of *res judicata* as regards 1920 grant was dealt with, they observed (p. 60):

"With regard to the 1920 grant, the learned Judge, taking the view—rightly, as their Lordships think—that the suit of 1917 was brought under the Code of Civil Procedure, states: "The only effect of the decree in that suit was to declare the appellant to be entitled to obtain from Jadu Charan properties yielding an annual income of Rs. 4,000. But Jadu Charan was incompetent to give effect to the decree unless the Commissioner sanctioned a transfer or charge under s. 12A." It is not clear how far this view is based on the learned Judge's opinion as to the 1909 grant. but, in any event, their Lordships are clearly of opinion that the learned Subordinate Judge was right on this point, and that the decision in the suit as to the construction of s. 12A is *res judicata* as the validity of the grant of 1920 which was made in fulfilment of the obligations of that decision."

The reasoning shows quite clearly that the decision as to the construction of the 1907 grant was held to be applicable to the 1920 grant but only on the ground that that grant was made in fulfilment of the obligations of the particular decision. It has been well now established that when a suit is instituted upon a cause of action the suit does not come tc an end along with the decree. A subsequent application for execution would be a continuation of the suit, and if in this case the decree-holder had been required to file an application for execution in order to obtain a grant from the judgment-debtor the judgment-debtor could not in the same case have been heard to say that the construction of s. 12A which had been adopted by the Code was not a correct one and sanction of the Commissioner even so was necessary. What happened was that the judgment-debtor sensibly, in stead of compelling the decree-holder to have recourse to any execution, executed a grant in favour of the decree-holder, and their Lordships said in effect that the grant stood upon the same footing as a grant which would have been obtained by filing an application for execution. No objection could have been taken to the latter in a subsequent suit on the ground of absence of the sanction of the Commissioner. Their Lordships decided that it made no difference that the grant of 1920 was obtained privately and not by having recourse tc a Court of law in execution. The case is an authority for the proposition that what the Courts are precluded from challenging is the applicability of a particular construction to the set of circumstances to which it was applied in the earlier litigation; the Courts are not precluded from applying a different construction of the law to a different set of circumstances arising between the same parties.

The learned advocate, who appears on behalf of the Municipal Borough of Ahmedabad says that it would not be correct to say that the principle of *res judicata* does not apply because the properties in the

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two suits are different. In support of this contention he says: Suppose it was a question of validity of a lease and in the former suit only one of the properties included in the lease was the subject-matter, if in a subsequent suit with regard to another property the validity of the same lease was sought to be put into issue, the finding in the earlier suit would have to be taken as a finding in the latter suit, and the matter could not be allowed to be agitated again. To that contention no exception can be taken. But the argument which has been put on behalf of the Borough Municipality goes much further; what it amounts to is that if the question of validity of a particular lease was decided between the parties in one suit upon a particular construction of a Statute, then, if there was a different lease executed between the same parties, then the same construction of the Statute must be adopted in a subsequent suit with regard to that lease. It would be convenient to have recourse to an example. Under s. 5 of the Bombay Tenancy Act no tenancy of any land shall be for a period of less than 10 years. Supposing A executes a lease in favour of B for a period of one year and the rent for that year not having been paid sues for its recovery, and B takes a contention that the lease is void on the ground of contravention of that section; any finding which is arrived at in the suit as to the validity of the said lease will have to be taken in any suit for rent which the plaintiff may file against the defendant basing his cause of action upon the same lease. But suppose that there was another lease executed by the plaintiff in a subsequent year; if the plaintiff files a suit whether for rent or whether for recovery of possession, contending that the lease has come to an end, no Court is required to adopt the construction of s. 5 which has been adopted in the earlier suit in connection with this different lease. Or take for example the case of an adoption; we shall assume that A and B are separated brothers, and after A's death A's widow takes in adoption C. There is no dispute between the parties that the adoption, as a matter of fact, took place, but the adoption is challenged on the ground that C was the son of A's sister and the adoption of sister's son was invalid; we shall assume that the adoption is held valid; subsequently B having died B's widow adopts another son of another sister of A and B, D. Now, if C sues D for possession of the property belonging to B claiming that the adoption by B's widow of the sister's son was invalid, D is precluded from contending that C's adoption by A's widow was invalid on the ground that an error of law was committed. I am assuming for the purpose of argument that an error of law was committed; but C is not precluded from contending by the decision in the suit between him and B that adoption by the widow of B of her husband's sister's son is invalid. The reason is that the bar of *res judicata* applies to the contention taken by D because of the view taken in the former suit that the adoption of C was valid that finding being binding between the parties so far as C's adoption is concerned. But so far as D's adoption is concerned, the view of law is not binding upon the parties because they never call upon the Court to determine a question of law irrespective of fact; what they call upon a Court of law to decide is the applicability of a particular principle to a particular set of facts.

In my opinion, if we apply these principles to the present case, what is barred by *res judicata* is that the particular order of the Collector

which was challenged in the earlier suit was an illegal order. The reasoning upon which that order has been based cannot, as was pointed out in the case of *Jones* v. *Lewis*[1] be taken in the present suit, and that is irrespective of whether the reasoning is correct or whether the reasoning is not correct. It is true that the reasoning proceeded upon a basis which was not confined to the particular street of land which was involved in that case. Had other pieces of land been involved the decision must have been the same; but other pieces of land were *not* involved and I do not think it is any more correct to say what the matter in issue in the issue framed by the appellate Court was the right of Government to levy non-agricultural assessment on street lands converted to use for non-agricultural purposes than saying in a suit in which the legality of the adoption of a sister's son is involved that what was involved was the right of the adopting mother to take in adoption her husband's sister's son. That was what was pointed out by their Lordships of the Madras High Court in *Narayana* v. *Subramaniam*.[2] In that case there was a dispute between a landlord and a tenant with regard to a higher rate of rent claimed by the latter with respect to a particular area. The tenant claimed that he was liable to pay only the dry rate on the ground that the coconut plantation in the same was an improvement within the meaning of s. 3 (4) (*f*) of the Estates Land Act. In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding it was held that the planting of a coconut garden was not an improvement and that the landlord was entitled to the enhanced rate. The Full Bench of the Madras High Court pointed out that the principle that a decision of law though erroneous is *res judicata* in a later suit between the same parties should be confined only to the matters which existed at the time of the prior suit, unless some question of general principle was settled in the same, and that, accordingly, the decision in the prior suit did not apply to the new areas in the holding which were not planted with coconut trees at the time of the prior suit and in respect of which no claim was or could be made in the former suit. Ramesam J., who delivered the principal judgment of the Full Bench in that case, pointed out that there could be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The case is an authority for the proposition that whenever it is claimed that the principle of *res judicata* applies, even though what was decided was a pure point of law, because the right claimed in the former suit is the same as the right claimed in the earlier suit, the right claimed in the earlier suit cannot be artificially phrased in such wide terms as contended on behalf of the Municipality, for example, in that case, the right of the landlord to levy a higher rate of rent with regard to coconut plantation. Similarly, in this case it cannot be said that what was involved in the prior suit was the right of Government to levy non-agricultural assessment upon areas which were formerly included in a street, but were subsequently converted for use for non-agricultural purposes. Whether such cases would be liable for non-agricultural assessment at a future date would depend not only upon the state of law which would be then existing but also upon any contract between the parties to which the conversion was subject. I would

[1] [1919] 1 K. B. 328.

[2] [1937] Mad. 364, F. B.

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myself, therefore, hold in this case that there was no bar of *res judicata* preventing the defendent from contending that the street land converted for non-agricultural use was liable to pay enhanced assessment.

VYAS J.—With respect I am unable to agree with my learned brother's view on the point of *res judicata* which has been argued before us. In my view, the matter directly and substantially in issue in both Suits Nos. 907 of 1942 and 1287 of 1944 was the same, namely, the alleged right of the Government of the Province of Bombay to levy non-agricultural assessment from a Municipality on a piece of public street land which vested in the Municipality and which was diverted by it to another purpose. The issue agitated in the former litigation (Suit No. 907 of 1942) was whether the order of the Collector charging non-agricultural assessment on a portion of the public street land—92 square yards—which vested in the Municipality and was diverted by it to be used for another purpose (purpose of fish market) was legal or illegal. That precisely was the substance of the issue involved in the subsequent suit also (Suit No. 1287 of 1944) in which a portion of the public street land —60½ square yards—which vested in the Municipality was diverted by it to be used for another purpose (purpose of meat stalls), and a question arose whether Government could charge non-agricultural assessment on it from the Municipality. Now, in the previous suit it was held both by the trial court and the court of appeal that it was illegal for Government to levy non-agricultural assessment on the portion of the street land which was utilised by the Municipality for another use. Therefore, in my opinion, the trial of substantially the same issue in the subsequent suit (1287 of 1944) would be barred under s. 11 of the Civil Procedure Code. Parties to both suits being the same and the matter directly and substantially in issue in both suits being also the same, the decision of the court in the previous suit to the effect that it was not legal for Government to levy non-agricultural assessment from the Municipality for a portion of the public street land converted by it to another use is binding on both parties in the subsequent suit. Of course the portion of the street land concerned in one suit was 92 square yards and that in the other suit was 60½ square yards. Similarly the purpose to which the public street land was diverted was different in the two suits, fish market in the one and meat stalls in the other. But those were merely subsidiary or unsubstantial details, the substance of the matter in issue being the same in both suits, namely, whether there was a legal right in Government to charge non-agricultural assessment if municipal street land is diverted by it to another purpose. I am therefore of the opinion that the principle of *res judicata* applies and it is not open to the Government of the Province of Bombay to charge non-agricultural assessment on 60½ square yards of the municipal street land diverted by it to be used as meat shops.

In 1942 a regular suit No. 907 was filed in the Court of the Civil Judge, Senior Division, Ahmedabad, for a declaration that the order of the Collector of Ahmedabad, No. C. T. S. 2787 dated July 30, 1941, charging non-agricultural assessment on 92 square yards of public street land converted by the Municipality into a fish market was *ultra vires*, illegal and not binding upon the plaintiff Municipality and for an injunction to

restrain the defendant Province of Bombay or its officers, from assessing and levying assessment on the parcel of land concerned from the plaintiff.

That suit was decreed in favour of the plaintiff. There was an appeal against that decree by the Province of Bombay in which the decision of the trial Court was confirmed.

In suit No. 1287 of 1944, from which this Letters Patent Appeal No. 36 of 1948 has arisen, a challenge was made by the Municipality of Ahmedabad against the order of the Collector of Ahmedabad dated March 29, 1941 charging non-agricultural assessment to the Municipality for utilising 60½ square yards of the public street land for three meat shops.

The suit was dismissed by the trial Judge (Joint Civil Judge, Senior Division, Ahmedabad). On appeal by the Municipality, the decision of the trial Court was reversed, the learned appellate Judge holding that the decision in the previous suit (No. 907 of 1942) would be a bar to the agitation once again of the same question whether Government had a right to levy non-agricultural assessment on a portion of the street land diverted by the Municipality to another purpose. Against that appellate decision, the present letters patent appeal has been preferred by the Government of the Province of Bombay.

It would appear that in the present litigation the same matter in issue as was agitated in the previous suit between the parties has been agitated again, namely, whether Government of the State of Bombay has a right to levy non-agricultural assessment on a portion of the Municipal street land which the Municipality has diverted to another purpose. The decision in the prior suit was that the Government had no right to levy non-agricultural assessment on a portion of the Municipal street land, which in that particular case was 92 square yards and was diverted to be used as a fish market.

Mr. Kotwal for the appellant State of Bombay contends that as the previous decision was in respect of a piece of street land which was 92 square yards in area and which was diverted for use as a fish market, it could not operate as *res judicata* in this case where we are dealing with a different piece of land which is 60½ square yards in area and which has been diverted to be used for a different purpose, namely, as meat shops. His submission is that the matter in issue in the two suits is not the same.

Mr. Patel for the respondent Municipality contends that the distinction drawn by Mr. Kotwal between the two suits is on mere matters of detail which would not affect the principle of *res judicata*, that facts in no two cases can be identical and that if on such small points of difference regarding matters of detail we are to hold that the principle of *res judicata* will not apply the law regarding *res judicata* will be rendered nugatory.

Let us now read s. 11 of the Code of Civil Procedure. It says:

"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

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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."

What is to be considered, as far as s. 11 is concerned, is whether the matter directly and substantially in issue in both litigations is the same. Explanation III to s. 11 says:

"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."

Now, Mr. Kotwal contends that for the application of the doctrine of *res judicata* the cause of action in both the litigations must be the same. His submission is that the words "the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties" mean that the cause of action in both the litigations must be the same. He then argues that a pure and abstract question of law can never be a matter in issue. In other words, Mr. Kotwal submits that under s. 11 of the Code of Civil Procedure decisions on questions of fact and mixed questions of fact and law can be *res judicata*, but not the decisions on pure and abstract questions of law.

Mr. Patel, on the other hand, contends that so long as the matter directly and substantially in issue in both the suits is the same, all questions, whether of law or fact, can be subject-matter of *res judicata*.

In my opinion, there is no justification to restrict the meaning of the words "the matter directly and substantially in issue has been directly and substantially in issue in a former suit" so as to limit the section only to questions of fact and mixed questions of law and fact. The language of s. 11 does not contain any such words as "cause of action," "subject-matter of suit," "questions of fact," "mixed questions of fact and law" or any such phrase. The words used are "matter directly and substantially in issue in a former suit," and, in my opinion, so far as that requirement is fulfilled, even pure questions of law can be *res judicata*. So long as the matter directly and substantially in issue in a former suit is also directly and substantially in issue in a subsequent suit, it would make no difference to the principle of *res judicata* if mere formal details of a cause of action, which do not constitute its substance, differ in two suits. Legislature does not use superfluous words, and certainly the word "substantial" which is used in s. 11 is not superfluously used. Obviously the antithesis of substance is form and therefore it is easy to conceive of cases where the issues may *in substance* be the same, though their form and other unsubstantial details may be different. If Mr. Kotwal means that for the principle of *res judicata* under s. 11 of the Code of Civil Procedure to apply, the cause of action in both the litigations must be *in substance* the same, though its formal details may vary, I agree at once. But as he seems to contend that a bar of *res judicata* under s. 11 cannot apply even if the details, as distinguished from the substance, of the cause of action in two suits differ, I am unable to agree.

It is true that the English principle of *res judicata* applies only where the cause of action in both the suits is the same, (though even there the expression "cause of action" is to be liberally construed): see *Krishna Behari Roy* v. *Brojeswari Chowdranee.*[1] But in s. 11 of the Code of Civil Procedure, we do not see any such limitation imposed and therefore, in my view, the principle laid down in s. 11 goes further in this particular respect than the English doctrine of *res judicata* and appears to have been based or modelled to a certain extent on considerations on which the English law of estoppel by record has developed. In other words, the fundamental of the doctrine of *res judicata* as embodied in s. 11 of the Code of Civil Procedure is not that the cause of action, including even unsubstantial details associated with it, in both the suits should be the same, but that the matter directly and substantially in issue in both the litigations should be the same.

The important thing is the language of the statute concerned and a straight, natural meaning should be given to it. Nothing should be subtracted from its meaning or added to it unless the subtraction or addition is specifically provided for or can be clearly gathered. In this connection it would be convenient to refer to certain observations of their Lordships in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar.*[2]

It was said therein that (p. 736):

"In India, at all events, a party who takes a plea of *res judicata* has to show that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and also that it has been heard and finally decided. This phrase 'matter directly and substantially in issue' has to be given a sensible and business-like meaning, particularly in view of explanation 4 to s. 11 of the Code of Civil Procedure which contains the expression 'grounds of defence or attack.' Section 11 of the Code says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points, or points of law, or pure points of law. As a rule, parties do not join issue upon academic or abstract questions but upon matters of importance to themselves. The section requires that the doctrine be restricted to matters in issue and of these to matters which are directly as well as substantially in issue."

So long as the restriction of the doctrine of *res judicata* to matters which are directly and substantially in issue is borne in mind, it does not matter whether the issue is a pure issue of law or a mixed issue of fact and law, or whether the cause of action is the same, or whether its formal details which are not of substantial consequence differ. A matter in issue generally relates to rights of parties based on a statute or documents or other things as the case may be in different cases, and the law of *res judicata* says that if the rights of the parties in a particular matter directly and substantially in issue in a former suit have once been adjudicated upon, a second or subsequent adjudication on the same issue is barred. In the case before us the matter directly and substantially in issue is whether Government of the Province of Bombay has a right to levy non-agricultural assessment on a piece of Municipal street land diverted by the Municipality to another purpose. That issue was

[1] (1875) L. R. 2 I. A. 283.

[2] (1928) 56 Cal. 723, F. B.

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heard and finally decided between the parties in suit No. 907 of 1942 and therefore, in my view, according to the principal of law laid down in s. 11 of the Code of Civil Procedure, the second adjudication of the same question is barred.

At this stage it may be convenient to refer to certain authorities on the question of interpretation of a statute. In *Ramanandi Kuer* v. *Kalawati Kuer*,[1] it was observed by their Lordships of the Privy Council (page 23) that it had often been pointed out by them that where there was a positive enactment of the Indian Legislature the proper course was to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it might be founded. Then again in *Babulal Choukhani* v. *The King, Emperor*,[2] it was pointed out by their Lordships who were dealing with sub-s. (*1*) of s. 5 of the Code of Criminal Procedure that the language of that code was conclusive, and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. It was observed that doubtless, in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but that in general the words used read in their context must prevail. In *General Accident Fire and Life Assurance Corporation* v. *Janmahomed Abdul Rahim*,[3] the observations of their Lordships were even more categorical. They said (page 426) that a law of limitation and prescription might appear to operate harshly or unjustly in particular cases, but where such law had been adopted by the State it must, if unambiguous, be applied with stringency. It was observed that the rule must be enforced even at the risk of hardship to a particular party and that the Judge could not on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it. Their Lordships added that very little reflexion was necessary to show that great hardships might occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights, yet the statutory rules must be enforced according to their ordinary meaning. In *Gokul Mandar* v. *Padmanund Singh*,[4] it was held that the essence of a code was to be exhaustive on the matters in respect of which it declared the law, and that it was not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. As far as our own High Court is concerned, we might with advantage refer to *Sitaram Sakharam* v. *Laxman Vinayak*,[5] wherein Mr. Justice Shah observed (at page 1282) that s. 11 of the Civil Procedure Code did not make any distinction between issues of law and other issues, but referred generally to questions directly and substantially in issue and heard and finally decided, His Lordship did not think that the distinction could be accepted without restricting the scope of the section in a matter not justified by the words of the section. He said that a drawing of the distinction between issues of law and other issues, in construing s. 11, would involve the reading of the words in the section which were not there. His Lordship went on to say that the

[1] (1927) L. R. 55 I. A. 18.
[2] (1938) L. R. 65 I. A. 158.
[3] (1940) L. R. 67 I.A. 416.
[4] (1902) L. R. 29 I.A. 196.
[5] (1921) 45 Bom. 1260.

dictum in *Chamanlal* v. *Bapubhai*,[1] must be read in the light of the special facts of the case and added that the proposition, if taken without reference to the context, appeared to have been broadly stated and not wholly justified by the words of s. 13 of the Code of 1882 which was then in force. I shall refer to the case of *Chamanlal* v. *Bapubhai*,[1] later, but at this juncture it would be sufficient to say that, in the view of Mr. Justice Shah, the proposition laid down in that case appeared to have been too broadly stated and wholly justified by the words of s. 13 of the Code of 1882. The ratio of these authorities on the question of interpretation of a statute is that where the language of a statute is clear and plain and does not admit of any ambuguity, it must be given its natural meaning. Therefore, all that we have got to see in this case is whether the matter which was directly and substantially in issue in the previous Suit No. 907 of 1942 and the matter which is directly and substantially in issue in Suit. No. 1287 of 1944 is the same or not. If the matter directly and substantially in issue is the same, the decision in the previous suit will be a bar to the re-agitation of the same question in the subsequent suit as the parties to both the suits are the same, namely, the Ahmedabad Municipality and the Province of Bombay.

The question whether decision on a pure point of law can be *res judicata* or not is a somewhat vexed one and has been the subject-matter of numerous decisions of the different High Courts. In *Hoystead* v. *Commissioner of Taxation*,[2] under a will the annual income from an estate in Australia was divisible by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918-19 under the Land Tax Assessment Act, 1910-1916, of Australia; they claimed under s. 38, sub-s. 7, of the Act a deduction of 5000 L. in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (1) Whether the shares of the joint owners, or of any and which of them, in the land were original shares within s. 38; (2) How many deductions of 5000 L. the respondent should make. The Full Court answered these questions as follows: (1) The shares of the six children surviving at the date of the assessment; (2) Six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919-1920 the Commissioner allowed only one deduction of 5000 L., contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Full Court upheld the view, and held that the Commissioner was not estopped by the previous decision. It was held by their Lordships of the Privy Council that the Commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. The ratio of this decision is that where a particular matter which was fundamental to a decision in a previous suit between the parties has been decided, the same matter, if fundamental to the decision in a subsequent suit, cannot be agitated again between the same parties. In the above cited case the judgment of their Lordships was delivered by Lord Shaw who went on to say in the course of his judgment (p. 165):

[1] (1897) 22 Bom. 669.

[2] [1926] A. C. 155.

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"Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

It was stated that it was a principle of law that this could not be permitted, and that there was abundant authority reiterating that principle (see pp. 165-166). Let us apply the effect of these observations to our present case. We know it, as a matter of fact, that in Suit No. 907 of 1942 it was decided by a competent Court that the Government of the Province of Bombay had no right at law to levy non-agricultural assessment on a portion of street land (municipal land) which was diverted by the Municipality to a different purpose, namely, in that case a fish market. If it were open to the parties to agitate again the same question, namely, the right or otherwise of Government to levy non-agricultural assessment on a portion of municipal land diverted to another purpose by the Municipality, quite conceivably a contrary decision to the one which was arrived at in the previous litigation might be obtained. If it were open to the parties then also to reagitate the same matter, it is quite conceivable that again a different view might be taken on the point of law whether Government had a right to levy non-agricultural assessment in above stated circumstances. The point is that different Courts trying the same issue might go on arriving at different conclusions on the same point and there would be no finality to the litigation. It is thus only to put a stop to a further litigation on the same matter which is directly and substantially in issue between the same parties that the law of *res judicata* has been enacted in s. 11 of the Code of Civil Procedure, and it appears to me, in view of the observations of their Lordships of the Privy Council at page 166 in *Hoystead* v. *Commissioner of Taxation*,[1] that it is not open to the parties now in our present case to reagitate the question whether it is open to Government or not to levy non-agricultural assessment on a piece of municipal land converted by the Municipality to another purpose. In *Hoystead* v. *Commissioner of Taxation*[1] Lord Shaw went on to refer to the case in *In re Graydon*,[2] in which a country court judge had held that a sum of 20 L. was in the nature of personal earnings on the part of a bankrupt patentee and belonged to the bankrupt. Subsequent royalties having become due the trustee applied to the Bankruptcy Court for a declaration that they vested in him after-acquired property. It was held that the judgment of the country Court estopped the trustee from asserting that the royalties were not the bankrupt's personal earnings. The question as to the quantum of the allowance to be made to the bankrupt was another matter, and that allowance was varied; but Vaughan Williams J. said that he thought the fair inference from the judgment of the county court Judge was that the trustee did decide that the sums in question were in the nature of personal earnings. The trustee was accordingly estopped from denying this to be the nature of the payments when made. The question whether the royalties vested in the trustees or in the bankrupt was a pure question of law and yet it was held that

(1) [1926] A. C. 155. (2) [1896] 1 Q. B. 417.

the decision in a previous litigation was an effective estoppel as far as the agitation of the same question was concerned in a subsequent matter. Continuing his judgment in the case of *Hoystead* v. *Commissioner of Taxation* Lord Shaw said that there would be no quieting of litigation unless the judgment of the county court Judge was taken as it stood. It was plain, said Lord Shaw, that the *res* in the case had been adjudged, that *res* being, in figures, that six times 5,000 L. should be the suitable deduction from the assessed property. Applying that principle to the present case, it is clear that the *res* in Suit No. 907 of 1942 was that the Government of the Province of Bombay had no right to levy non-agricultural assessment on a portion of the municipal street land which the Municipality had diverted to a fish market. The matter directly and substantially in issue in the present suit No. 1287 of 1944 being the same, I am of opinion that, according to the principle laid down in s. 11 of the Code of Civil Procedure, it would not be open to Government once again to contend that it has a right to levy non-agricultural assessment on such land.

Then, at page 170 in the same case *Hoystead* v. *Commissioner of Taxation*,[1] we find observations of importance for our present case:

"It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision."

In *Howlett* v. *Tarte*,[2] Williams J. said that it was quite clear upon the authorities to which his attention had been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. In my opinion, the plea of Government in Suit No. 1287 of 1944 is inconsistent with the allegation which was traversable in the previous litigation (No. 907 of 1942). The allegation of the Municipality in that previous litigation was that Government had no right to levy non-agricultural assessment on a portion of municipal street land converted into another purpose and there is no doubt that the plea of Government in the subsequent suit is inconsistent with that allegation. Clearly, therefore, in the spirit of the above observations of Lord Shaw in *Hoystead* v. *Commissioner of Taxation*[1] the principle of *res judicata* will apply and it will not be open to Government to contend that it has a right to levy non-agricultural assessment on a portion of the public street land concerned in Suit No. 1287 of 1944. To my mind, the effect of the decision in the above mentioned case is that if a matter, fundamental to a particular decision, has been once adjudicated upon as between certain parties, it would not be open to reagitate the same matter in another suit between the same parties. The previous decision would hold good not only in respect of the points which were raised in that case but to every point which would properly belong to the subject-matter of that case. The point

[1] [1926] A. C. 155.

[2] (1861) 10 C. B. (N. S.) 813. at p. 826.

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whether Government is entitled to levy non-agricultural assessment in a case of this sort is a point which properly belonged to the matter which was directly and substantially in issue in the previous litigation and therefore, I think, the principle of *res judicata* would apply in this case.

In *Sitaram Sakharam* v. *Laxman Vinayak*,[1] the Sharakati Inam village of Kasar Kolwan was divided half and half between Government and the plaintiff Inamdar but not by metes and bounds. In 1885-86 survey settlement was introduced into the village without the consent of the Inamdar. The defendant-khots who were in the position of occupants in the village used to collect the assessment, half of which was paid by them to Government. The Inamdar did not rest content with the other half, but levied payment at Mamul rate which was a higher rate. At first the defendants made the payment. In 1892 the plaintiff sued the defendants to recover Mamul dues for the years 1888-1890. The Court decreed the plaintiff's claim following the decision in *Gangadhar Hari Karkare* v. *Morbat Purohit*.[2] In 1917 the plaintiff again sued one of the defendants to recover the Mamul dues for the years 1915 and 1916. The defendant contended that all that the plaintiff was entitled to recover was one-half of the survey assessment under ss. 216 and 217 of the Bombay Land Revenue Code; but the plaintiff contended that the defendant was barred by *res judicata* from reagitating the question. The matter was heard by a Full Bench of the Bombay High Court and Mr. Justice Shah in his judgment observed that the plea of *res judicata* was not dependent upon the merits of the reason given for a particular conclusion. The conclusion, whether right or wrong, was binding upon the parties. Its binding character did not depend upon the correctness of the reasons for the conclusion. It was stated that the words of s. 11 did not lend support to the suggestion that if an issue was decided under any misapprehension of fact, it could be re-agitated in a subsequent suit. Mr. Justice Shah went on to say that the section did not make any distinction between issues of law and other issues, but referred generally to questions directly and substantially in issue and heard and finally decided. His Lordship did not think that the distinction could be accepted without restricting the scope of the section in a manner not justified by the words of the section and without reading the words in the section which were not there.

Mr. Patel for the respondent referred us next to the case of *Barrs* v. *Jackson*,[3] (Smith's Leading Cases, 13th Edition, p. 694.) It is true that the judgment of Knight Bruce, V.-C., in *Barrs* v. *Jackson*[3] was reversed on appeal. Nevertheless it is recognized that the principles laid down therein present a full and clear statement of the law of estoppel. After discussing certain leading English authorities, Knight Bruce, V-C., proceeded to say (p. 597):

"...Lord Ellenborough, certainly, and the Court of King's Bench, in *Outram* v. *Morewood*,[4] decided most accurately, . . . that an allegation on record, upon which issue has been once taken and found, is,

[1] (1921) 45 Bom. 1260.
[2] (1893) 18 Bom. 525.
[3] (1842) 1 Y.& C. C. C. 585.
[4] (1803) 3 East. 346.

between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found."

These words are important. An allegation was specifically raised by the Municipality in Suit No. 907 of 1942 that the Government of the Province of Bombay had no right to levy a fine or revenue or assessment on a portion of the municipal street land which was diverted by the Municipality to the purpose of a fish market. On that allegation a definite finding was recorded by the court of competent jurisdiction that the Government had no right to levy non-agricultural assessment on that portion of the street land. Applying the principle laid down by Lord Ellenborough in *Outram* v. *Morewood*,[1] to which Knight Bruce, V.-C., referred approvingly in *Barrs* v. *Jackson*,[2] it would follow that the abovesaid finding in Suit No. 907 of 1942 would be conclusive as far as the parties to that suit were concerned. It would estop them from agitating the same allegation again, namely, about the right of Government to levy non-agricultural assessment on a portion of a municipal street land diverted to another purpose. In my view, it would not make any difference whether purpose in one case was a fish market and in another case a meat stall.

In *Outram* v. *Morewood*,[1] Lord Ellenborough went on to observe further that the rule against re-agitating the matter adjudicated was subject generally to the restriction that however essential the establishment of particular facts might be to the soundness of a judicial decision, however it might proceed on them as established, and however binding and conclusive the decision might, as to its immediate and direct object, be, those facts were not all necessarily established conclusively between the parties, and that either might again litigate them for any other purpose as to which they might come in question, *provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object.* The proviso is again important. We know that in Suit No. 907 of 1942 a decision was arrived at that Government was not entitled to levy non-agricultural assessment on municipal street land diverted to be used as a fish market. If either of the parties to that litigation now makes an attempt to withdraw from the operation of that decision by setting up a case that Government has a right to charge non-agricultural assessment on a municipal street land diverted to another purpose, it would not be permissible to him to do so.

In *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*,[3] it was held that correctness or otherwise of a judicial decision had no bearing upon the question whether it did or did not operate as *res judicata*. A party taking a plea of *res judicata* had to show that the matter directly and substantially in issue in a subsequent litigation had also been directly and substantially in issue in a previous suit and had been heard and decided. The facts in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*[3] were that a suit was instituted in 1924 for recovery of rent for four years—1327 to 1330 B. S.—at Rs. 16 per year together with Rs. 2 for cess and interest on arrears of rent at 75 per cent. under a kabuliyat,

[1] (1803) 3 East. 346.
[2] (1842) 1 Y.& C. C. C. 585.
[3] (1928) 56 Cal. 723, F. B.

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in all amounting to Rs. 174-2-as. The said kabuliyat was executed by one Sitala Dasi in 1880 in favour of the plaintiff's predecessor-in-title and stipulated to pay interest on arrears of rent at 75 per cent per annum. Then, in 1898, the holding was sold in execution of a rent decree and was purchased by the defendant's father. In 1915, a similar rent suit was brought by the former landlord in respect of the same *jote* and the defence was that the defendants, as auction-purchasers, were not bound to pay interest at 75 per cent. under the kabuliyat and the same was in the nature of a penalty. That suit was decreed for the plaintiff landlord and no appeal was filed against that decree. In the suit of 1924 the same defence was taken. The learned Munsif who tried the suit held that the doctrine of *res judicata* would apply and decreed the suit for the plaintiff. On appeal, the learned Additional Judge held, relying on the decision in *Anandamoyee Debi* v. *Sudamini Debya*,[1] that the defendant being an auction-purchaser was not bound by the high rate of interest stipulated in the kabuliyat of 1880 and refused to give effect to the plea of *res judicata* taken by the plaintiff. An appeal was preferred to the High Court against that decision and the Division Bench hearing that appeal referred the matter to a Full Bench. The following questions were referred for the opinion of the Full Bench:—

"(1) Whether an erroneous decision on a pure question of law operates as *res judicata* in a subsequent suit where the same question is raised?

(2) Whether the case of *Anandamoyee Debi* v. *Saudamini Debya*[1] has been correctly decided?"

While dealing with the first point, it was observed by the Full Bench that to say that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that, therefore, it might be disregarded, was an indensible form of reasoning. It was stated that it was not true that a point of law was always open to a party for agitation again in a subsequent suit. Rankin, C. J., who delivered the judgment of the Full Bench, said that in India, at all events, a party who took a plea of *res judicata* had to show that the matter had been directly and substantially in issue in the former suit and also that it had been heard and finally decided. It was pointed out that the phrase 'matter directly and substantially in issue' had to be given a sensible and businesslike meaning, particularly in view of explanation 4 to s. 11 of the Code of Civil Procedure which contains the expression 'grounds of defence or attack'. Chief Justice Rankin went on to observe that s. 11 of the Code said nothing about causes of action, a phrase which always required careful handling, nor did it say anything about points, or points of law, or pure points of law. His Lordship said that as a rule, parties did not join issue upon academic or abstract questions, but upon matters of importance to themselves, and that all that the section required was that the doctrine be restricted to matters in issue and of these to matters which were directly as well as substantially in issue.

In *Chhaganlal* v. *Bai Harkha*,[2] it was held that a plea of estoppel by *res judicata* could prevail even where the result of giving effect to it would be to sanction what was illegal in the sense of being prohibited

[1] (1922) 27 Cal. W. N. 502. [2] (1909) 33 Bom. 479.

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by statute. The facts in that case were that on February 3, 1903 a possessory mortgage of certain Bhagdari land was executed by Govind Khodabhai and his brother in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for five years. Further agreements of a similar nature were subsequently executed by Govind in the plaintiff's favour, the last being of September 18, 1902 for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow the second defendant cultivated the land on behalf of herself and the first defendant her minor son. The suit had been brought by the plaintiff to recover the rent of the land for two years namely 1904-05 and 1905-06. No objection had been taken that rent accruing due in the lifetime of Govind was not claimable against the defendants personally in that suit. The plaintiff went in special appeal having failed in both the lower Courts. It was argued on behalf of the defendants that the tenancy agreements, whether express or implied, under which the mortgagor Govind and his heirs had remained in possession were void as being alienations tainted with the same vice as the principal transaction (mortgage) and that rent was therefore not recoverable. For the plaintiff it was contended that not only were these arguments unsound but also that they were no longer open to the defendants because the plaintiff's right to recover rent had been established by an *ex parte* decree against Govind obtained by the plaintiff for rent in respect of the years 1902-03 and 1903-04. It was argued before their Lordships that the question raised before them by the defendants might and ought to have been raised in the suit in which the decree was obtained and must be taken to have been decided against the plaintiff since they (defendants) claimed title merely by virtue of their heirship to Govind. Scott, C. J., who delivered the judgment in that case, while dealing with the suggestion of the defendants that a plea of estoppel by *res judicata* could not prevail where the result of giving effect to it would be to sanction what was illegal, said that that was not the law and that no such limitation was contained in s. 13 of the Code of 1882. His Lordship pointed out that if the legality of an act was point substantially in dispute it might be a fair subject of compromise in Court like any other disputed matter and thus become *res judicata* (*Great North-West Central Railway* v. *Charlesbois*).[1] Chief Justice Scott went on to say (p. 482):

"Similarly if it (i. e., a point of law) is abandoned or not put forward by a defendant it must, having regard to the provisions of s. 13, be deemed to have been decided against him. The defences raised are therefore not now open to the defendants and the plaintiff is entitled to the rent claimed."

To my mind, this decision is clear authority for holding that even a pure point of law which as directly and substantially in dispute in a previous suit could be the subject of *res judicata*.

In *Bindeswari Charan Singh* v. *Bageshwari Charan Singh*,[2] the owner of an impartible estate, the management of which had been vested in a manager appointed under s. 2 of the Chota Nagpur Encumbered Estates Act, 1876, shortly after its release to him in 1909 executed a maintenance grant in favour of the appellant, one of his sons, yielding

[1] [1899] A. C. 114 at p. 124. [2] (1935) L. R. 63 I.A. 53.

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an annual income of Rs. 1,300. The sanction of the Commissioner was not obtained under s. 12A of the above Act to that grant. On attaining majority the appellant instituted proceedings against his father and two brothers claiming a maintenance grant of Rs. 4,000 a year, and maintaining that the sanction of the Commissioner under the Act was not necessary. A decree was passed in that suit that he was entitled to a maintenance grant yielding Rs. 4,000 annually, inclusive of the Rs. 1,300 payable under the grant of 1909 and that the grant of 1909 was "legally valid". In implement of that decree the appellant's father executed in 1920 an additional maintenance grant up to the value of the decreed sum. On a claim by the respondent, a son of one of the appellant's brothers, who subsequently became owner of the impartible estate, sued for a declaration that the two maintenance grants of 1909 and 1920 were illegal and not binding on him and for possession and mesne profits. It was held by their Lordships of the Privy Council that the question of the validity of the 1909 grant in view of s. 12A of the Act of 1876, having been directly and substantially in issue and decided in the maintenance suit, in which the similarity of the parties to those in the respondent's suit satisfied the conditions of s. 11 of the Civil Procedure Code, the Court in the respondent's suit was not competent, in view of the provisions of s. 11 of the Civil Procedure Code, to try the issue of the validity of the 1909 grant. In the case before us also the question whether the Government of a Province is entitled to charge non-agricultural assessment under the provisions of the Land Revenue Code on a certain piece of municipal land which is diverted by the Municipality to another purpose, (e. g., a fish market in that case—a meat shop or—any similar object, might as well have been another purpose) was directly and substantially in issue in the previous suit of 1942 and was decided in that suit. It was again a matter directly and substantially in issue in the suit of 1944 between the same parties. To my mind, the conditions laid down in s. 11 of the Code of Civil Procedure are fulfilled in this case also, and accordingly, in view of the decision in *Bindeswari Charan Singh* v. *Bageshwari Charan Singh*,[1] it would not be open to Government in the subsequent suit to agitate again the same question which was raised and decided in the previous suit, namely, their incompetence under the law to levy non-agricultural assessment on a land which was similar to the land which was the subject-matter of the 1942 suit.

In *Keshav* v. *Gangadhar*,[2] it was laid down that a decision on an issue of law operated as *res judicata* if the cause of action in the subsequent suit was the same as in the previous suit. Mr. Justice Baker who delivered the judgment said that the general principle was that a decision on an issue of law operated as *res judicata* if the cause of action in the subsequent suit was the same as in the previous suit, and it was immaterial if the decision was erroneous in law. Now, it does not appear to me that merely because the pieces of land were different in the two suits it would make any difference to the substance of the issue, namely, the municipal challenge to Government regarding the latter's alleged right to charge non-agricultural assessment on a portion of the street land diverted to another purpose. The diversion, in one case, for fish

[1] (1935) L. R. 63 I.A. 53. [2] (1931) 33 Bom. L. R. 1443.

market and, in the other case, for meat shop, would again make no difference to the substance of the issue. At the risk of repetition, I would emphasize that the word "substantially" in s. 11 has been deliberately used and not superfluously or inadvertently. The purpose in using it is that for the application of the doctrine of *res judicata* mere minor details which do not constitute the substance of the issue do not matter. The idea in using the word "substantially" is to bring out, as far as language can, a distinction between the substance of the matter and its unimportant details. In my opinion, details regarding area of the piece of land, numbers and dates of the orders of the Collector of Ahmedabad and such other matters are not so important. The question is what was the *res* in the previous suit. The *res*, there is no doubt, was that Government had no legal right to charge non-agricultural assessment on a portion of the street land which was diverted by the Municipality to another purpose. That *res* could not be agitated again between the same parties. Whether the diversion was for one purpose or another, whether the area diverted was this much or that much, and such other details were mere adjuncts or appendages of the *res*. They were no integral part of the *res*. Therefore the *res* in both the suits being the same, I am of opinion that the provisions of s. 11 of the Code of Civil Procedure would apply. The matters of detail which differed in the suits of 1942 and 1944 would not mean that the cause of action in both the suits was different. The cause of action, to my mind, was the same in both the suits, namely, the intrusion by Government on the right of the Municipality to hold land free of non-agricultural assessment, land which was vested in it and which was diverted by it to another purpose. The cause of action in both the suits being the same, the principle laid down in *Keshav* v. *Gangadhar*,[1] would help the respondent in this case. It may be noted that in *Keshav* v. *Gangadhar*[1] a reference is made to the following remarks of Rankin, C. J., in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*[2] (p. 735):

"To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that, therefore, it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party."

These observations clearly lay down, as far as words can lay down, that a pure point of law can be the subject of *res judicata*. Indeed Rankin, C. J., observed further (p. 736):

"In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point. On the other hand, it is plain from the terms of s. 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarliy the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of

[1] (1931) 33 Bom. L. R. 1443. [2] (1928) 56 Cal. 723, F. B.

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law as applicable to them, *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided."

What I am trying to emphasize is not that the reasoning which was employed in deciding Suit No. 907 of 1942 should be binding. We have nothing to do with that reasoning. The point is that the decision which was arrived at in that suit, being between the parties who were parties in the subsequent suit, should be binding in the subsequent suit, as the subject-matter in both the suits was substantially the same. There is no question in this case of fastening upon the parties to the subsequent suit any special principles of law as applicable to them *inter se*. The point is that the question of a right to levy non-agricultural assessment on a portion of municipal land which was diverted to another purpose having once been adjudicated by a competent Court, the same could not be made the subject-matter of subsequent litigation between the same parties. On that subject, I am of the view that the decisions both of the Bombay High Court and the Calcutta High Court agree.

In *Gokul Mandar* v. *Pudmanund Singh*,[1] it was observed by their Lordships of the Privy Council that the essence of a Code was to be exhaustive on the matters in respect of which it declared the law, and that it was not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. Applying that dictum to the present case, all that we are concerned with having regard to the language of s. 11 is to see whether the matter which was directly and substantially in issue in the suit of 1942 is again directly and substantially in issue in the suit of 1944. I have already stated that matters of mere detail such as this much or that much area, this purpose or that to which the diversion of the land was made, this number or that number of the Collector's order, etc., should make no difference to the substance of the matter in issue which was involved in the two litigations.

In *Ahmed Bhauddin* v. *Babu*,[2] it was said by Mr. Justice Patkar that a question of law even though wrongly decided between the parties operated as *res judicata*. His Lordship approvingly referred to *Waman* v. *Hari*[3] in which also it was held that an erroneous decision upon a point of law might yet as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from re-agitating it. *Chhaganlal* v. *Bai Harkha*,[4] was also referred to, in which it was decided that a plea of estoppel by *res judicata* could prevail even where the result of giving effect to it would be to sanction what was illegal in the sense of being prohibited by statute. Clearly therefore the effect of these decisions and others to which I have already referred is to show that even a pure question of law, so far as the matter directly and substantially in issue between the parties in both the litigations is the same, can be the subject of *res judicata*.

In *Waman* v. *Hari*,[3] to which I have already referred, the execution of a decree passed in plaintiff's favour was stayed pending appeal by

(1) (1902) L. R. 29 I.A. 196.
(2) (1929) 31 Bom. L. R. 778.
(3) (1908) 31 Bom. 128.
(4) (1909) 33 Bom. 479.

the defendant on his furnishing security. Afterwards the plaintiff having proceeded in execution against the defendant and the surety, the Court allowed the plaintiff's claim against the surety. In a subsequent execution proceeding the plaintiff having presented a darkhast for further execution against the party, the Court passed an order allowing the claim. The order was confirmed in appeal. On second appeal by the surety, it was held by Mr. Justice Beaman that an erroneous decision upon a point of law might yet as between the parties to it, but no further, be a sufficient *res judicata* to preclude them from reagitating it.

The decision in *Savitri* v. *Holebasappa*,[1] is to the same effect as the decision in *Keshav* v. *Gangadhar*,[2] namely, that a decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the first suit. In my opinion, the cause of action in both the suits (of 1942 and 1944) is the same in substance, although the various formal details differ in the two cases. Thus the decisions of our own High Court support the view that, so far as the provisions of s. 11 of the Code of Civil Procedure are concerned, there can be *res judicata* even on a pure question of law.

I shall now proceed to deal with the cases of other High Courts. In *Sheoram and another* v. *Seth Mulchand*,[3] it was held that a previous decision on a question of law was *res judicata* in a subsequent suit. In *Sanichar Mahton* v. *Raja Dhakeshwar Prasad Narain Singh*,[4] also it was held that an erroneous decision on a point of law would constitute *res judicata* as much as a correct decision on a question either of law or fact, which meant that there could be *res judicata* not only on a question of fact, a mixed question of law and fact, but also on a pure question of law on which the parties might be at dispute regarding the matter which was directly and substantially in issue in the two litigations.

In *Hub Lal* v. *Gulzari Lal*,[5] the decision given in *Mangalathammal* v. *Narayanswami Aiyar*,[6] was dissented from and it was held that even on an erroneous decision on an issue of law a plea of *res judicata* could be based. The facts in that case were very brief. It was a plaintiff's appeal in a suit for damages on the allegations that the defendant had wrongfully cultivated the plaintiff's share, a joint holding, and had further cut certain trees and taken certain fruit from groves belonging to the plaintiff. The trial court held that the plaintiff's joint ownership of the tenancy was *res judicata*, and decreed the plaintiff's claim, allotting him Rs. 531-10-0 as damages. It was admitted on behalf of both parties that there were two previous suits in 1916 and 1920, in which the question of ownership had been decided in favour of the plaintiff. The lower appellate court, however, held that the matter was not *res judicata* because the plaintiff's title was based on his acquisition by sale and foreclosure of a certain share in an occupancy holding, and that such a title was void under the provisions of the Tenancy Act. It further held that a wrong decision on a point of law could not be the basis

[1] (1931) 34 Bom. L. R. 198.
[2] (1931) 33 Bom. L. R. 1443.
[3] [1940] Nag. 181.
[4] (1929) 9 Pat. 674.
[5] (1927) 49 All. 543.
[6] (1907) 30 Mad. 461.

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of a plea of *res judicata*, and in support of that proposition reliance was put on the decision of the Madras High Court in *Mangalathammal* v. *Narayanswami Aiyar*,[1] in which it was held that (p. 463):

"...It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal on a question of law directly and substantially in issue between the parties in a suit does not prevent a court from deciding the same question arising between the same parties in a subsequent suit according to law."

Their Lordships went on to say that they were unable to concur in that expression of opinion. In their view, the words of s. 11 of the Code of Civil Procedure were clear that "No court shall try any suit in which the matter directly and substantially in issue has..." Their Lordships pointed out that in their view there was nothing in the above quoted words to limit the matter in issue to an issue of fact. This decision would again show that even on a pure question of law there could be *res judicata* as long as, of course, the matter directly and substantially in issue in both the litigations was the same as between the same parties.

In *Lilabati Misrain* v. *Bishun Chobey*,[2] it was held that a decision might operate as *res judicata*, although no issue had been expressly raised. The test to be applied was whether it plainly appeared that the question which was raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it. In Suit No. 9 of 1942 the question which was raised by the parties, who were also parties to Suit No. 1287 of 1944, was about the right or otherwise of the Government of the Province of Bombay to charge non-agricultural assessment on a certain piece of municipal land which was diverted by the Municipality to another purpose. A judgment on it was given by the Court which held that Government had no such right.

In *Greenhalgh* v. *Mallard*,[3] Somervell, L. J., observed that on the authorities to which he referred in his judgment, it would be accurate to say that *res judicata* was not confined to the issues which the court was actually asked to decide, but that it covered issues or facts which were so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. His Lordship referred to the case of *Green* v. *Weatherill*,[4] in which Mr. Justice Maugham had quoted the following observations of Wigram, V. V., in *Henderson* v. *Henderson*,[5] (p. 115):

"...the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[1] (1907) 30 Mad. 461.
[2] (1907) 6 Cal. L. J. 621.
[3] [1947] 2 All. E. R. 255.
[4] [1929] 2 Ch. 213.
[5] (1843) 3 Hare 100.

This would show that merely because the details about the identity of the land in the two suits, or their areas, or the purpose to which they were diverted differed, it could not be said that the matter directly and substantially in issue in the two suits was different. The matter substantially in issue in both suits was the same and so the decision in the former suit would be *res judicata*.

Thus on the examination of the authorities, I am of the opinion that their weight is strongly in favour of holding that as long as the conditions specified in s. 11 of the Code of Civil Procedure are satisfied, namely, as long as the substance of the issue involved in the two litigations is the same, the rule of *res judicata* will apply, irrespective of whether the question is a question of fact, or a mixed question of law and fact, or a pure question of law.

On behalf of the appellant our attention was invited to *Mahadevappa Somappa* v. *Dharmappa Sanna*,[1] *Chamanlal* v. *Bapubhai*[2] *Narayan* v. *Subramanian*,[3] *Santosh Kumar* v. *Nripendra Kumar*,[4] *Krishna Behari Roy* v. *Brojeswari Chowdranee*,[5] *Kanta Devi* v. *Kalawati*,[6] *Jones* v. *Lewis*,[7] and certain observations from Halsbury's Laws of England (Second Edition, Vol. 13).

In *Mahadevappa* v. *Dharmappa*,[1] a suit was brought in 1928 by defendant No. 1 which ended in a decree based on a compromise that the adoption of the plaintiff in 1927 by defendant No. 2, a widow in a joint Hindu family, was invalid as having taken place without the authority of her husband or consent of his coparceners. It was based on the view of the law which then was prevalent. There having been a change in the law in 1932, defendant No. 2 again adopted the plaintiff in 1935. In 1937 the plaintiff sued for a declaration that his adoption in 1935 was valid, when he was met with the plea that he was barred by *res judicata* from setting up his adoption by reason of the decree in the suit of 1928. It was held that the bar of *res judicata* did not apply, for the plaintiff could not be regarded as litigating under the same title in both the suits inasmuch as the title that he had sought to make out in the two suits, though of the same nature, had been derived from different transactions. Now, in the first place, it appears to me that in our present case the cause of action in both the suits is the same. The right which is asserted by the Government of the Province of Bombay and challenged by the Municipality of Ahmedabad, which was a point for decision in the previous suit and which is also a point for decision in the subsequent suit, is the same. It does not matter whether a cause of action arises in reference to this or that piece of land, or this or that area, or this or that order of an authority, or this or that purpose to which the portion of the street land was put. In substance, the cause of action in both the suits was the interference with, or the intrusion on, the alleged right of the Municipality to hold a piece of street land, whose

(1) (1942) 44 Bom. L. R. 710.
(2) (1897) 22 Bom. 669.
(3) [1937] Mad. 364, F.B.
(4) [1949] A. I. R. Cal. 430.
(5) (1875) L. R. 2 I. A. 283.
(6) [1946] A. I. R. Lah. 419.
(7) [1919] 1 K. B. 328.

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use was diverted, free of non-agricultural assessment. It is pertinent in this context to turn once again to the words of s. 11 of the Code of Civil Procedure which refer to the matter directly and substantially in issue being the same. Surely the substance of the suit of 1942 did not lie in details such as area, purpose to which the land was diverted, the number and the date of the order of the Collector, etc. The substance lay clearly in the assertion of an alleged right of the Municipality to hold the street land, which was diverted to another purpose, free from non-agricultural assessment, and that surely is the substance of the issue in the present litigation also. In *Krishna Behari* v. *Brojeswari Chowdranee*,[1] it was observed by their Lordships of the Privy Council that the expression "cause of action" had to be construed liberally. In the present case there is no need even to resort to a liberal construction of the "cause of action". Even on a strict construction of the words "directly and substantially in issue" used in s. 11 of the Code of Civil Procedure, I would hold that the issue in Suit No. 907 of 1942 and that in Suit No. 1287 of 1944 is substantially the same.

In *Mahadevappa* v. *Dharmappa*,[2] Mr. Justice Sen observed that the decision in the previous suit regarding defendant No. 2's power to adopt was not in reference to all time. In his opinion it was improbable that plaintiff had asked the Court to consider the question of defendant No. 2's power to adopt throughout her lifetime. It did not appear to him therefore that the defendant's right to adopt for all years was alleged or decided in the earlier suit. This limitation does not exist in the case before us. There is nothing to show that the decision in the suit of 1942 regarding the absence of right in Government to levy non-agricultural assessment on a certain piece of land was to hold good as between the parties for a limited length of time only. Accordingly I am of the opinion that the decision in *Mahadevappa* v. *Dharmappa* does not come in the way of our holding that even a pure question of law can be *res judicata*.

In *Chamanlal* v. *Bapubhai*,[3] the plaintiff sought to recover eleven years' arrears of his share in a certain Government allowance received by the defendants and also prayed for an order directing the defendants to pay and his heirs his proper share in future. The defendants contended that under the Limitation Act (XV of 1877) only three years' arrears could be recovered. In a previous suit brought by the plaintiff in 1874 against the same defendants it was decided by the High Court that twelve years' arrears could be recovered. The lower Court held that that decision bound the parties and that, therefore, the subsequent claim should be allowed. It accordingly passed a decree for the plaintiff for the amount claimed and directed that the defendants should pay to the plaintiff and his heirs for the future his share in the allowance. It was held (varying the decree) by Mr. Justice Parsons and Mr. Justice Ranade that a point of law though decided in a suit between the same parties could not be *res judicata* and that the plaintiff under the Limitation Act (XV of 1877) was only entitled to recover arrears for three years. In the first place, as I have pointed out, there have been subsequent decisions of our own High Court in which a contrary view has

[1] (1875) L. R. 2 I.A. 283.
[2] (1942) 44 Bom. L. R. 710.
[3] (1897) 22 Bom. 669.

been taken. For instance, in *Sitaram Sakharam* v. *Laxman Vinayak*,[1] it was observed that the expressions "cause of action," or "questions of fact," or "mixed questions of law and fact," or "pure questions of law" were not to be found in s. 11 of the Code of Civil Procedure and that there could be *res judicata* even on a pure question of law.

Besides, the decision in *Chamanlal* v. *Bapubhai*,[2] proceeded on a reasoning which in the words of Mr. Justice Parsons was this:

"We do not think that the decision of this High Court *Chhaganlal* v. *Bapubhai*,[3] in a suit between the same parties, that arrears for twelve years could be awarded is *res judicata* in the sense that this Court is bound ever after to decide that a claim for twelve years' arrears is good. That decision was passed when either Act XIV of 1859 or Act IX of 1871 applied to the claim. The present suit was brought after Act XV of 1877 came into force, and it, therefore, must be applied."

Clearly, therefore, the decision was based on the application of Act XV of 1877. No doubt, incidentally his lordship also observed that it appeared to him that a point of law could not be *res judicata*. It seems to me that that observation was merely *obiter*. It was based on a decision of the Madras High Court in *Parthasarthi* v. *Chinnakrishna*,[4] in which their Lordships said that the Courts were bound to ascertain and apply the law and not to make law and that it was a suggestion repugnant to reason and to justice that, because a Court had erred in ascertaining the law, it was bound to repeat its error whenever the same question of law might arise between the same parties (p. 310). A detailed examination of the authorities on the subject was not made by their Lordships of the Madras High Court before laying down the proposition to which I have just referred. In any case, with respect, this Court is not bound by the decisions of the Madras High Court. The weight of the decisions of our own High Court is definitely in favour of holding that even on a pure question of law there can be *res judicata*.

In *Narayan* v. *Subramanian*,[5] a ryot had resisted the claim of a landlord for a higher rate of rent with respect to a particular area and stated that he was liable to pay only the dry rate on the ground that the coconut plantation in the same was an "improvement" within the meaning of s. 3 (4) (*f*) of the Estates Land Act. In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding it was held that the planting of a coconut garden was not an "improvement" and that the landlord was entitled to the enhanced rate. It was held by their Lordships that the principle that a decision of law though erroneous was *res judicata* in a later suit between the same parties should be confined only to the matters which existed at the time of the prior suit, unless some question of general principle was settled in the same, and that, accordingly, the decision in the prior suit did not apply to the new areas in the holding which were not planted with coconut trees at the time of the prior suit and in respect of which no claim was or could be made in the same. Mr. Kotwal, relying on this authority, has argued that since the subject-matter of

(1) (1921) 45 Bom. 1260.
(2) (1897) 22 Bom. 669.
(3) (1880) 5 Bom. 68.
(4) (1882) 5 Mad. 304.
(5) [1937] Mad. 304, F. B.

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the present dispute which is involved in the suit of 1944 did not exist at the time of the suit of 1942, the decision arrived at in the previous suit (of 1942), would not operate as *res judicata*. It is true that in the year 1942 the Municipality had not diverted this particular land, which is referred to in the suit of 1944, to another purpose, namely, the purpose of meat shops. But on that ground alone, I do not think the decision in the suit of 1942 would not operate as *res judicata*. What was held in *Narayan* v. *Subramanian*[1] was that unless some question of general principle was settled in the previous decision, that decision should be confined only to matters which had existed at its time. In the body of the opinion of the Court which was delivered by Mr. Justice Ramesam, he referred to an argument that in cases under the Bengal Tenancy Act it had been held that a decision between a landlord and tenant as to the rate of rent in a prior year did not constitute *res judicata* in later years when the same question came up and added that even there it had been held that, where the earlier decision decided a matter of general principle, it would be *res judicata* in later years. His Lordship supported this observation by reference to *Gnananda* v. *Nalini Bala Debi*,[2] and *Shreemati Ayetonnessa Bibi* v. *Amjad Ali*.[3] The point therefore is whether the decision arrived at in a previous suit was a decision on a matter of principle. If it was a decision on a matter of principle, it would operate as *res judicata*. There is no doubt, to my mind, that it was decided as a matter of *general principle* in the suit of 1942 that Government had no right under the provisions of the Land Revenue Code to charge non-agricultural assessment on municipal street land which was diverted by the Municipality to another purpose. That being so, *Narayan* v. *Subramanian* would not help the appellant.

In *Santosh Kumar* v. *Nripendra Kumar*,[4] it was held that an abstract question of law dissociated from and unconnected with the rights claimed or denied as between the parties to the litigation was of no importance or value to them or to the decision of the case itself and could not be said to be substantially in issue, and the principles of *res judicata* could not apply. The respondent has no quarrel with this proposition at all. This is not a case of an abstract question of law dissociated from the rights claimed or denied as between the parties to the litigation. The point of law which was to be decided in the previous suit of 1942 and which has come up for decision in the subsequent litigation of 1944 arose out of the rights claimed by the parties, namely, the right claimed by the Municipality on the one hand that they were not liable to pay non-agricultural assessment to Government for the street lands diverted by them to another use and the right claimed by Government on the other hand that it was entitled to charge non-agricultural assessment. It is thus difficult to understand how it could possibly be argued that we are dealing with an abstract question of law dissociated from the rights claimed or denied by the parties. I am of the view that this decision also cannot possibly help the appellant.

Proceeding further, Mr. Kotwal drew our attention to *Jones* v. *Lewis*.[5] Now, it is necessary to appreciate the facts of that case. By

[1] [1937] Mad. 364, F. B.
[2] (1925) 45 Cal. L. J. 146.
[3] (1928) 48 Cal. L. J. 184.
[4] [1949] A. I. R. Cal. 430, F.B.
[5] [1919] 1 K. B. 328.

s. 7 of the Poor Relief Act, 1819, it was provided that "It shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discrete person or persons to be assistant overseer or overseers of the poor of such parish . . . and it shall be lawful for any two of His Majesty's justices of the peace . . . by warrant . . . to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor . . . and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer." By s. 33, sub-s. 1, of the Local Government Act, 1894, it was provided that "The Local Government Board may, on the application of the council of any . . . urban district, make an order conferring on that council . . . the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers . . ." By sub-s. 4, it was provided that "The order . . . shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers." Before the passing of the Local Government Act, 1894, the plaintiff was duly elected assistant overseer of the poor of a certain parish by the inhabitants of the parish in vestry assembled at a salary, in the events which happened, of 85 L. a year, and was duly appointed by a warrant of justices. In 1896 the Local Government Board, acting under s. 33 of that Act, made an order conferring on the council of the urban district in which the parish was situate the power of appointing and, subject as mentioned in art. VI, of revoking the appointment of the assistant overseer of the parish. Art. VI provided that "Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present." In September, 1905, the inhabitants of the parish, without revoking the plaintiff's appointment and without his resigning, passed a resolution increasing his salary by 115 L. a year, and in August, 1905, two justices issued a warrant which after reciting that the inhabitants had nominated and elected the plaintiff and had fixed the yearly sum of 200 L. as his salary together with such a sum as he might be allowed for work in connection with the registration of voters, proceeded to appoint him assistant overseer to perform the duties and receive the salary fixed by the inhabitants. In an action by the plaintiff against the overseers of the parish, who refused to pay the increased salary; it was held on March 23, 1907, that the plaintiff had not been duly appointed at the increased salary, because (among other reasons) the power of re-nomination and re-election, which were neceesary before the salary of an assistant overseer could be increased, had been vested in the urban district council. In September 1912, the inhabitants, without any resignation of the plaintiff of revocation of his appointment, resolved that he should be paid a salary of 250 L. a year for performing the duties of overseer of the poor with certain exceptions; and in October, 1912, two justices issued a warrant which, after reciting that the inhabitants had nominated and elected the plaintiff and had fixed his yearly salary at 250 L., proceeded to appoint him assistant overseer to execute the duties and receive the salary fixed by the inhabitants. Doubts having

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arisen as to the validity of this appointment, the Local Government Board in 1915 made an order substituting for art. 6 of their order of 1896 the following:—"(1) Nothing in this order shall (*a*) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends; (*b*) preclude any such person as aforesaid, from being re-appointed to such office as if this order had not been made. (2) Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter." In 1916 the inhabitants again, without any resignation of the plaintiff or revocation of his appointment, resolved that the plaintiff should be paid a salary of 250 L. a year for performing the duties of overseer of the poor with the same exceptions as before, and again two justices issued a warrant reciting his nomination and election by the inhabitants and appointing him to be overseer of the poor and empowering him to perform the duties and receive the salary fixed by the inhabitants. In an action by the plaintiff against the overseers of the parish claiming a declaration that he was entitled under the warrant of 1912, or alternatively under the warrant of 1916, to salary at the rate of 250 L. a year, it was held, by Bankes and Warrington L. JJ., that under s. 7 of the Poor Relief Act, 1819, the inhabitants in vestry assembled had no power to increase the salary of an assistant overseer unless either he resigned his office, or they revoked his appointment, or it terminated by effluxion of time; and that, as none of these events had happened, the warrants of 1912 and 1916 were inoperative. It was also held that the plaintiff was not estopped by the judgment of March 23, 1907, from contending that the power of revoking his appointment and re-electing him at an increased salary remained in the vestry after the order of the Local Government Board made in 1896. In the body of the judgment, which was delivered by Bankes L. J., he observed as follows (pp. 344-345):—

"No question of fact which was directly in issue between the parties to the action before Bray J., and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J., whether it were a point of law or of mixed law and fact. But the reasons which led the learned Judge to his decision upon the precise point do not bind the parties in a subsequent litigation. I need only refer to two cases in support of this view. In *Outram* v. *Morewood*,[1] Lord Ellenborough C. J. said: 'The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.'"

Warrington L. J. in the same case has said (p. 351):

[1] (1803) 3 East. 346 at p. 355.

"As to the attempt made in 1905 it is only necessary to say that the judgment of Bray J. in the former action is conclusive against the respondent to this extent, that the resolution of the vestry in September, 1905, and the warrant of the justices in August, 1906, were not effectual to increase his salary. That was the precise point decided in that action, and that point he is estopped from disputing; he does not indeed dispute it in this action. The reasons for the decision and the grounds on which it was based are not binding upon him. I need not refer to the authorities."

With very great respect, it appears that the ultimate decision of their Lordships in that case was inconsistent with the principles laid down by them in the body of the judgment to which I have already referred, and, in any case, it seems that the supervention of the order of the Local Government Board in 1915 had not a small effect on the ultimate decision in the subsequent litigation, since it was clear that in view of that order the inhabitants of the parish would be within their rights to increase the salary of the overseer and the plaintiff's rights, at the date of the subsequent litigation, would not be barred by the decision in the suit of 1907 at which time the Local Government Board order of 1915 did not exist.

What we are concerned with in our present case is the interpretation of law of *res judicata* as embodied in s. 11 of the Code of Civil Procedure. Of course, the English decisions are very valuable for the help and guidance they give, but, all the same the point is that we are interpreting a section of an Indian statute and, therefore, the words of that statute are important. It appears clear to me that the matter directly in issue in both the suits being substantially the same, the doctrine of *res judicata* as contained in s. 11 of the Code of Civil Procedure will apply.

In *Krishna Behari Roy* v. *Brojeswari Chodranee*,[1] it was held that where a material issue had been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it could not be again tried in another suit between them. It was also held that the expression, "cause of action," could not be taken in its literal and most restricted sense; it was to be construed rather with reference to the substance than to the form of the action. As I have pointed out, the rights of the parties—the Municipality of Ahmedabad and the Government of the Province of Bombay—in relation to each other as far as the question of levying non-agricultural assessment by one party on a portion of the land belonging to the other party and diverted to another use by it is concerned, were adjudicated upon in the suit of 1942. According to *Krishna Behari Roy* v. *Brojeswari Chowdranee*,[1] therefore, the same question cannot again be tried in a subsequent suit between the same parties. I have also pointed out that even without interpreting liberally the words "matter substantially in issue" it appears quite clear on the facts of the case that the substance of the matter in issue in both the suits is the same.

[1] (1875) L. R. 2 I. A. 283.

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Lastly, our attention was invited by Mr. Patel to certain observations in Halsbury's Laws of England (13th Edition). For instance, we were referred to art. 464 at page 408, which says:

"The most usual manner in which questions of estoppel have arisen on judgments *inter partes* has been where the defendants in an action raised a defence of *res judicata,* which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel. In order to support that defence it was necessary to show that the subject-matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit), that it came in question before a Court of competent jurisdiction, and that the result was conclusive so as to bind every other Court.

"But provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established; as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him."

In this case it may be emphasized at the risk of repetition that the precise point, namely, the right of Government to levy non-agricultural assessment on a municipal street land diverted to another purpose, was once distinctly put in issue in the suit of 1942. It was "solemnly" found against the State of Bombay in that suit. Therefore, it would appear from the above quoted observations from Halsbury that the Government would be precluded from contending in the subsequent litigation that they have a right to levy non-agricultural assessment.

This practically finishes all the authorities which we were referred to. On a careful perusal of them, they appear to me to be overwhelmingly in favour of holding that even on a pure question of law there can be *res judicata* so long as the conditions referred to in s. 11 of the Code of Civil Procedure are fulfilled. What matters is the substance of the issue directly raised in a former suit and a subsequent suit. As facts in no two cases can be identical, there are bound to be differences in two suits regarding matters of detail; and obviously all matters of detail are not substantial. Some of them may be substantial and others may be merely descriptive and may not be affecting the substance of the contention which is fundamental to a particular suit. In both the suits in this case (suit of 1942 and suit of 1944) the fundamental point on which the parties went to the Court was the right or otherwise of Government to levy non-agricultural assessment on a certain type of land (municipal street land diverted to another use) and as that issue was once decided by a competent court in a former suit, it would not be open to either party subsequently to agitate it again in a subsequent action. This seems to me the gist of the various decisions to which we have been referred and with which I have dealt. The result therefore would be that in my view it would not be open to Government in this case to contend that pursuant to the provisions of the Land Revenue Code they are entitled to charge non-agricultural assessment on a piece

of land 60½ square yards in area, which is a portion of the municipal street land and which has been diverted by the Municipality for the purpose of meat stalls. Such a contention would be barred by the principle of *res judicata.*

On the merits of the case, that is to say, assuming that the principle of *res judicata* did not apply in this case and assuming that it was open to Government to contend in spite of the decision in the previous suit of 1942 that they had a right to levy non-agricultural assessment on this piece of land, 60½ square yards in area, which has been converted by the Municipality into meat stalls, I agree with my learned brother for the reasons stated by him that it would be competent to Government under the provisions of the Land Revenue Code to levy non-agricultural assessment. I do not see why any distinction should be drawn between the ownership of a Municipality and the ownership of others, although I do see of course that the Municipality is a public body. The distinction between ownership on such ground as this does not appear to me to be within the purview of s. 45 of the Land Revenue Code. Therefore, *assuming that the bar of* res judicata *under s. 11 of the Code of Civil Procedure does not apply in this case,* then, as far as the merits of the case are concerned, I agree with my learned brother.

As we are unable to agree on the question as to whether the Government of the State of Bombay is barred by the principle of *res judicata* because of the decision in Suit No. 907 of 1942 from contending that they were entitled to levy assessment under the provisions of s. 45 of the Bombay Land Revenue Code on the street land in suit converted for use as meat shops, the papers should be placed before the Honourable the Chief Justice for further action under cl. 36 of the Letters Patent.

In view of this difference of opinion the matter was placed before the Hon'ble the Chief Justice under cl. 36 of the Letters Patent. The Chief Justice directed the matter to be heard by a Full Bench.

A Full Bench consisting of Chagla C. J., Dixit and Shah JJ. heard the appeal on January 7, 1953.

R. B. Kotwal, for the appellant.

D. V. Patel, for the respondent.

R. B. Kotwal.—The question for decision in this appeal is whether an abstract issue of law can be *res judicata inter partes.* My submission is that an abstract question of law is never a matter directly in issue. Parties are not interested in abstract questions of law; they are interested in their own rights. In the present case the matter in issue in the first suit was the earlier order of the Collector with reference to one piece of land. If the Government were to levy non-agricultural assessment on the same piece of land again, they would certainly be met with the plea of *res judicata.* But in the present suit another order of the Collector with reference to

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a different piece of land is challenged. The two matters are entirely different.

Under explanation III to the section, the matter must have been alleged by one party and denied or admitted by the other. What was alleged in the former suit was the validity of the particular order of the Collector. Law is never alleged by the parties. In fact its pleading is forbidden by O. VI, r. 2. Parties allege only material facts on which their rights are based. What becomes *res judicata* is the actual decision of the Court on those facts and not the reasons for that decision. The decision on the question of law is related to a particular set of facts. I do not go to the length of saying that a decision on a question of law is never a *res judicata*. For instance, if law is wrongly applied to one set of facts, then that wrong law has to be applied between the same parties to the same set of facts coming up again before the Court. But that rule does not hold good when the facts are different.

In *Keshav* v. *Gangadhar* [(1931) 33 Bom. L. R. 1443], the cause of action in the subsequent suit was the same as in the previous suit. In *Savitri* v. *Holebasappa* [(1931) 34 Bom. L. R. 198], the same document came for construction before the Court in the second suit. Both these cases can be distinguished from the present case. The observations of Madgavkar J. in *Ragho Ravji* v. *Gopal Janardan* [(1929) 54 Bom. 162 at 168] are in my favour. *Mahadevappa* v. *Dharmappa* [(1942) 44 Bom. L. R. 710], fully supports me. In *Sitaram Sakharam* v. *Laxman Vinayak* [(1921) 45 Bom. 1260 at 1277], Macleod C. J. has observed that a decision on an abstract question of law as opposed to a concrete question is not a question of *res judicata*.

Santosh Kumar v. *Nripendra Kumar* [A. I. R. 1949 Cal. 430 (F. B.)], *Narayana* v. *Subramanian* [I. L. R. (1937) Mad. 364, 370 (F. B.)], *Ratneshawri Nandan* v. *Bhagwati Saran* [A. I. R. 1950 F. C. 142, 179] and *Kanta Devi* v. *Kalawati* [A. I. R. 1946 Lah. 419, 422], are the cases of the other High Courts in my favour. *Bindeswari* v. *Bageshwari* [(1935) 63 I. A. 53, 59], is not against me.

D. V. Patel.—The groundwork or the basis of the decision in the previous suit was that the Government was not entitled to levy non-agricultural assessment even though the land was put to profitable use by the Municipality. That foundation of the previous decision is binding in subsequent litigation.

[Shah J. You are trying to convert that decision into a precedent].

I don't want it to be binding on other parties. The point decided was generally whether non-agricultural assessment could be levied on any land for making profitable use of it. The decision was not with reference to suit land only.

Explanation III to s. 11 makes no reference to pleadings. As a matter of fact the rules of pleading set out in O. 14 require that a proposition of law should be stated when material. In the former suit I had raised a general issue of law. The foundation of the judgment is not confined to a specific land, but it decides a general proposition of law. Reasoning of a decision may not be *res judicata* but the basis on which the judgment is founded is *res judicata*. Right in both the cases is the same.

[C. J. The rights are not the same. Properties are different; orders challenged are different.].

But the basic right, viz. the right of the Municipality to hold the land free of non-agricultural assessment is the same.

[Dixit J. The former suit was not filed to assert that basic right. It was a suit with reference to one piece of land only. How can decision in that suit bind the rights of the parties in regard to other lands?]

The right that was litigated was in substance the general right. An issue of law can also be *res judicata*. According to *Chhaganlal* v. *Bai Harkha* [(1909) 33 Bom. 479] and *Hub Lal* v. *Gulzari Lal* [(1927) 49 All. 543], even an erroneous decision on an issue of law operates as *res judicata*. The important point to note is what was the matter in issue in the former suit. Was it the general right of the Government to levy non-agricultural assessment or the right with reference to a particular land?

[Shah J. No one raised the larger question in the former suit].

If you read the judgment as a whole, it will be seen that it was given on the larger question. A judgment is not only conclusive with reference to the actual matter decided, but it is conclusive with reference to the grounds of the decision. I rely on *Alison's Case* [(1873) Ch. A. C. 1 at p. 25]; *Graydon* In re [(1896) 1 Q. B. 417]; *Hoystead* v. *Commissioner of Taxation*

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[(1926) A. C. 155]; *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill* [(1926) A. C. 94]; *Krishna Behari Roy* v. *Brojeswari* [(1875) 2 I. A. 283].

R. B. Kotwal, not called in reply.

Chagla C. J. The Municipality of Ahmedabad constructed three meat shops over 60½ square yards of public street land which had vested in the Municipality. The Collector of Ahmedabad issued an order levying non-agricultural assessment on this land. The Municipality filed a suit contending that the order of the Collector was illegal and asking for a declaration that the order was invalid and should not be given effect to. The suit was tried before the Joint Civil Judge, Senior Division, Ahmedabad, who dismissed the suit. In appeal the learned Assistant Judge allowed the appeal. A second appeal was preferred which was summarily dismissed. Leave for Letters Patent was given and the Letters Patent Appeal came before Mr. Justice Bavdekar and Mr. Justice Vyas. The two learned Judges differed and the matter has now come before us in this Full Bench.

The issue that was raised in the trial Court was whether having regard to s. 45 of the Land Revenue Code the Collector had a right to levy assessment on the land which vested in the Municipality and the learned Judge answered that issue in the affirmative. When the matter came before the learned Assistant Judge he took the view that the decision of the trial Court was correct, but that he was bound by a decision given in an earlier appeal before the District Judge, and although the view taken by the District Judge in that appeal was according to the learned Assistant Judge manifestly absurd, he was bound by that decision as according to him that decision operated as *res judicata.* Therefore, the learned Assistant Judge allowed the appeal not on merits in differing from the view taken by the trial Court, but because he held that he was bound by reason of s. 11 of the Civil Procedure Code, to give effect to the earlier decision and hold that the present suit was barred by reason of *res judicata.* In the Letters Patent Appeal both the learned Judges took the view that the decision of the trial Court on merits was correct. Mr. Justice Bavdekar took the view that there was no bar of *res judicata.* Mr. Justice Vyas took the contrary view taking the same view which the learned Assistant Judge had taken. In view of this difference of opinion the matter was placed before me under cl. 36 of the Letters

Patent and I directed that the matter should be placed before a Full Bench as the question on which the learned Judges had differed was a question of some importance.

Now, in order to decide whether the decision in the earlier suit operates as *res judicata,* we must look at the nature of that suit, what were the issues raised in that suit and what was actually decided in that suit. That suit No. 907 of 1942 was filed by the Ahmedabad Municipality challenging a decision of the Collector of Ahmedabad levying non-agricultural assessment on 92 square yards of public street which had been converted by the Municipality into a Fish Market. Therefore it is clear that the order of the Collector which was challenged in that suit was entirely different from the order of the Collector which is challenged in the present suit and that the assessment levied in that suit was entirely different from the assessment levied in the present suit. The actual issue that was raised in that suit was whether the levy of tax for the 92 square yards referred to in the plaint was illegal and that issue was decided in favour of the Municipality and an appeal was preferred to the District Judge from that decision and the appeal was dismissed. What is urged on behalf of the Municipality is that what was really decided in suit No. 907 of 1942 was that the State of Bombay has no right to levy non-agricultural assessment in respect of land which has vested in the Municipality as a public street, and inasmuch as in the present case also the State is attempting to levy non-agricultural assessment upon land which has vested in the Municipality, the earlier decision is binding upon the Court trying the present suit and that it is not open to the State of Bombay to contend in this suit that the levy made by the Collector is a valid levy.

Mr. Kotwal has argued that there can be no *res judicata* on an abstract question of law and that what constitutes *res judicata* is the actual decision of the Court and not the reasons which led the Court to give its decision. Mr. Kotwal contends that although in coming to the decision that it did the Court in suit No. 907 of 1942 may have given as its reason that in law it was not competent to the State to levy assessment upon land which has vested in the Municipality, the real decision of that Court and the only decision of that Court was that the Collector's order levying assessment upon that particular land which was the subject-matter of that suit was an illegal order; that beyond that decision no other part of the judgment given by the trial Judge can operate as *res judicata* preventing a party from litigating a question which might have been dealt with

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as a reason in the judgment of that Court. In order to appreciate the contention of Mr. Kotwal it is perhaps best to look at the section itself, and the material part of the section with which we are concerned in this appeal is:

"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....., and has been heard and finally decided by such Court."

Therefore it is only that matter which is directly and substantially in issue and which the Court in the former suit decides which can operate as *res judicata*. Now, what is the matter which s. 11 contemplates as being directly and substantially in issue. Considerable light is thrown upon this expression by explanation III to s. 11 which provides:

"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."

Therefore, before a matter can be directly and substantially in issue, there must be an allegation with regard to it by one party and there must be a denial of that allegation by the other. When a party goes to Court it is only incumbent upon him to allege material facts on which his right is based and if the other party wishes to controvert any of those facts it would be the duty of the party to deny those facts and therefore only the material facts necessary for the party to allege in order to establish his right in the suit that can become matters directly and substantially in issue. It is clear that in suit No. 907 of 1942 the material facts which it was necessary for the Ahmedabad Municipality to allege was the order of the Collector levying non-agricultural assessment upon the 92 square yards of the public street, because the right that it claimed, viz. a declaration that the order was invalid, was based upon this material fact which it had to allege and which it did allege. The State of Bombay which was the party arrayed on the other side had to deny the allegation made by the Municipality that the order of the Collector was invalid and therefore the matter in issue between the parties in that suit was whether the order of the Collector relating to the 92 square yards of public street was a valid order or not. That was the only matter in issue between the parties in that suit and the decision of the Court with regard to that matter undoubtedly became *res judicata*. It would be erroneous to suggest that the matter in issue between the parties was whether the State had the right in law to levy assessment upon lands which had vested in the Municipality. If that contention

were to be accepted we would be magnifying or glorifying a simple suit filed by the Ahmedabad Municipality with regard to specific piece of land into a general declaratory suit filed by the Municipality for a declaration that the State had no right to levy any assessment on any land which had vested in the Municipality. Obviously that was not the nature of suit No. 907 of 1948. That matter was never put in issue; the Court was not called upon to decide that issue, and the Court never decided it. It is clear that what becomes *res judicata* is the matter which is decided and not the reason which leads the Court to decide the matter. It is true that the learned Judge, in order to decide that the order of the Collector was bad, had to consider the law on the subject, had to interpret the law, and had to hold that under the various provisions of the Municipal Act and the Land Revenue Code the Government had no right to levy the assessment. But all this constituted the reasoning of the judgment. It constituted the mental process which the learned Judge underwent in order to come to the decision that the order of the Collector was invalid. But neither the reasoning nor the mental process can operate as *res judicata*. It would be impossible to contend that in a subsequent suit the reasoning of the learned Judge could not be challenged, nor could it be suggested that the mental process of the learned Judge was erroneous. What could not be challenged and what had become conclusive was the actual decision given in the former suit, and, as we have said before, the actual decision and the only decision was that the order of the Collector relating to the particular piece of land in that suit was an illegal order. It is never safe to lay down extreme general propositions of law and we do not propose to say that in no case can a question of law not operate as *res judicata*. If certain facts had to be determined on an application of the law to those facts or an interpretation of the law with regard to those facts, then the law applied to or interpreted with regard to those particular facts would constitute *res judicata* and it would not be open to a party to say that the law was different either in its applicability or in its interpretation with regard to those facts from what had been decided in the earlier suit. But if law is interpreted as a mere reasoning which leads up ultimately to the final decision, then that decision of law does not become *res judicata* in subsequent suits when the facts which have got to be determined are entirely different. The distinction between *res judicata* and a precedent established by

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Court must always be borne in mind. When a Court interprets the law, when it construes a statute or determines what the position in law is with regard to a particular matter, that constitutes a precedent set up by that Court and that Court may well follow that precedent when similar cases come before it where the same law has to be considered and interpreted. But a decision given by a Court on a question of law does not bind the same parties when those parties are litigating with regard to an entirely different right. The decision of law would only be binding between the same parties as *res judicata* if the right that a party claimed was the same in the former suit and in the later suit. If certain facts were determined on an interpretation of the law and it was held that a party had a certain right or that he was not entitled to a particular right, then it would not be open to that party in a subsequent suit to challenge the interpretation of the law and ask the Court to decide that he had the right or to the other party to allege that he did not have the right. Therefore the first and the primary consideration in applying s. 11 is to decide what is the *res* which has been determined. It is only the *res* which is determined which could become *res judicata*. If the *res* is a question of law, it may become *res judicata*. But if the *res* is the finding of certain facts, then what becomes *res judicata* is only those facts and not the interpretation of the law which led the Court to find those facts. In this particular case the *res* which was determined in suit No. 907 of 1942 was the validity of the Collector's order. The *res* which the Court is called upon to consider in the present suit is an entirely different order of the Collector. The *res* in the former suit viz. the Collector's order was concerned with a particular land and the assessment levied upon that land. The *res* in the present suit is the Collector's order with regard to an entirely different piece of land and an entirely different assessment. It is difficult to understand how the *res* that was decided in suit No. 907 of 1942 can possibly operate as *res judicata* for the purpose of the present suit. Now, we do not find in the large array of authorities which were cited at the Bar any decision which has taken a contrary view to what we are suggesting is the correct principle in interpreting s. 11 of the Code of Civil Procedure. Fortunately in this case we are not called upon to decide between a conflict of authorities and to prefer one set of authorities to another set. When we look at all the decisions which are cited before us the principle which we have stated is discernable in those cases.

The first case of this High Court to which reference was made is *Keshav* v. *Gangadhar*.[1] That is a judgment of Mr. Justice Baker and Mr. Justice Nanavati and the judgment sets out all the earlier decisions bearing on the point. The head-note is not very helpful because it says:

"A decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as in the previous suit."

The cause of action was material in s. 11 before it was enacted by the Code of 1908. But as far as the present section is concerned what we have got to bear in mind is not the cause of action in the two suits but the matters in issue in the two suits. Emphasis is placed on the fact that what the Court held was that not only an issue of fact but even an issue of law can operate as *res judicata*. In order to understand this decision a few facts will have to be stated. In the earlier proceeding a claim was made under an award decree and the award decree came to be construed by the Court. In the subsequent proceeding the claim was made under the same award and the question that arose was whether the interpretation put by the Court upon the award in the earlier proceeding was binding upon the parties in the subsequent proceeding. The interpretation of the award was a question of law and Mr. Justice Baker and Mr. Justice Nanavati held that although the interpretation of the award was a question of law, still the decision on that issue was binding upon the parties in a subsequent proceeding. What is to be borne in mind is that the right that was claimed in both the proceedings was under the same award. In order that the plaintiff should succeed in the earlier proceeding he had to establish his right under that award and that right could only be established on the interpretation placed upon that award by the Court. In the subsequent proceeding the right that was claimed by the plaintiff was not under any other document but it was under the very same award and in order to succeed he had to establish that under the award he had a particular right. Therefore the interpretation of the award was directly in issue both in the first proceeding and in the subsequent proceeding and it is on those facts that Mr. Justice Baker held that a decision on an issue of law operated as *res judicata*. At page 1448 Mr. Justice Baker observes:

"No doubt it has been repeatedly laid down by the Privy Council that the interpretation of documents is a matter of law, but it is not a pure

[1] (1931) 33 Bom. L. R. 1443.

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question of law in the present case, but rather a question of opinion as to the meaning of the words employed in certain documents."

Mr. Justice Baker also refers to the decision of *Baij Nath Goenka* v. *Padmanand Singh*[1] and he quotes the observations at page 853 of the judgment.

"...But when a decision does lay down what the law is and is found to be erroneous, it cannot, in our opinion, have the force of *res judicata* in a subsequent proceeding for different relief. A decision cannot alter the law of the land".

This statement must mean that the law laid down by a Court and applied by it to the facts before it in determining whether the party is entitled to the relief or not would be *res judicata* if the parties sought to reagitate the same facts or to claim the same relief. However erroneous the decision as to law might be it would be binding as between the parties in the limited sense which we have indicated. But if the law is merely laid down by the Court generally and in order to arrive at a decision as part of the reasoning in the judgment, that law cannot become a binding law between the parties in respect of a different relief which might be claimed in a subsequent suit. Then Mr. Justice Baker refers to the decision in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*.[2] It is a Full Bench decision and the observations of Rankin C. J. are very pertinent: (p. 736):

"In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point. On the other hand, it is plain from the terms of s. 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or recontesting that which has been finally decided".

In our opinion the whole attempt of Mr. Patel has been to fasten upon the Ahmedabad Municipality and the State of Bombay the principles of law which were enunciated by the trial Judge in the earlier suit. Those propositions of law cannot

[1] (1912) 39 Cal. 848.

[2] (1928) 58 Cal. 723, F. B.

bind the parties in the present suit, although the parties are the same because the rights that were ascertained in the prior suit were different from the rights which the Court was called upon to ascertain in the present suit and also the facts upon which the rights of the parties directly and substantially depended were different from the facts in the present suit. The next case to which a reference was made is the decision reported in *Savitri* v. *Holebasappa*.[1] That is a judgment of Mr. Justice Baker and Mr. Justice Nanavati and Mr. Justice Baker came to the same conclusion as in the earlier decision and substantially relied on the same authorities. The next is the judgment of Mr. Justice Madgavkar reported in *Ragho Ravji* v. *Gopal Janardan*[2] and Mr. Justice Madgavkar at page 168 draws a distinction between a *ratio decidendi* and a decision which can operate as *res judicata*. The *ratio decidendi* of a decision may be the law which the Court applies in order to come to a particular conclusion. But what operates as *res judicata* is not the *ratio decidendi* but the decision itself. The next is the judgment reported in *Mahadevappa Somappa* v. *Dharmappa Sanna*.[3] That is a judgment of a Division Bench, Mr. Justice Broomfield and Mr. Justice Sen. In that case a compromise decree was passed by which the parties agreed that the adoption made by the widow in a joint Hindu family was invalid. In 1932 the Privy Council decided the case of *Bhimabai* v. *Gurunathgowda*.[4] That decision materially altered the Hindu law as to adoption and taking advantage of that decision the widow again adopted the plaintiff and the plaintiff then filed the suit for a declaration that the subsequent adoption made by the widow was valid. He was met with the plea of *res judicata* and the Court held that the bar of *res judicata* did not apply, for the plaintiff could not be regarded as litigating under the same title in both the suits inasmuch as the title that he had sought to make out in the two suits, though of the same nature, had been derived from different transactions. It is clear from the judgment of Mr. Justice Broomfield that the reason why the Court took the view that s. 11 did not apply was not merely because the parties were not litigating under the same title but also that the matter in the subsequent suit was not directly and substantially in issue in the former suit because it is clear that the right which the plaintiff claimed in the first suit was different from the right which he claimed in the

(1) (1931) 34 Bom. L. R. 198.
(2) (1929) 54 Bom. 162.
(3) (1942) 44 Bom. L. R. 710.
(4) (1932) 35 Bom. L. R. 200, P.C.

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subsequent suit. Whereas the right which he claimed in the first suit was under the earlier adoption, the right which he claimed in the subsequent suit was under the later adoption. Mr. Patel has strenuously urged that this decision has been over-ruled by a recent decision of the Supreme Court in *Sunderabai* v. *Devaji*[1]. Turning to the judgment of Mr. Justice Bhagwati who delivered the judgment of the Court the learned Judge clearly points out that:

"Mr. Justice Broomfield refused to entertain the bar of *res judicata* not on the ground that the plaintiff was not litigating under the same title but on the ground that the matter directly and substantially in issue in the subsequent suit had not been directly and substantially in issue in the former suit in a Court competent to try such subsequent suit and had not been heard and finally decided by such Court."

Then Mr. Justice Bhagwati relies on the judgment of the Full Bench of the Lahore High Court in *Mt. Sardaran* v. *Shiv Lal*[2] and the learned Judge points out that that Court held that:

"where the right claimed in both suits is the same the subsequent suit would be barred as *res judicata* though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as *res judicata* even though the property was identical".

Therefore, with respect, the Supreme Court in accepting the view laid down by the Lahore High Court, has enunciated the same principle to which we are trying to give effect in this decision. Further it must be borne in mind that this judgment of the Supreme Court turned not on the question of *res judicata* but on the question of estoppel. What was really held was that in that case there being a consent decree under which the plaintiff received a sum of Rs. 8,000 from the widow on his representing that he would not contend that his adoption was valid, the widow had acted upon this representation to her detriment and therefore the plaintiff was estopped from putting forward his adoption. Therefore, the decision really was under s. 115 of the Evidence Act and not under s. 11 of the Code of Civil Procedure. In our opinion, the decision of the Supreme Court in no way impairs the decision of the Division Bench reported in *Mahadevappa Somappa* v. *Dharmappa Sanna*.[2] The next decision of this Court to which reference was made is a decision of a Full Bench reported in *Sitaram Sakharam* v. *Laxman Vinayak*.[3] The question that arose for

[1] Supreme Court Civ. App. No. 128 of 1951.
[2] [1944] A. I. R. Lah. 282, F.B. [3] 1942) 44 Bom. L. R. 710.
[4] (1921) 45 Bom. 1260, F. B.

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the decision of the Full Bench was whether the Inamdar was entitled to levy payment at the Mamul rate which was a higher rate than the rate of assessment. The Court decreed the Inamdar's claim, following the earlier decision of this Court in *Gangadhar Hari Karkare* v. *Morbhat Purohit*.[1] Subsequently the Inamdar again sued one of the Khots to recover the Mamul dues. The contention of the Khot was that the Inamdar was entitled to recover only one-half of the survey assessment under ss. 216 and 217 of the Bombay Land Revenue Code. The plaintiff's contention was that the defendant was barred by *res judicata* from re-agitating the question. The decision of the Full Bench was that the principle of *stare decisis* should be applied and the law having been settled as far back as 1893, it should not again be unsettled. But in the course of his judgment the learned Chief Justice observed (p. 1277):

"But when there has been a decision on an abstract question of law, as in this case, namely, what was the proper construction to be placed on s. 216 of the Bombay Land Revenue Code, and not a concrete question such as the construction of a document entered into between the parties to a suit, it is no longer a question of *res judicata* as a Court, at any rate a Full Bench, can form its own opinion as to what the law is".

What is relied upon on the other side are certain observations of Mr. Justice Shah (p. 1281):

"It is urged that a question of law can never be *res judicata*. The observations in *Chamanlal* v. *Bapubhai*[2] are relied upon in support thereof. The earlier decision in the present case was based upon the construction of s. 216; and it is contended that such a question is outside the scope of the rule of *res judicata*. In the first place I am not satisfied in this case that the question whether the plaintiff was entitled to recover the Mamul rates was a pure question of law. Assuming, however, that it was, I do not see how it could be treated as being outside the scope of s. 11 of the Code of Civil Procedure. The section does not make any such distinction between issues of law and other issues: it refers generally to questions directly and substantially in issue and heard and finally decided; and I do not think that the distinction could be accepted without restricting the scope of the section in a manner not justified by the words of the section. It would involve the reading of words in the section which are not there".

In one sense, with respect, the observations of Mr. Justice Shah may be correct because the question that has got to be considered is not whether a pure question of law can or cannot operate as *res judicata*. The question that has always got to be considered is what is the matter directly and substantially in

[1] (1893) 18 Bom. 525. [2] (1897) 22 Bom. 669.

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issue between the parties and if in deciding the rights of the parties the Court applies a principle of law, then that principle of law may operate as *res judicata,* if the parties are litigating in respect of the same matter. Mr. Justice Fawcett also points out at page 1284:

> "... I feel some doubt whether a distinction can be rightly drawn between a decision on an abstract question of law, such as the proper construction to be put on s. 216 of the Bombay Land Revenue Code, and on a concrete question, such as the construction of a particular document entered into between the parties to a suit. There can, I think, be no doubt that such a distinction cannot be drawn in cases where parties seek to litigate again the very same cause of action as has been decided against them in a prior suit."

Mr. Justice Fawcett also emphasises the important test which has got to be applied viz. whether the parties are litigating under the same cause of action or to use different and, with respect, better language, whether they are litigating in respect of the same right, and at page 1285 Mr. Justice Fawcett leaves the question of *res judicata* open and bases his judgment on the principle of *stare decisis.* Then there is an important decision of the Full Bench of the Calcutta High Court reported in *Santosh Kumar* v. *Nripendra Kumar*[1]. In our opinion, the principle laid down by this Full Bench, with respect, is the correct principle and the principle is thus enunciated:

> "An abstract question of law dissociated from and unconnected with the rights claimed or denied as between the parties to the litigation, is of no importance or value to them or to the decision of the case itself and cannot be said to be substantially in issue, and the principles of *res judicata* cannot apply. It is not decision of a question of law between the parties which is binding but only that decision on such a question which affects the subject-matter or creates a legal relation between the parties or defines the status either of them, which is binding".

Therefore, whenever a question arises as to whether a question of law operates as *res judicata,* the question that the Court must address itself is: Is it a question of law which is dissociated from and unconnected with the rights claimed or denied as between the parties to the litigation? If it is dissociated or unconnected then the question of law does not constitute a decision which operates as *res judicata* . If, on the other hand, the question of law is directly connected or associated with the rights claimed or denied and constitutes the very decision of the Court, then the question of law would operate as *res judicata.* Then there is a very significant decision of the Full Bench of

[1] [1949] A. I. R. Cal. 430, F. B.

the Madras High Court reported in *Narayan* v. *Subramanian*.[1] In that case a ryot resisted the claim of a landlord for a higher rate of rent with respect to a particular area and his contention was that he was liable to pay only the dry rate on the ground that the coconut plantation in the same was an "improvement" within the meaning of s. 3 (4) (*f*) of the Estates Land Act. In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding it was held that the planting of a coconut garden was not an "improvement" and that the landlord was entitled to the enhanced rate and the question was whether the decision in the previous suit operated as *res judicata* and the Full Bench of the Madras High Court held that the decision in the prior suit did not apply to the new areas in the holding which were not planted with coconut trees at the time of the prior suit and in respect of which no claim was or could be made in the same. At page 374 Mr. Justice Ramesam points out:

> "...there can be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision. Areas and trees to which it was not applied then will be governed by the correct principle of law".

Applying that principle to the facts of this case, here also what the Ahmedabad Municipality is attempting to do is to apply a decision which was given with regard to one area to an entirely different area and to apply a decision with regard to one order of the Collector to an entirely different order. Therefore the principle that emerges from this decision of the Full Bench is that the decision must be confined to the matter to which it has been applied at the time when the decision was given; or in other words, the decision as to law must be confined to these matters which were in issue between the parties and the decision as to law cannot be extended to matters which were not in issue between the parties. Then we have a decision of the Privy Council reported in *Bindeswari Charan Singh* v. *Bargeshwari Charan Singh*[2]. In that case the owner of an impartible estate executed a maintenance grant in 1909 in favour of one of his sons. On attaining his majority the son instituted proceedings against his father and two brothers claiming a maintenance grant of Rs. 4,000 a year. The Court decreed the claim, holding that he was entitled to Rs. 4,000, inclusive of Rs. 1,300 payable

[1] (1935) L. R. 63 I. A. 53.

[2] (1935) L. R. 63 I.A. 53.

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under the maintenance grant executed by the father in implementation of the decree the father executed an additional maintenance grant to the value of the decree itself. A suit was then filed by a son of one of the brothers of the person to whom the grant was given and who became owner of the impartible estate, for a declaration that the two maintenance grants were illegal and not binding on him. The Privy Council held that the question of the validity of the first grant was directly and substantially in issue and decided in the maintenance suit and therefore it operated as *res judicata*. What was contended by the plaintiff in the subsequent suit was that s. 12A of the Chota Nagpur Encumbered Estates Act, 1876 rendered the transaction relating to the maintenance void, and the Privy Council points out at page 59 that "the question whether it applies to a particular transaction entitles the Court to consider the construction of the section, and the determination of its applicability rests with the Court. The decision of the Court in the suit of 1917 (maintenance suit) determined that the section had never applied to the transaction of 1909, and it is difficult to follow the reasoning of the learned Judge which allowed him, not only to express a strong contrary view as to the applicability of the section, which he was entitled to do, if he so chose, but to try anew the issue as to its applicability in face of the express prohibition in s. 11 of the Code". Therefore, the Privy Council clearly points out that s. 12A having been interpreted in order to determine the nature of the transaction of 1909 and on that interpretation it having been held that the transaction was a valid transaction, it was not open in a subsequent suit again to consider the validity of that transaction and to construe the law afresh; even though the law had been wrongly construed in determining the validity of the transaction of 1909, that interpretation would be binding upon the same parties in a subsequent suit. But the Privy Council impliedly held that if the transaction was not the same, the law laid down in the earlier suit would not be binding upon the same parties in a subsequent suit.

Now, Mr. Patel's contention before us has been that what we should look at is the basis or the ground-work or the foundation of the judgment in the earlier suit. These are very imposing words and what really Mr. Patel wants us to do is to consider the reasoning of the learned Judge who held in favour of the

Municipality in the earlier suit. In support of his contention Mr. Patel has relied on several decisions. But when we consider them we find that they do not bear out the proposition for which he is contending. Reliance has first been placed on a decision of this Court reported in *Chhaganlal* v. *Bai Harkha.*[1] The head-note is:

"A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute".

But when we turn to the facts of the case, it is clear that the claim was made under the same tenancy agreement and the same tenancy agreement came to be considered in both the suits and what the Court held was that the rights of the parties having been determined in the earlier suit under the tenancy agreement it was not competent to the Court to re-consider the legal effect of the tenancy. The proposition laid down in this case, with respect, is sound when the limitation is borne in mind and the limitation is that even an erroneous decision of law is binding between the parties if they are asserting the same rights in the subsequent suit which they had asserted in the earlier suit and the Court must give effect to the earlier decision even though it is sanctioning what is contrary to law. To the same effect is a decision of the Allahabad High Court reported in *Hub Lal* v. *Gulzari Lal*[2] and what this case lays down is that an erroneous decision on an issue of law can be the basis of a plea of *res judicata.* It is not open to a Court to consider the propriety of the earlier judgment to the extent that the earlier judgment records the decision on matters in issue between the parties. Mr. Patel has also relied upon certain English decisions. The first is a decision of the English Court of Appeal in *Campbell's* case: *Hippisley's* case: *Alison's* case.[3] What is relied on is the observation of Lord Justice Mellish at page 25. This is what the learned Lord Justice says:

"It is clear, I apprehend, that the judgment of the Courts of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered".

This observation must be read in the light of the actual facts that came up for consideration before the Court of Appeal.

[1] (1909) 33 Bom. 479.
[2] (1927) 49 All. 543.
[3] (1873) 9 Ch. 1.

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What happened in that case was that the Bank of Hindustan filed a suit against Alison and the suit was dismissed. The judgment did not record any reason why the suit was dismissed and the Court of Appeal held that it was clear that the reason why the suit brought by the Bank of Hindustan against Alison had failed was that he was not a shareholder of the Bank. Therefore the Court of Appeal took the view that what was in issue between the Bank and Alison in that suit was whether Alison was a shareholder of the Bank because it was only on the basis that Alison was a shareholder that the Bank would be entitled to recover any amount. Therefore it is clear that the question whether Alison was a shareholder or not was a matter directly and substantially in issue between the parties. Then there are two judgments reported in the same volume of Appeal Cases, 1926, Appeal Cases. The first is *Hoystead* v. *Commissioner of Taxation.*[1] The trustees of a will objected to an assessment for the financial year 1918-19 under the Land Tax Assessment Act, 1910-1916, of Australia. They claimed a deduction of 50,002 in respect of the share of each of the daughters of the testator. A case was stated for the opinion of the Full Court of the High Court and the Full Court answered the question that the shares of the six daughters surviving at the date of the assessment were entitled to be deducted. In the assessment year 1919-1920 the Commisioner allowed only one deduction of 50,002, contending that the beneficiaries were not joint owners within the meaning of the Act and the Privy Council held that the Commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. What Mr. Patel relies upon is the observation of the Privy Council at page 165 : "What becomes *res judicata* is what is fundamental to the decision," and Mr. Patel says that if a decision of law is fundamental to the decision, then that decision of law becomes *res judicata.* At page 165 the Privy Council oberves :

"...Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle".

[1] [1926] A. C. 155.

Now, these observations again must be read not wrenched from their context but in the light of the facts actually found by the Privy Council and as already pointed out, the claim for deduction made by the trustees was under the same will; that will had already been construed in the prior litigation and on that construction it was held that the trustees were entitled to a deduction and the Commissioner attempted to re-agitate that matter by asking for a different construction of the will and at page 168 the Privy Council makes it clear that

"...it is plain that the *res* in the present case was adjudged, that *res* being, in figures, that six times 50,002 should be the suitable deduction from the assessed property".

The question that the Privy Council asked itself was what was the *res* that was adjudicated upon in the previous litigation and having satisfied itself what the *res* was, it expressed its opinion that the very *res* could not be reagitated. Turning to the other case in the same volume (*Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*)[1] the question that arose for consideration was that what was the unimproved capital value of a mine for rating purposes and the question that the Privy Council had to consider was whether an earlier decision given by the High Court of Australia between the same parties as to the valuation of the mine for a previous year was *res judicata* when the question had to be considered with regard to the valuation for the subsequent year and the Privy Council at page 100 observes:

"...The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadom questio*, and therefore the principle of *res judicata* cannot apply".

Therefore, it is only when we have *eadem questio* or the same question that the principle of *res judicata* can apply. But when the questions are different, when the matters are different, the decisions in law with regard to one matter cannot operate as *res judicata* with regard to a different matter. Applying these principles once again to the facts before us, it is clear that the question whether in law the State of Bombay cannot levy assessment upon lands which have vested in the Municipality was never a matter in issue between the parties in the earlier suit. It is true that the learned trial Judge did hold that in law the State could not levy the assessment. But that decision on a legal point must only relate to and be

[1] [1926] A. C. 94.

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associated with the specific right which the Municipality was claiming in that suit and that specific right was with regard to the particular land on which assessment was levied and with regard to the particular Collector's order which sanctioned the levy. It is not permissible in law to rely on the interpretation of the law given by the learned Judge in that suit for the purpose of deciding the different right which the Municipality claimed in this suit viz., the right of the Government to levy assessment with regard to a different land and the question of the validity of a different order passed by the Collector. The only matter in issue between the parties in the earlier suit was with regard to the 92 square yards of land and the particular Collector's order made with regard to that land. To the extent that the law was interpreted and applied in respect of that particular land and that particular Collector's order, that question of law would operate as *res judicata* between the parties but when an attempt is made to apply that law to a different matter altogether, s. 11, in our opinion, has no application. As pointed out, on merits Mr. Justice Bavdekar and Mr. Justice Vyas have held that in law the State can levy assessment on land which has vested in the Municipality. We, therefore, agree with Mr. Justice Bavdekar that the decision in the earlier suit does not operate as *res judicata* and the State of Bombay is not precluded from urging that the assessment made by it is a valid assessment.

We allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court with costs throughout.

This Letters Patent Appeal has in all lasted for six days, five days before Mr. Justice Bavdekar and Mr. Justice Vyas and about a day before us, and we understand that for all the services rendered by the learned advocate for the State he will be given a handsome fee of Rs. 45. The matter was of some complexity. Several authorities were relied upon and two Judges of this Court took different views on this matter. We feel this is a case where the State should consider whether the advocate appearing for it should not be better compensated.

Appeal allowed.

M. W. P.