

WORKSHOP - III

Paper Presentation on

Res sub-judice & Res Judicata

By

Smt. R. Shanthi Sree,
Principal Junior Civil Judge,
Srikakulam.

Res sub-judice & Res Judicata

1. **Introduction**

Section – 10 deals with the doctrine of *res sub-judice* and section-11 deals with the doctrine of *res -judicata*. Section -10 provides the rule with regard to stay of suits where things are under consideration or pending adjudication by a court. On the other hand section-11 provides the rule relates to a matter already adjudicated. It bars the trial of a suit or an issue in which the matter directly and substantially in issue has been adjudicated upon in a former suit. Sections 10 and 11 are mandatory.

2. **Res sub-judice**

Subjudice in latin means 'under judgment'. It denotes that a matter or case is being considered by court or judge. when two or more cases are filed between the same parties on the same subject matter, the competent court has power to stay proceeding. However the doctrine of *res-subjudice* means stay of suit. This Code provides rules for the civil court in respect of the doctrine of res subjudice. This rule applies to trial of a suit not the institution thereof.

S.10: Stay of Suit

- No Court shall proceed with the trial of any suit
- in which the matter in issue is also directly and substantially in issue
- in a previously instituted suit between the same parties,
- litigating under the same title where such suit is pending
- in the same or
- any other Court in Bangladesh or
- in any Court beyond the limits of Bangladesh established or continued
- by the Government and having like jurisdiction, or
- before the Supreme Court.

Explanation

The pendency of a suit in a foreign Court

- does not preclude the Court in Bangladesh
- from trying a suit founded on the same cause of action.

Therefore civil court should not proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties and the court before which the previously instituted suit is pending is competent to grant the

relief sought.[1]The stay must be of the latter suit and not of the earlier suit between the same parties.[2] The word suit includes an appeal, but it does not include an application for leave to appeal.[3]

3. Conditions of Res sub-judice

This section can only be applied if the following condition are satisfied. These are:

- Two suits - Previously Instituted and Subsequently Instituted.
- Matter in issue in subsequent suit - directly and substantially in issue in previous suit.
- Both suits between same parties or their representatives.
- Previous suit must be pending in same or in any other court.
- The court dealing with previously instituted suit competent to grant relief claimed in subsequent suit
- Parties litigating under the same titles in both the suit.

Example

Wife A filed a suit for separation of conjugal life and custody of minor child against husband B. Subsequently husband B claimed custody of minor child by filling another suit against wife B. The second suit liable to stay under section 10 of CPC,1908.

But problem arises when part of the subject matter is common to previously instituted suit and subsequently instituted suit. In a case the Appellate Division that only one plot was common in two suits, but that was not considered as a ground for stay and it was held that the two suits should be tried analogously.[4]

4.When not apply

Court cannot apply this section where point at issues are distinct and different,[5] or even where there are some issues in common and others are different issues.[6] This section is also not applicable between the suits where although the parties are same, but the issues are not the same.[7]

5. Purposes of Res sub-judice

The section -10 intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. It also protect the litigant people from unnecessary harassment. It also aims to avert (avoid) inconvenience to the parties and gives effect to the rule of res judicata.[8]

Purpose in short

- Avoid wasting Court Resources.
- Avoid Conflicting decisions.
- Avoid multiplicity of suit.

6. Inherent power to stay

Court may use its inherent power to stay of suit. Although the provision of section 10 is mandatory, but this provision has not taken away the court's inherent power under 151 so as to stay the proceedings on the facts and circumstances of a given case to secure the ends of justice where section 10 is not applicable.[9] Therefore court may use its inherent power to secure the ends of justice when section – 10 is not applicable, even to prevent abuse of process of court, court may stay former suit by applying its inherent power.[10]

7. Suit pending in foreign court

The pendency of a suit in a foreign court does not preclude the court in Bangladesh from trying a suit founded on the same cause of action. So the court of Bangladesh may try a subsequently instituted suit if the previously instituted suit is pending in a foreign court.[11]

8.S.11; Res Judicata

No Court shall try any suit or issue

- in which the matter directly and substantially in issue
- has been directly and substantially in issue
- in a former suit between the same parties litigating under the same title,
- in a court competent to try such subsequent suit and
- has been heard and finally decided by such Court.

Example

A sues B for damages for breach of contract. The suit is dismissed. A subsequently filed another suit against B for damages for breach of the same contract. The subsequent suit shall be barred by the principle of res-judicata, because B shall not be vexed twice over for the same cause.

The doctrine of res judicata is based on three maxims:

1. Nemo debet bis vexari pro una et eadem causa
 - no man should be punished twice for the same cause
2. Interest reipublicae ut sit finis litium
 - it is in the interest of the state that there should be an end to a litigation
3. Res judicata pro veritate occipitur
 - a judicial decision must be accepted as correct

▪
Res judicata is a Latin expression or term that means matter once adjudicated, cannot be re-adjudicated. The doctrine of *res judicata* technically means that a matter is issue which has already been tried by competent court, then trial between the same parties in respect of the same matter shall not be allowed. It is a very important doctrine in civil Justice system, it emphasis that a subject matter of the suit which has already been decided, is deemed to be decided forever, and cannot be reopened by the same parties. The rule of *res-Judicata* is based upon the principle that no person should be *vexed twice* for the same cause of action. Our constitution provided that no one should be vexed twice. [12] Similar doctrine also can be found under provisions of the Code of Criminal Procedure, 1898. [13] In criminal Justice system this doctrine is called double jeopardy. The General Clauses Act, 1897 also provided similar provision, as follows, where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. [14]

However, no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. [15]

The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. [16]

For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court. [17]

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.[18]

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.[19]

Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.[20]

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.[21]

Example

Nirzar sues Reza for damages for breach of contract. The suit is dismissed. A subsequent suit by Nirzar against Reza for damages for breach of the same contract is barred. Nirzar's right to claim damages from Reza for breach of contract having been decided in the previous suit, it becomes *res judicata*, and cannot therefore be tried in the subsequent suit. Reza cannot be vexed twice over for the same cause.

9. Essential conditions of *res judicata*

- the matter directly and substantially in issue in the subsequent suit &
- former suit.
- Parties of former suit & subsequent suit must be the same.
- The court which decided the former suit must be a competent court.
- The matter should have been decided on merits and final decision should have been made after hearing.

10. Purposes of *resjudicata*

The doctrine of *res-judicata* is based upon three Roman maxims namely, *nemo debet bis vexari pro un et eadem causa*, means no man should be vexed twice over for the same cause of action and *Interest republicae ut sit finis litium*, means it is to the interest of the State that there should be an end to litigation. The first maxim looks to the interest of the litigant, who should be protected from a vexatious multiplicity of suits. The second maxim is based on the ground

of public policy that there should be an end to litigation. The third number maxim is *res judicata pro veritate occipitur* means a judicial decision must be accepted as correct. This maxim is also based on public policy.

If suits are allowed to be endlessly for the same cause of action it will be impossible for existing courts to deal with the overgrowing number of suits. Unlimited or perpetual litigation disturbs the peace of the society and leads to disorder and confusion. Therefore the main objects of the res-judicata are to prevent-

- (1) injustice to the parties of a decided suit;
- (2) unnecessary waste of court resources,
- (3) multiplicity of suit
- (iv) recovery of damages from the defendant twice for the same injury

Principle of res judicata is intended not only to prevent a new decision, but also to prevent a new investigation, so that the same person cannot be harassed again and again in various proceedings upon the same question.[\[22\]](#)

Purposes in a short

The main objects of the res-judicata are to prevent-

- injustice to the parties of a decided suit;
- unnecessary waste of court resources,
- multiplicity of suit
- recovery of damages from the defendant twice for the same injury

11. kinds of res-Judicata

Res-Judicata can be classified into two:

1. a) Direct res judicata or actual res judicata
- (b) Constructive res judicata

12. Direct resjudicata

It means a matter actually resolved by court, between the parties in earlier suit cannot be reopened through subsequent suit. Explanation 3 deals with the direct res judicata. It provides 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.

13. Constructive Res Judicata

It is the interest of justice that a party should bring forward his whole case in respect of the matter in suit. Constructive res judicata means a matter which might and ought to have been made ground of claim or defense in a former suit, but a party ignores it, then the issue shall be deemed to have been a matter directly and substantially in issue in such suit. In other words if a party had an opportunity that he ought to have taken a plea as a plaintiff or defendant, if he fails to do so, and the matter is decided the decision will operate as res-judicata in respect of all issues, which were taken and which ought and might have taken and second suit would not lie for such issue.[23]

Principle of constructive res judicata is that if the disputed subject matter are so framed as to afford ground for final decision in the first suit, then they are not to be disposed of by subsequent suit.[24] Thus the earlier suit was for declaration of title and the latter suit for declaration of title and recovery of possession, the latter suit is barred by res judicata.[25] Principle of constructive res judicata is applicable to execution proceeding.[26]

14. Ex parte decree and res-judicata

Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served, the court may proceed ex parte.[27] An ex parte decree passed by a competent court on merits will operate as res judicata, because the effect of ex parte decree is like as by-partie decree. But the doctrine of res judicata does not apply to a consent decree, because in a consent decree a matter cannot be said to be heard and finally decided on merits, the decision in the former suit will operate as res judicata though the suit was decreed ex parte.[28]

15. Foreign judgment and res judicata

Section 13 provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, where it has been pronounced by a court of competent jurisdiction. So if a foreign judgment is delivered on merits by a court of competent jurisdiction in the matter, it would operate as res judicata.[29]

16. Res judicata between co-plaintiffs and co-defendants

The principle of res judicata applies between co-defendants and also co-plaintiffs. The rule of res judicata applies in a case of co-defendants, if the following conditions are satisfied:

1. a) There must be conflict of interest between defendants concerned.
2. b) It must be necessary to decide the conflict in order to give the relief which plaintiff claims.
3. c) The co-defendants must be necessary or proper parties to the suit.
4. d) The questions or disputes between the co-defendants must have been finally decided inter se between them.

Example:

'A' sues 'B', 'C' and D and in order to decide a claim of the court has to interpret a will. The decision regarding interpretation of the will on rival claims of the defendants will. Operate as res judicata in any subsequent suit by any of the defendants against the rest.

However rule of res judicata shall be applicable between co-defendants to the question finally decided inter se between them.^[30] The doctrine of res-judicata between the co-defendants is applicable even against the non-appearing or non contesting defendant if he is proved that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.^[31] But the doctrine of res judicata will not operate as against proforma defendant against whom no relief is asked for on a point affecting his interest decided between the principle parties.^[32]

Rule of res judicata shall also be applicable between co-plaintiffs.^[33] The rule of res judicata applies in a case of co-plaintiffs, if the following conditions are satisfied:

1. a) There must be a conflict of interest between the co-plaintiffs.
2. b) It must be necessary to decided such conflicts, in order to give relief to the plaintiff.
3. c) The questions between the plaintiffs to be finally decided.

17. Res- judicata and res-subjudice

- *Res subjudice* relates to matter pending judicial enquiry or trial sub judice.
- *Res-judicata* relates to a matter already adjudicated or matter in which decision is already there.
- *Res subjudice* bars to the trial of a suit.
- *Res-judicata*, bars to file a suit.
- Section 10 deals with *res-subjudice*
- Section 11 deals with *res- judicata*.

18. Res Judicata and Estoppel

- Res-judicata based upon public policy that litigation should end.
- Estoppel is part of law of evidence where a man can't change his stance
- once taken.
- Res-judicata prevents someone from saying SAME thing in different
- litigations,
- Estoppel stops him from saying DIFFERENT things at different times,
- either in the same suit or different suits.
- Res-judicata bars the trial itself
- Estoppel only stops a certain piece of evidence from being taken on
- record, while the trial continues.
- Res-judicata ousts the Jurisdiction of the Court
- Estoppel stops the mouth of a party.
- Res-judicata derives from a Court Decision
- Estoppel from facts asserted by parties.

19. Important Explanations of S.11

Explanation I. (Former suit)

"Former suit" shall denote

- a suit which has been decided prior to the suit in question
- whether or not it was instituted prior thereto.

Explanation III. (Direct Resjudicata)

The matter above referred to in the former suit

- have been alleged by one party and
- either denied or admitted, expressly or impliedly, by the other.

Explanation IV. (Constructive Resjudicata)

Any matter which

- might and ought to have been made ground of defence or
- attack in such former suit
- shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. (Deem to refuse)

Any relief claimed in the plaint,

- which is not expressly granted by the decree,
- shall be deemed to have been refused.

21. Mandatory Provision

S.11 is mandatory and not directory in nature. The judgment in a former suit can be avoided only by taking recourse to s.44 Evidence Act, 1872 on grounds of fraud or collusion. Gross negligence in former suit doesn't

amount to fraud or collusion and thus acts as bar to subsequent suit.

[34]

20. **Focusing Points**

- Res subjudice bars to the trial of a suit.
- Res-judicata, bars to file a suit. Original jurisdiction
- 11 has 6 explanations
- The principle of res judicata applicable to Exparte decree
- The principle of res judicata applicable to Foreign judgment
- The principle of res judicata applicable to co-plaintiffs and co-defendants
- Resjudicata principle reflects also under section 403 of Code of Criminal Procedure, 1898; under Article-35(2) of Constitution, under section-40 of Evidence Act,1872, under section -26 of General Clauses Act, 1897.

By

Smt. R. Shanthi Sree,
Principal Junior Civil Judge,
Srikakulam.

