A RAMADHAR SHRIVAS

v.

BHAGWANDAS

OCTOBER 27, 2005

B [R.C. LAHOTI, CJ., C.K. THAKKER AND P.K. BALASUBRAMANYAN, JJ.]

Code of Civil Procedure, 1908:

Section 11 Explanation IV:

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Constructive **Res Judicata**—*Matter constructively in issue—A matter 'might and ought' to have been made a ground of defence or attack and parties had an opportunity of controverting the same—Held, to be taken as if the matter has been actually controverted and decided—Object is to take all the grounds of attack or defence in one and the same suit.*

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Appellant, after purchase of a house from his vendor, filed suit for dispossessing *inter alia* the respondent who had forcibly taken possession of a portion of the house, claiming the house to be their ancestral property and as such the vendor had no right to sell the same. Trial court held that the vendor was absolute and full owner of the property and he had a right to sell it to the appellant and, accordingly, the sale was held to be legal, valid and in accordance with law. As regards the respondent rejecting his contention, the court found that he was occupying the property as tenant under the vendor and after the sale, under the appellant but was not paying rent to him. Respondent was not held to be in unauthorized possession or a 'trespasser' but was tenant, and, therefore, the suit was dismissed against him. Subsequent suit for eviction and arrears of rent was decreed holding that there was relationship of tenant and landlord. The Appellate court, however allowed the appeal and dismissed the suit. Second appeal preferred by the appellant was dismissed by the High Court. Hence, this appeal.

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Appellant contended that ownership of the appellant over the suit property was conclusively established in the earlier suit and it operated as *res judicata* and the respondent was bound by it. It was further contended that if it was the case of the respondent that the was in lawful possession in any capacity other than tenant, he ought to have raised such defence in the earlier

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proceeding. A

Respondent, on the other hand, contended that the so called finding recorded in the earlier proceeding was collateral and incidental in nature and would not operate as *res judicata* in the subsequent suit.

Allowing the appeal, the court B

HELD 1.1. It is not open to the respondent to deny the title of the appellant since in appropriate proceeding, a finding has been recorded as to ownership of the property and a decree has been passed by a competent civil court holding the appellant to be the owner which has attained finality and would operate as *res judicata.* [816-A; 817-A] C

1.2. Rule of constructive *res judicata* applies to the present case. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it 'might and ought' to have been made a ground of defence or attack in the former suit. Where the parties have had an opportunity of controverting D a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. [818-B, C, E]

Pawan Kumar Gupta v. *Rochiram Nagdeo,* [1999] 4 SCC 243; *P.K. Vijayan* v. *Kamalakshi Amma and Ors.,* [1994] 4 SCC 53; K. *Ethirajan (dead) by Lrs.* v. *Lakshmi and Ors.,* [2003] 10 SCC 578; *Marwari Kumhar and Ors.* v. *Bhagwapuri Guru Ganeshpuri and Anr.,* [2000] 6 SCC 735; *Madhavkrishna and Anr.* v. *Chandra Bhaga and Ors.,* [1997] 2 SCC 203; *Konda Lakshmana Bapuji* v. *Government of A.P. and Ors.,* [2002] 3 SCC 258 and *Most. Rev. P.M.A. Metropolitan and Ors.* v. *Moram Mar Marthoma and Anr.,* [1995] Supp 4 SCC 286, referred to. E F

1.3. The object of the 'Rule of constructive *res judicata'* is to compel the parties to take all the grounds of attack or defence in one and the same suit. [818-E]

Vide Horo v. *JHAN Ara,* [1973] 2 SCC 189: AIR (1973) SC 1406; G *Jaswant Singh* v. *Custodian of Evacuee Property,* [1985] 3 SCC 648: AIR (1985) SC 1096: [1985] Supp 1 SCR 331; *Forward Construction Co.* v. *Prabhat Mandal,* [1986] 1 SCC 100: AIR (1986) SC 391: [1985] Supp 3 SCR 766; *Direct Recruit Class II Engineering Officers Association* v. *State of Maharashtra,* [1990] 2 SCC 715:AIR (1990) SC 1607 and *Vijayan* v. H

A *Kamalakshi,* **[1994] 4 SCC 53: AIR (1994) SC 2145, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6597 of 2005.

From the Judgment and Order dated 17.3.2003 of the Madhya Pradesh High Court in S.A. No. 396 of 1998.

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Niraj Sharma for the Appellant.

Amitabh Verma and Ashok Mathur for the Respondent.

The Judgment of the Court was delivered by

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C.K. THAKKER, J. Leave granted.

The present appeal is filed against the judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Second Appeal No. 396 of 1998 by which the High Court confirmed the judgment and order passed by
D the Court of First Additional District Judge, Hoshangabad in Civil Regular Appeal No. 1-A of 1997, setting aside the judgment and decree passed by the Court of First Civil Judge, Class II, Hoshangabad in Civil Suit No. 31-A of 1991.

To appreciate the controversy raised in this appeal, few relevant facts
E may be noted.

Ramadhar - appellant herein purchased a house bearing Municipal Ward No. 80, Sheet No. 34 situate at Mohalla Gwaltoli in Hoshangabad (M.P) by a registered sale-deed dated February 23, 1981 from one Hiralal Babulal for a consideration of Rs. 12,000. In the said deed it was expressly mentioned that
F Hiralal was the absolute owner of the property and he had full rights to sell the house. It was also stated that in future if any of his brothers or legal representatives would make any claim or raise any dispute or the purchaser would be dispossessed, the seller would pay compensation, damages and costs to the buyer. It was the case of the appellant that Ganpat, brother of
G Hiralal and Bhagwandas (respondent herein) claimed that Hiralal did not have the right to sell the house inasmuch as it was the ancestral property of their family and was not self acquired property of Hiralal. According to the appellant, both, Ganpat and Bhagwandas took forcible possession of some portion of the house on the southern side of the property comprising of *Dhalia* (roofed house) and adjoining *Angana* (open land). Ganpat also constructed *Chhapri*
H (thatched roof) thereon. The appellant, therefore, was constrained to file Civil

Suit No. 40-A of 1982 in the Court of Civil Judge, Class II, Hoshangabad against Hiralal (vendor), Ganpat and Bhagwandas (respondent herein) for possession and removal of unauthorized encroachment. A written statement was filed by Hiralal (vendor) admitting the claim of the plaintiff. So far as Ganpat and Bhagwandas are concerned, they filed joint written statement contending that the property was joint family property and Hiralal had no right to sell it to the plaintiff. The sale deed executed by Hiralal was, therefore, illegal, void and inoperative. The Trial Court framed necessary issues on the basis of pleadings of the parties and held that Hiralal was absolute and full owner of the property and he had right to sell it to the plaintiff. Accordingly, the sale by Hiralal in favour of the plaintiff was held legal, valid and in accordance with law. As to possession of defendant Nos.1 and 2, the Court held that defendant Ganpat was found to be in possession of the suit land but he could not produce any evidence to show as to how his possession could be said to be lawful. Ganpat was, therefore, held to be in unlawful and unauthorized possession of property and was ordered by the Court to handover possession of *Chhapri* to the plaintiff. Thus, a decree was passed against him.

Regarding defendant Bhagwandas, the Court found that he was occupying the property as a tenant and was paying rent of Rs.10 per month to Hiralal. He had also constructed *Chhapri* and *Dhalia*. Bhagwandas was paying rent to original owner Hiralal. Since plaintiff-Ramadhar purchased house from Hiralal, Bhagwandas became tenant of Ramadhar and was liable to pay rent to the plaintiff, but Bhagwandas was not paying rent to him. Bhagwandas, however, could not be said to be in unauthorized possession or a 'trespasser' but was tenant. Hence, a suit in Civil Court by plaintiff-Ramadhar against defendant-Bhagwandas was not maintainable. The suit was accordingly dismissed against Bhagwandas.

The Court stated;

> Hiralal PW-1 has made statement that he had made Chhapri over the suit accommodation in which Bhagwandas resided and gave him rent of Rs. 10 per month, in the Chhapri made by Hiralal Bhagwandas lived. The Dhalia constructed thereon was used by Bhagwandas. Bhagwandas paid rent Rs. 10 per month to Hiralal. Since he had purchased house from Hiralal, thereafter Bhagwandas has not paid rent of Dhalia. In this manner, from statement of plaintiff, it becomes clear that Bhagwandas is tenant of Dhalia of Hiralal since the time for

A which the house existed. The Dhalia has been sold to plaintiff by Hiralal. Therefore, defendant Bhagwandas became tenant of the plaintiff. In this manner defendant No. 2 Bhagwandas is tenant of Ramadhar. Therefore, it cannot be accepted that possession of defendant Bhagwandas is unauthorized encroachment.

B Being aggrieved by that part of the order by which the suit of the plaintiff was dismissed against Bhagwandas, he preferred Regular Civil Appeal No. 20-A of 1983 in the Court of Second Additional District Judge, Hoshangabad but it was also dismissed on April 16, 1991 confirming the decree passed by the Trial Court.

C In view of the fact that defendant-Bhagwandas was held to be tenant of Hiralal and after the sale of property by Hiralal to the plaintiff, Bhagwandas held to be tenant of the plaintiff, he initiated the present proceeding against defendant-Bhagwandas by filing Civil Suit No. 31-A of 1991 in the Court of First Civil Judge, Class II, Hoshangabad for his eviction and for arrears of D rent. In the said suit, it was the case of the appellant-plaintiff that the previous suit filed by him was decided by the Trial Court wherein the defendant was held to be tenant of Hiralal and after sale of property by Hiralal to the plaintiff, tenant of the plaintiff. According to the plaintiff, he was entitled to possession of the property in accordance to the provisions of M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'the Act'), *inter alia* on the E grounds of (i) *bona fide* need of the plaintiff; (ii) non-payment of rent by the defendant; (iii) denial of title by the defendant; (iv) damage caused to the property by the defendant; and (v) need for reconstruction of property by the plaintiff.

F The defendant filed written statement and contended that the plaintiff was not the owner of the suit house, Dhalia and open space, Hiralal had no right to sell the suit property to the plaintiff since the property was ancestral property of Babulal common ancestor of defendant and vendor Hiralal. Hiralal had inherited the property from his fore-fathers and defendant Bhagwandas, his father Ganpat and other brothers as also other family members had right G therein. Since Hiralal had no right to transfer the property, the plaintiff could not get ownership right over the house. He also contended that Hiralal did not give possession of the property to the plaintiff. The defendant asserted that he was neither the tenant of Hiralal nor of the plaintiff and there was no relationship of landlord and tenant between the plaintiff and the defendant and plaintiff was not entitled to get decree of eviction against him.

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On the basis of contentions raised by the parties, the Trial Court framed necessary issues. Considering the evidence adduced by the parties, the Court held that in the earlier suit, it was decided by the Court that Hiralal was the absolute owner of the property and defendants Ganpat and Bhagwandas had no ownership right in the suit property. Therefore, when Hiralal sold the property to plaintiff Ramadhar, the latter became full owner. As Bhagwandas was in possession as tenant of Hiralal, on sale of property to Ramadhar, Bhagwandas became tenant of Ramadhar. There was thus relationship of landlord and tenant between the plaintiff and the defendant. The Court also held that the plaintiff's requirement was genuine and *bona fide* and he had no other house in the City of Hoshangabad. It also held that defendant had denied title of the plaintiff and on that ground also the defendant was liable to be evicted. In view of the said findings, the Trial Court decreed the suit and directed the defendant to handover possession of the suit property to the plaintiff along with payment of rent at the rate of Rs. 10 per month from the date of the suit till the date of the decree.

Being aggrieved by the decree passed by the Trial Court, the defendant preferred an appeal in the Court of the First Additional District Judge, Hoshangabad contending that the suit filed against him was not maintainable as there was no relationship of landlord and tenant between the plaintiff and the defendant. The Trial Court, submitted the defendant, committed an error of law in passing the decree and directing the defendant to handover possession of the suit property to the plaintiff. The lower Appellate Court observed that two questions had arisen; *firstly*, whether the landlord-tenant relationship had been established between the plaintiff and the defendant; and *secondly*, whether the plaintiff required the suit property for genuine need for residence? According to the lower Appellate Court, however, there was no relationship of landlord and tenant between the plaintiff and the defendant and the suit was not maintainable. The Court relied on the fact that plaintiff-Ramadhar had stated in his deposition that defendant Bhagwandas had not paid any rent to him after he purchased the property from Hiralal. The defendant refused to pay rent to him. According to the Court, in the earlier suit, what was held by the Court was that since Hiralal was the owner of the property and the defendant was paying rent of Rs. 10 per month to him, when Hiralal sold the property to the plaintiff, the plaintiff became owner of the house and Bhagwandas continued to remain tenant of the new owner-Ramadhar. In view of the fact, however, that defendant Bhagwandas had categorically stated that he was not the tenant of the property and was not paying any rent either to Hiralal or to the plaintiff, the relationship of landlord and tenant had not been

A proved. In view of the said finding, the Appellate Court allowed the appeal holding that the Trial Court had committed an error of law in passing the decree against the defendant. The Appellate Court thus allowed the appeal and dismissed the suit filed by the plaintiff.

Being aggrieved by the decree passed by the Appellate Court, the B appellant filed Second Appeal in the High Court, but the High Court also confirmed the order passed by the Appellate Court and dismissed the appeal.

Against that order, the appellant has approached this Court. Notice was issued on August 29, 2003. Affidavits and further affidavits have been filed by the parties.

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We have heard learned counsel on both sides.

The learned counsel for the appellant vehemently contended that the Appellate Court as well as the High Court had committed an error of law as also of jurisdiction in dismissing the suit filed by the plaintiff. According to D the counsel, in earlier proceedings, the ownership of the plaintiff over the suit property was established. In that suit, the case of the appellant was that he had become absolute owner of the property in the light of the sale deed executed by Hiralal in his favour. In those proceedings, it was specifically contended by defendant Bhagwandas that Hiralal was not the owner of the E property and the house was a part and parcel of ancestral property and it could not have been sold by Hiralal alone. The contention was expressly negatived by the court and a finding was recorded that it was self-acquired property of Hiralal. There was no interest of any other member in the said property and sale of house by Hiralal in favour of plaintiff was legal, valid and in accordance with law. The Court observed that defendant-Bhagwandas F could not produce any material whatsoever to show as to how he was claiming the ownership right. The Court also recorded a finding that defendant-Bhagwandas was a tenant of part of the property and was paying Rs. 10 per month to Hiralal. Since Hiralal sold the property to the plaintiff, defendant-Bhagwandas became tenant of new owner-Ramadhar. Defendant Bhagwandas G did not challenge the said finding recorded by the Trial Court in that suit. Since no order of eviction was passed against the defendant by Civil Court in view of the finding that the defendant could not be held to be 'trespasser' but tenant of the property, the suit against him was dismissed. The plaintiff preferred an appeal which was also dismissed by the Appellate Court. It was, therefore, open to the appellant to initiate present proceedings and accordingly H a suit for possession was filed by the plaintiff against the defendant. According

to the counsel, it was not open to the defendant now to contend in the present proceedings that the suit property was joint family property and Hiralal had no right to sell the property to the plaintiff. The issue as to ownership had been finally and conclusively decided by Civil Court and it operated *res judicata* and the defendant was bound by it. It was also submitted by the counsel that since the plaintiff had been held to be absolute owner of the property, the defendant could not have denied his title and on that ground also, the plaintiff was entitled to the possession of the property. It was urged that if it was the case of the defendant that he was in lawful possession in any capacity other than tenant, he '*ought*' to have raised such defence in the earlier proceedings. The finding recorded in earlier suit would thus operate as constructive *res judicata* also and the defendant was bound by the said judgment. It was submitted that once the plaintiff was held to be owner of the property, he was entitled to possession and the Trial Court was wholly justified in passing the decree in his favour. The Appellate Court and the High Court ought not to have set aside the said decree. He, therefore, submitted that the appeal deserves to be allowed by setting aside the judgment and decree passed by the Appellate Court and the High Court and by restoring the decree for possession passed by the Trial Court.

The learned counsel for the respondent, on the other hand, supported the order passed by the two courts below. He submitted that when the defendant was not tenant of the property, the Trial Court committed an error of law and of jurisdiction in passing the decree and courts below were right in setting aside the said decree. He also submitted that the so-called finding recorded by the Civil Court as to the status of defendant-Bhagwandas was collateral and incidental in nature and would not operate as *res judicata* in subsequent suit. He, therefore, prayed for the dismissal of the appeal.

Having heard learned counsel for the parties and having considered the rival contentions, in our opinion, the appeal deserves to be allowed and the judgment and decree passed by the Trial Court deserves to be restored by setting aside the judgment and decree passed by the lower Appellate Court as well as by the High Court. It is clear from the evidence adduced by the parties in the former suit as also the decree passed by the Trial Court in Civil Suit No. 40-A of 1982 that Hiralal was the absolute owner of the suit property who had sold the property to appellant-Ramadhar. The appellant, therefore, had become full owner of the property. In the said suit, the respondent herein was also joined as one of the defendants. The respondent-Bhagwandas in that suit contended that the property was joint family property and Hiralal had

A no right to dispose of that property since other family members had also interest therein. The contention which was expressly taken was specifically negatived by the Court and decree was passed in favour of the plaintiff. Moreover, an order of eviction was also passed against defendant No.1 Ganpat as he was found to be in unauthorized occupation of the property. Keeping in view the evidence on record that Bhagwandas-present respondent-
B defendant No.2 in that suit was paying Rs. 10 p.m. as rent to Hiralal, the Court observed that he could not be held trespasser and no decree could be passed by a Civil Court against him. The Court at the same time, observed that defendant-Bhagwandas could not produce any evidence as to how he was occupying the property as an owner. Since Hiralal was the owner of the
C property and defendant-Bhagwandas was occupying the property and paying Rs. 10 per month as rent to Hiralal, after the sale of property by Hiralal to plaintiff, Bhagwandas became tenant of the plaintiff.

To us, therefore, it is clear that the ownership right of the plaintiff came to be established by a competent court of law in earlier proceedings wherein
D certain specific findings of fact had been recorded that the property was not joint family property but self-acquired property of Hiralal; Hiralal had sold the said property to the plaintiff for Rs. 12,000 by a registered sale deed; defendant-Bhagwandas was paying rent of Rs. 10 per month to Hiralal; and Bhagwandas could not produce any evidence to show his propriety rights over the property.
E No decree could be passed against Bhagwandas as the suit was filed by the plaintiff against the owner Hiralal, trespasser Ganpat and defendant-Bhagwandas in a Civil Court. Since the defendant was not found to be 'trespasser' or in unauthorized occupation, the suit was dismissed against him. In our opinion, therefore, it was not open to defendant-Bhagwandas to
F put forward the claim in the present proceedings that Hiralal was not the absolute owner of the property and the property was joint family property which Hiralal could not have sold to the appellant. It was also not open to the defendant to deny the title of the plaintiff since in appropriate proceedings, a finding had been recorded as to ownership of property and a decree had been passed by a competent Civil Court holding the plaintiff to be the owner
G who had purchased it from its real owner Hiralal. The Trial Court, in our opinion, was wholly justified in passing the decree in favour of the plaintiff and against the defendant.

The learned counsel for the appellant is also right in contending that the finding as to ownership of the plaintiff had attained 'finality' in the earlier
H proceedings in the decree passed a Civil Court. So far as the ownership rights

of the plaintiff are concerned, they had not been challenged by defendant-Bhagwandas and hence that finding would operate as *res judicata.* In this connection our attention has been invited by the learned counsel to the following decisions;

Pawan Kumar Gupta v. *Rochiram Nagdeo,* [1999] 4 SCC 243;

P.K. Vijayan v. *Kamalakshi Amma and Ors.,* [1994] 4 SCC 53;

K. Ethirajan (dead) by Lrs. v. *Lakshmi and Ors.,* [2003] 10 SCC 578; *Marwari Kumhar and Ors.* v. *Bhagwanpuri Guru Ganeshpuri and Anr.,* [2000] 6 SCC 735;

Madhavkrishna and Anr. v. *Chandra Bhaga and Ors.,* [1997] 2 SCC 203;

Konda Lakshmana Bapuji v. *Government of A.P. and Ors.,* [2002] 3 SCC 258; and

Most Rev. P.M.A. Metropolitan and Ors. v. *Moran Mar Marthoma and Anr.,* [1995] Supp 4 SCC 286.

In the above decisions, various aspects of the doctrine of res judicata have been dealt with by this Court.

In *Pawan Kumar Gupta,* a suit filed by the plaintiff against the defendant was dismissed by the Court but the Court negatived the contention of the defendant that the plaintiff was not the real owner of the suit property. The Court recorded a finding that the plaintiff was absolute owner. In a subsequent suit by the plaintiff against the defendant, this Court held that an issue as to the title of the property was 'directly and substantially' in issue between the parties in a former suit and decided in favour of the plaintiff. Such finding, ruled this Court, would operate as *res judicata* in a subsequent suit against the defendant.

The Court observed:

> "The rule of res judicata incorporated in Section 11 of the Code of Civil Procedure (CPC) prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any

A incidental question to reach such decision, which operates as *res judicata*. It is not correct to say that the party has no right of appeal against such a decision on an issue though the suit was ultimately recorded as dismissed."

In our opinion, the learned counsel for the appellant is also right in B submitting that the rule of constructive res judicata applies to the present case. The expression 'matter in issue' under Section 11 of the Code of Civil Procedure, 1908 connotes matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is C constructively in issue when it 'might and ought' to have been made a ground of defence or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which 'might and ought' to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.

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The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit. [*Vide Horo* v. E *Jahan Ara*, [1973] 2 SCC 189 192 : AIR (1973) SC 1406 (1409); *Jaswant Singh* v. *Custodian of Evacuee Property*, [1985] 3 SCC 648 : AIR (1985) SC 1096 : (1985) Supp 1 SCR 331; *Forward Construction Co.* v. *Prabhat Mandal*, (1986) 1 SCC 100 : AIR (1986) SC 391 : [1985] Supp 3 SCR 766; *Direct Recruits Class II Engineering Officers' Association* v. *State of Maharashtra*, [1990] 2 SCC F 715 : AIR (1990) SC 1607 and *Vijayan* v. *Kamalakshi*, [1994] 4 SCC 53 : AIR (1994) SC 2145.

In the case on hand, it is clear that in the earlier suit, the Court had recorded a clear finding that defendant-Bhagwandas was neither the owner of the property nor he could show any right as to how he was occupying G such property except as a tenant of Hiralal. If Bhagwandas was claiming to be in lawful possession in any capacity other than a tenant, he '*ought*' to have put forward such claim as a ground of defence in those proceedings. He ought to have put forward such claim under Explanation IV to Section 11 of the Code but he had failed to do so. The doctrine of constructive *res judicata* engrafted in Explanation IV to Section 11 of the Code thus applies H

to the facts of the case and the defendant in the present suit cannot take a contention which ought to have been taken by him in the previous suit and was not taken by him. Explanation IV to Section 11 of the Code is clearly attracted and defendant-Bhagwandas can be prevented from taking such contention in the present proceedings.

There is one more reason also as to why the Trial Court was right in passing the decree against the defendant. As is clear from the record, even after the disposal of previous proceeding in civil suit as well as in appeal qua defendant-Bhagwandas, the plaintiff-Ramadhar issued a notice to the defendant on June 03, 1991, by registered AD. In the said notice, the plaintiff through his advocate asked the defendant-Bhagwandas to handover possession of Dhalia and to pay arrears of rent stating therein that the plaintiff had become owner of suit property as he had purchased the property by a registered sale deed dated February 23, 1981 from Hiralal and he was occupying it as owner of the property. It was also stated that though it was the case of the plaintiff in earlier suit that defendant-Bhagwandas and his father Ganpat had illegally encroached upon the land, the Court of First Civil Judge, Class II, Hoshangabad held in the judgment dated September 2, 1983 that defendant-Bhagwandas was tenant of suit Dhalia for a monthly rent of Rs. 10 and in view of the said finding, no decree for possession was passed in favour of the plaintiff. The father of the defendant, however, was found to be in illegal possession and accordingly decree was passed against him. The notice further stated that in spite of the decree passed by the Trial Court and confirmed by the lower Appellate Court, the defendant had not paid rent to the plaintiff and he was in arrears of rent and was liable to eviction under Section 12 of the Act. It was also stated that the defendant had denied title of the landlord and was liable to be evicted on that count as well. Moreover, the defendant had damaged the property and got pits dug. The plaintiff wanted old construction to be demolished for making new construction and it was not possible without obtaining the possession of the portion occupied by the defendant and for that reason also, the landlord required the possession of the property from the defendant. It may be stated here that according to the plaintiff, the defendant neither replied to the notice nor surrendered possession of the property. In view of the said fact also, the Trial Court was right in proceeding to decide the case on merits and in passing the decree in favour of the plaintiff.

So far as the findings recorded by the Trial Court for passing a decree for possession in favour of the plaintiff are concerned, they have neither been

A disturbed nor set aside by the lower Appellate Court nor by the High Court. The plaintiff is, therefore, entitled to a decree for possession.

For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The decree and order passed by lower Appellate Court and confirmed by the High Court are set aside and the decree B for possession passed by the Trial Court is restored. Respondent-Bhagwandas is granted four month's time to vacate the premises subject to his filing usual undertaking within four weeks from today. In the facts and circumstances of the case, there shall be no order as to costs.

C B.K. Appeal allowed.

SATRUCHARLA VIJAYA RAMA RAJU

v.

NIMMAKA JAYA RAJU AND ORS.

OCTOBER 27, 2005

[R.C. LAHOTI, CJ., C.K. THAKKER AND P.K. BALASUBRAMANYAN, JJ.]

Res Judicata :

Election Law—Representation of Peoples Act, 1951—Sections 5, 80, 100(1)(d)(i), 116A—CPC, 1908—Section 11 Expln. VI—Election petition challenging election of returned candidate reserved for SC candidate—Candidate describing himself to be 'Konda Dora' tribe assailed as he belonged to 'Kshatriya' caste —challenge by another person on same ground in earlier election petition—Held, earlier petition not being inter-parties cannot operate as Res judicata.

Evidence Act—Sections 41, 42, 43—Election petition held, is not a suit of general nature or a representative action for adjudication of the status of a person, and the same cannot be treated as a judgment in rem—The conclusion arrived in earlier proceedings based in evidence in that proceedings by itself is not sufficient to rebut the present claim.

The appellant successfully contested the State Assembly Elections in 1999 from No. 8 Naguru (ST) assembly constituency in the State of Andhra Pradesh. His election was challenged by respondent No. 1, under Section 80 of the Representation of the People Act, 1951 read with Section 5 and 100(1)(d)(i) of the Act. The first respondent contented that the appellant was not qualified to contest from a constituency reserved for the scheduled tribes, he being a 'Kshatriya'; that his claim that he belongs to the "Konda Dora" tribe, was not true; and that since he was ineligible to contest from the constituency, his election was liable to be declared void and set aside and that he may be declared elected instead.

The appellant contested the election petition. He pleaded that he belonged to the "Konda Dora" tribe which was a notified Scheduled Tribe, that he was neither a *'Kondaraju'* nor a *'Kshatriya'*, that even otherwise, *'Kondaraju'* and *"Konda Dora"* were synonymous and the "Konda Dora" tribe

A was incluede in the list of Schedule Tribes; that his earlier election from No.8 Naguru (ST) assembly constituency, the self-same constituency, was challenged by a voter on the very same ground that he did not belong to the "Konda Dora" tribe, and it was dismissed by the Judge and the said decision barred a fresh enquiry into the same question in the present election petition and the decision therein was conclusive on his status; and that his ancestors
B and himself described themselves as 'Kshatriyas' in view of the status enjoyed by them in their tribe and not because they belonged to the 'Kshatriya' community.

The trial Judge set aside the election of the appellant. The prayer of
C the first respondent to declare him elected, was declined on the ground that such relief was not liable to be granted at that point of time and in view of the dissolution of the assembly itself.

In appeal to this Court appellant contended that the High Court was wrong in holding that the decision in E.P. 13 of 1983 did not operate as *res*
D *judicata* and was not conclusive on the status of the appellant; that the judgment was one in rem; that alternatively the said judgment operated as a judicial precedent and should have been accepted as such by the Judge; that it was against judicial discipline for a subsequent Judge assigned to try an election petition, to differ from the conclusion of the High Court rendered in an earlier election petition on the status of the appellant and judicial discipline
E warranted that the matter should have been referred to a Division Bench for decision, in case the judge was inclined to disagree, that the issue of the certificate under the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of Community Certificates Act, 1993 was conclusive and binding on the proceedings under the Representation
F of the People Act, 1951; that the High Court was in error in its appreciation of the evidence and the finding that the appellant did not belong to the "Konda Dora" tribe was clearly erroneous; that merely because a person belonging to a Scheduled Tribe described himself as a 'Kshatriya' or claimed to be a 'Kshatriya', he would not become a 'Kshatriya' or cease to be a tribal and this aspect has not been properly appreciated by the Judge; that the
G appreciation of the evidence by the Judge was perverse and important pieces of evidence have been ignored or not given the weight they deserved; that the admissions extracted from the witnesses examined on behalf of the election petitioner and the deposition of the witnesses examined on behalf of the appellant and their impact on the relevant question, have not been considered
H properly by the election judge; and that the decision under appeal suffers from

innumerable infirmities and required to be set aside by this Court. A

The first respondent contended that it has been found by the order dated 13.12.2002, that the decision in E.P. 13 of 1983 did not operate as res judicate and was not conclusive on the tribal status of the appellant; that the certificate obtained under the State Act was not conclusive on the election tribunal; that those findings have become final and have been approved by this Court by B dismissing the petitions for special leave to appeal filed by the appellant challenging that order; that it was not open to the appellant to raise those questions all over again in this appeal; that the finding in E.P. 13 of 1983 was only to the effect that the election petitioner therein, had failed to prove that the appellant did not belong to a scheduled tribe or that he belonged to the 'Kshatriya' caste and that did not amount to a declaration of the status of the C appellant as belonging to the "Konda Dora" tribe; that every election furnishes a fresh cause of action and the finding in an election petition relating to an earlier election to which the present election petitioner was not even a party, does not operate as *res judicate* and does not even have any evidentiary value; that a series of documents have been produced which D contained admissions by the predecessors of the appellant and by the appellant that they were 'Kshatriyas' and those admissions were conclusive as against the appellant, since he was not in a position to show that they were wrong or to explain them away except stating that they wanted to claim a higher status for prestige; that the documents were spread over for a number of years; that the appellant had admitted that in his school leaving certificate book, his caste E has been shown as 'Kshatriya' and since that piece of evidence was almost conclusive, there was no reason to interfere with the finding of the Judge that the appellant did not belong to the "Konda Dora" tribe; that in the face of the admissions contained in documents of unimpeachable authenticity, the burden had shifted to the appellant to show that he belongs to the "Konda F Dora" tribe and that the admissions earlier made, were wrong; and that on a proper appreciation of evidence in the case, the Judge has rightly come to the conclusion that the appellant was ineligible to contest from a reserved constituency and there was no reason for this Court to interfere with that decision.

G

Dismissing the Appeal, the Court

HELD: 1. *Res judicata* is nothing but the merger of a cause of action in a decree, transit in *rem judicatum*. So, even if the cause of action in the earlier election petition merged in the final adjudication therein, since according to this Court, the subsequent election furnishes a fresh cause of action, the H

A merger of the earlier cause of action with the decision therein cannot bar the trial of the fresh cause of action arising out of subsequent election. It is true that the earlier election petition was filed by a voter in the constituency concerned and he had also raised the plea that the appellant did not belong to the "Konda Dora" community. An election petition filed, though it abates on the death of the petitioner therein, could be pursued by another person coming B forward to prosecute that election petition as enjoined by Section 112 of the Act. But that does not make an election petition a representative action in the sense in which it is understood in law. Therefore, normally, the adjudication in an election petition, not inter-parties, cannot operate as *res judicata* in a subsequent election petition challenging that subsequent election.

C [832-C, D, E]

C.M. Arumugam v. *S. Rajgopal and Ors.*, [1976] 1 SCC 863, referred to.

2. Though Section 112 of the Representation of the People Act gives D any other voter the right to come forward and pursue E.P. 13 of 1983, the prior election petition, in case the petitioner therein died and the election petition abated, on that basis alone, the earlier action cannot be understood to be a representative action so as to attract explanation VI to Section 11 of the Code of Civil Procedure. The plea of *res judicata* raised by counsel for the appellant cannot be sustained. The appellant, therefore, cannot rely on Section E 40 of the Evidence Act. [832-G, H; 833-A]

3. In a case where the election petitioner failed to establish his claim, it could not be said that it amounted to a declaration of the status of the respondent in that election petition, the successful candidate and that such a F finding on status would operate as a judgment in rem so as to bind the whole world. It is also not one of the judgments specifically recognized by Section 41 of the Evidence Act. It has been held that the challenge to an election is only a statutory right. An election petition is not a suit of a general nature or a representative action for adjudication of the status of a person. Even if it is taken that the earlier judgment is admissible in evidence, on that, no objection G was raised even at the trial, it could be brought in under Section 42 of the Evidence Act on the basis that it relates to a matter of a public nature or under Section 43 of the Evidence Act. In either case, not being inter-parties, the best status that can be assigned to it is to say that it is of high evidentiary value, while considering the case of the parties in the present election petition.

H [833-G, H; 834-A

Spencer Bower on "Resjudicata", referred to. A

4. The argument that the judgment in E.P. 13 of 1983, should be held to be a judgment in rem binding on the whole including the election petitioner herein, even though he was not a party to the earlier proceeding, cannot be sustained. [834-H]

Inamati Mallappa Basappa v. *Desai Basavaraj Ayyappa and Ors.*, [1959] SCR 611 and *A. Sreenivasan* v. *Election tribunal, Madras and Anr.*, Vol.XI E.L.R. 278, referred to. B

K. Kamaraja Nadar v. *Kunju Thevar and Ors.*, [1959] SCR 583, relied on.

C

5. The decision in the earlier election petition depended upon the pleadings and the evidence adduced in that case and their appreciation. The essential finding was that the election petitioner therein had not established the plea set up by him. It was not a case where a particular document was interpreted in a particular manner by the highest court of the land and the interpretation of the same document was again involved in a subsequent D litigation between those who were not parties to the earlier litigation, that appreciation of evidence has no relevance in the present election petition and, the High Court rightly held that the present election petition has to be tried on the pleadings and that evidence available in this case. [835-A, B, E]

Kharkan and Ors. v. *State of Uttar Pradesh,* AIR (1965) SC 83, referred E to.

6. The trial judge has rightly proceeded on the basis that the initial burden was on the election petitioner to establish his plea that the appellant did not belong to a Scheduled Tribe. Though in a prior statement, an assertion in one's own interest, may not be evidence, a prior statement, adverse to one's F interest would be evidence. In fact, it would be the best evidence the opposite party can rely upon. Therefore, in the present case, where the appellant is pleading that he is a Konda Dora, the statement in the series of documents, pre-constitution and post constitution, executed by his ancestors and members of his family including himself describing themselves as 'Kshatriyas', would G operate as admissions against the interest of the appellant in the present case. These admissions also strengthened the admission of the appellant that in his school leaving certificate also, he is described as a 'Kshatriya' and his paternal uncle's son is also described as a 'Kshatriya' in his school leaving certificate and that uncle's son was also held to be a 'Kshatriya' on an enquiry made in that behalf. Therefore, the trial judge was correct in holding that the H

A election petitioner had discharged the initial burden placed on him and the burden shifted to the appellant to establish that he belonged to the 'Konda Dora' Tribe. [836-D, F, G]

7. Having gone through the evidence of RWs 1 to 9 the Court agrees with the trial judge that the evidence of RWs 1 to 9 is totally insufficient to B establish that the appellant belonged to the Konda Dora Tribe. On a scrutiny of the evidence of PWs 1 to 8, also, there is nothing in their evidence that would justify holding that the appellant has established his claim. On going through the detailed discussion therein and the materials, it is not possible to hold that these documents establish that the appellant belonged to the 'Konda C Dora' tribe. On going through the evidence of CW1 and on scrutinizing Exhibits C1 to C10 and the reasoning adopted by the trial judge, the Court is satisfied that the trial judge was fully justified in discarding the caste certificate relied on by the appellant. [837-B-E; 838-B]

8. Evidence in the case on hand also indicates that the family of the D appellant had marital relationship mostly with the Zamindar families outside the present State of Andhra Pradesh and their way of life was also not that of the tribals. No positive acceptable evidence could also be adduced to show that the family interred into marital relationship with 'Konda Dora' tribals. The evidence also shows that the family of the appellant did not have any close relationship with the Konda Doras of the locality. The admissions of RW.1 E show that quite a few of the customs the family was following had no relation to the customs generally followed by the Konda Dora Tribe and some of the practices clearly differed from that of the tribe and was more consistent with the practices followed by Kshatriya and higher castes. The trial judge has carefully analysed these aspects and there is no justification in differing from F his appreciation of the oral as well as documentary evidence in the case. [836-F, G, H; 839-A]

V.V. Giri v. *Dippala Suri Dora and Ors.*, [1960] 1 SCR 426, distinguished.

G 9. The purpose of reservation of constituencies is to ensure representation in the legislatures to such tribes and castes who are deemed to require special efforts for their upliftment. The person seeking election from such constituencies must be the true representative of that tribe. The evidence shows that the appellant could not be considered to be a true representative of a tribe included in the Presidential Order deserving special H protection. [839-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1102 of 2004. A

From the Judgment and Order dated 30.1.2004 of the Andhra Pradesh High Court in E.P. No. 13 of 1999.

M.N. Rao, and C.K. Sucharita for the Appellant.

B

Bojja Tarakam, S.U.K. Sagar, Ms. Bina Madhavan, Ms. Pooja Nanekar, Ms. Susan Zacharia and A. Venayagam, for M/s. Lawyer's Knit & Co. for the Respondent.

Venkateswara Rao Anumolu, (NP) for the Respondents Nos. 2-4.

C

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. 1. The appellant successfully contested the State Assembly Elections in 1999 from No.8 Naguru (ST) assembly constituency in the State of Andhra Pradesh. His election was challenged by respondent No.1 herein, in Election Petition No. 13 of 1999, under Section 80 D of the Representation of the People Act, 1951 read with Sections 5 and 100 (1) (d) (i) of the Act. The contention raised by the first respondent was that the appellant was not qualified to contest from a constituency reserved for the scheduled tribes. According to respondent No.1, the election petitioner, the appellant was a 'Kshatriya' and was not eligible to contest from a constituency reserved for the scheduled tribes. His claim that he belongs to E the "Konda Dora" tribe, was not true. Since he was ineligible to contest from the constituency, his election was liable to be declared void and set aside. The first respondent also prayed that he may be declared elected instead.

2. The appellant resisted the election petition. He pleaded that he F belongs to the "Konda Dora" tribe which was a notified Scheduled Tribe. He was neither a 'Kondaraju' nor a 'Kshatriya'. Even otherwise, 'Kondaraju' and "Konda Dora" were synonymous and the "Konda Dora" tribe was included in the list of Scheduled Tribes. He further pleaded that his earlier election from No.8 Naguru (ST) assembly constituency, the self-same constituency, was challenged by a voter in Election Petition No. 13 of 1983 on the very same G ground that he did not belong to the "Konda Dora" tribe. That election petition, after contest, was dismissed by the learned Judge to whom it was assigned after a regular trial and the said decision barred a fresh enquiry into the same question in the present election petition and the decision therein was conclusive on his status. He also explained that his ancestors and himself H described themselves as 'Kshatriyas' in view of the status enjoyed by them

A in their tribe and not because they belonged to the 'Kshatriya' community. An ancestor of his had been conferred the title "Satrucharla" and it was the surname of his family. His predecessors and his cousin had all contested in prior elections from reserved constituencies and no objection had ever been raised prior to 1983 regarding their status. In a similar case, where the members of the family of a candidate had described themselves as 'Kshatriya', the B Supreme Court had held in an election petition that was filed challenging their status, that as a matter of fact that candidate belonged to a Scheduled Tribe and was not a 'Kshatriya'. He raised a further contention that the caste certificate issued by the competent authority under the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of C Issue of Community Certificates Act, 1993 to the effect that he belongs to the "Konda Dora" tribe was final and binding on the court.

3. Issues were raised, *inter alia*, on pleas that the judgment in E.P. 13 of 1983 operated as *res judicata* with regard to the status of the appellant, that the judgment therein was a judgment in rem and consequently conclusive D on the status of the appellant and that the present election petition was not maintainable, so long as the community certificate issued by the Collector remained in force. At the instance of the appellant, the above three issues were taken up for consideration as preliminary issues. By order dated 13.12.2002, the assigned Judge of the High Court held that the judgment in E.P. 13 of 1983 E dated 16.1.1984 did not operate as *res judicata* on the status of the appellant as far as the present election petition is concerned; that the judgment in E.P. 13 of 1983 was not a judgment in rem and could not bind those who were not parties to it and that the said adjudication did not bar the trial of the present election petition. He held that the provisions of the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of F Community Certificates Act, 1993 or the certificate issued thereunder did not have any impact on the trial of the election petition under the Representation of the People Act, 1951 and that the election petition had to be tried and decided on the basis of evidence that may be adduced in it. This order of the learned Judge was challenged before this Court in SLP (C) Nos. 1438-1439 of 2003. This Court, by order dated 7.2.2003, dismissed those petitions for G special leave. Thereafter, evidence was taken in the election petition. Documents were marked on the side of the parties and oral evidence was led. The learned Judge, on an appreciation of the pleadings and the evidence in the case, came to the conclusion that the appellant did not belong to "Konda Dora" community, a Scheduled Tribe and was consequently ineligible to contest the election H from a constituency reserved for the scheduled tribes. Thus, the learned

Judge set aside the election of the appellant from No.8 Naguru (ST) assembly constituency in the general elections held on 11.9.1999. The prayer of the first respondent to declare him elected, was declined on the ground that such relief was not liable to be granted at that point of time and in view of the dissolution of the assembly itself. Feeling aggrieved by the setting aside of his election on the ground that he did not belong to a scheduled tribe, the appellant has filed this appeal under Section 116-A of the Representation of the People Act, 1951.

4. Learned Senior Counsel for the appellant contended that the learned Judge in the High Court was wrong in holding that the decision in E.P. 13 of 1983 did not operate as *res judicata* and was not conclusive on the status of the appellant. The judgment was one in rem. He alternatively contended that the said judgment operated as a judicial precedent and should have been accepted as such by the learned Judge. It was against judicial discipline for a subsequent Judge assigned to try an election petition, to differ from the conclusion of the High Court rendered in an earlier election petition on the status of the appellant and judicial discipline warranted that the matter should have been referred to a Division Bench for decision, in case the judge was inclined to disagree. Though, he faintly raised the contention that the issue of the certificate under the Andhra Pradesh (Scheduled Castes, Scheduled Tribes and Backward Classes) Regulation of Issue of Community Certificates Act, 1993 was conclusive and binding on the proceedings under the Representation of the People Act, 1951, he did not seriously pursue that contention, obviously because of the fact that the certificate issued under that Act served a different purpose and could not stand in the way of an election petition filed under the Representation of the People Act, 1951 being tried in accordance with law by the High Court. On facts, he submitted that the High Court was in error in its appreciation of the evidence and the finding that the appellant did not belong to the "Konda Dora" tribe was clearly erroneous. He emphasized that merely because a person belonging to a Scheduled Tribe described himself as a 'Kshatriya' or claimed to be a 'Kshatriya', he would not become a 'Kshatriya' or cease to be a tribal and this aspect has not been properly appreciated by the learned Judge. He ultimately submitted that the appreciation of the evidence by the learned Judge was perverse and important pieces of evidence have been ignored or not given the weight they deserved. The admissions extracted from the witnesses examined on behalf of the election petitioner and the deposition of the witnesses examined on behalf of the appellant and their impact on the

A relevant question, have not been considered properly by the election judge. He submitted that the decision under appeal suffers from innumerable infirmities and required to be set aside by this Court in appeal.

5. Learned counsel for the first respondent, on the other hand, contended that it has been found by the order dated 13.12.2002, that the decision in E.P. B 13 of 1983 did not operate as *res judicata* and was not conclusive on the tribal status of the appellant and that the certificate obtained under the State Act was not conclusive on the election tribunal and that those findings have become final and have been approved by this Court by dismissing the petitions for special leave to appeal filed by the appellant challenging that order. He C submitted that it was not open to the appellant to raise those questions all over again in this appeal. Even otherwise, the finding in E.P. 13 of 1983 was only to the effect that the election petitioner therein, had failed to prove that the appellant did not belong to a scheduled tribe or that he belonged to the 'Kshatriya' caste and that did not amount to a declaration of the status of the appellant as belonging to the "Konda Dora" tribe. He submitted that D every election furnishes a fresh cause of action and the finding in an election petition relating to an earlier election to which the present election petitioner was not even a party, does not operate as *res judicata* and does not even have any evidentiary value. He submitted that a series of documents have been produced which contained admissions by the predecessors of the E appellant and by the appellant that they were 'Kshatriyas' and those admissions were conclusive as against the appellant, since he was not in a position to show that they were wrong or to explain them away except stating that they wanted to claim a higher status for prestige. He pointed out that the documents were spread over for a number of years. He also pointed out that the appellant had admitted that in his school leaving certificate book, his F caste has been shown as 'Kshatriya' and since that piece of evidence was almost conclusive, there was no reason to interfere with the finding of the learned Judge that the appellant did not belong to the "Konda Dora" tribe. He finally submitted that in the face of the admissions contained in documents of unimpeachable authenticity, the burden had shifted to the appellant to show that he belongs to the "Konda Dora" tribe and that the admissions G earlier made, were wrong. He submitted that on a proper appreciation of evidence in the case, the learned Judge has rightly come to the conclusion that the appellant was ineligible to contest from a reserved constituency and there was no reason for this Court to interfere with that decision. He prayed for a dismissal of the appeal.

H

6. First, we will deal with the contention based on the adjudication in E.P. 13 of 1983. That was an election petition relating to an earlier election in respect of the same assembly constituency filed by a voter challenging the eligibility of the appellant to contest as belonging to a Scheduled Tribe. The learned Judge noticed that the election petitioner had not examined anyone belonging to the 'Kshatriya' community to show that the appellant had been accepted as a 'Kshatriya' and had also not led adequate evidence to show that the appellant was not accepted as a member of the "Konda Dora" tribe. In his view, the explanation of the appellant that they had claimed the status as 'Kshatriyas' only for prestige was adequate to wipe out the effect of the consistent admissions contained in some documents and the entry in the secondary school leaving certificate. It was thus held that the election petitioner therein, had not chosen to lead any evidence worth the name to show that the appellant was a 'Kshatriya' and he had only tried to pick holes in the evidence adduced on the side of the appellant. In the light of the evidence on the side of the appellant, it had to be held that the appellant belonged to the "Konda Dora" tribe and that his nomination was rightly accepted.

7. Before proceeding to consider this question, it requires to be noticed that at the instance of the appellant, the learned Judge had held by his order dated 13.12.2002, that the adjudication in E.P. 13 of 1983 did not operate as *res judicata* and was not conclusive on the question of the status of the appellant. That order had been challenged before this Court in Petitions For Special Leave To Appeal (Civil) Nos. 1438-1439 of 2003. Though, this Court had not given reasons, this Court had dismissed those Petitions for Special Leave to Appeal by order dated 7.2.2003 without granting liberty to the appellant to challenge the findings while challenging the final decision, if it became necessary. Whether there be a merger of the order of the High Court with the order of this Court or not (the present view is that there is no merger), as far as the present proceedings are concerned, would it not be conclusive as against the appellant? This Court is only a court of co-equal jurisdiction and is normally bound to respect its own earlier orders. Similarly, the High Court also could not reconsider the issues after trial. If the appellant had not challenged the order made by the learned Judge then and there, he could have set out a challenge to the order dated 13.12.2002 in the present memorandum of appeal as envisaged by the principle recognized in Section 105 (1) of the Code of Civil Procedure, 1908 (the Code, of course, does not stricto sensu apply to these proceedings). In the present appeal, though the appellant had raised a ground that the judgment in E.P. 13 of 1983 is a judgment in rem and it consequently precluded the High Court from going against that decision,

A he has not set out a specific challenge to the order dated 13.12.2002. Really, it is possible to say that as far as the present appeal is concerned, the appellant is not entitled to raise the questions covered by the order leading to SLP (C) Nos. 1438-1439 of 2003, in view of the dismissal of those petitions.

8. But, we do not think it necessary to rest our decision on that ground B alone. Even otherwise, the plea that the earlier adjudication operated as *res judicata* is difficult of acceptance. The first respondent herein, the petitioner in the present election petition, was not a party to the prior election petition. This Court in *C.M. Arumugam* v. *S. Rajgopal and Ors.*, [1976] 1 SCC 863] has held that every election furnishes a fresh cause of action for a challenge to C that election and an adjudication in a prior election petition cannot be conclusive in the subsequent proceeding. *Res judicata* is nothing but the merger of a cause of action in a decree, transit in rem judicatum. So, even if the cause of action in the earlier election petition merged in the final adjudication therein, since according to this Court, the subsequent election furnishes a fresh cause of action, the merger of the earlier cause of action with D the decision therein cannot bar the trial of the fresh cause of action arising out of subsequent election. It is true that the earlier election petition was filed by a voter in the constituency concerned and he had also raised the plea that the appellant did not belong to the "Konda Dora" community. An election petition filed, though it abates on the death of the petitioner therein, could E be pursued by another person coming forward to prosecute that election petition as enjoined by Section 112 of the Act. But that does not make an election petition a representative action in the sense in which it is understood in law. Therefore, normally, the adjudication in an election petition, not inter-parties, cannot operate as *res judicata* in a subsequent election petition challenging that subsequent election.

F

9. The appellant could have invoked explanation VI to Section 11 of the Code of Civil Procedure if it were possible to hold that the person who was the petitioner in E.P. 13 of 1983, was litigating in respect of a public right or of a private right claimed in common for himself and others and he was also *bona fide* litigating therein. Though, as noticed earlier, Section 112 of the G Representation of the People Act gives any other voter the right to come forward and pursue E.P. 13 of 1983, the prior election petition, in case the petitioner therein died and the election petition abated, on that basis alone, the earlier action cannot be understood to be a representative action so as to attract explanation VI to Section 11 of the Code of Civil Procedure. We do H not think it necessary to advert to the authorities on the scope of explanation

VI to Section 11 and the nature of litigations prior and subsequent, to which that explanation would have relevance. Suffice it to say that the plea of *res judicata* raised by counsel for the appellant cannot be sustained. The appellant, therefore, cannot rely on Section 40 of the Evidence Act.

10. The contention that the judgment in E.P. 13 of 1983 is a judgment in rem also cannot be accepted. Under the Indian Evidence Act Section 41 is said to incorporate the law on the subject. A judgment in rem is defined in English Law as "an adjudication pronounced (as its name indeed denotes) by the status, some particular subject matter by a tribunal having competent authority for that purpose". Spencer Bower on *Res judicata* defines the term as one which "declares, defines or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or thing to the world generally". An election petition under Section 80 of the Representation of the People Act, 1951 cannot be held to lead to an adjudication which declares, defines or otherwise determines the status of a person or a jural relation of that person to the world generally. It is merely an adjudication of a statutory challenge on the question whether the election of the successful candidate is liable to be voided on any of the grounds available under Section 100 of the Representation of the People Act, 1951. It is not an action for establishing the status of a person. It is not an action initiated by a person to have his status established or his jural relationship to the world generally established, to borrow the language of Spencer Bower. No doubt in E.P. 13 of 1983, the question was whether the election petitioner therein who alleged that the appellant before us was not qualified to contest as a candidate belonging to a Scheduled Tribe, in a constituency reserved for that tribe and to that extent, having relationship to the status of the appellant. In such an action under the Representation of the People Act, 1951 what is decided is whether the election petitioner had succeeded in establishing that the successful candidate belonged to a caste or community, that was not included in the Scheduled Tribes Order. In a case where the election petitioner failed to establish his claim, it could not be said that it amounted to a declaration of the status of the respondent in that election petition, the successful candidate and that such a finding on status would operate as a judgment in rem so as to bind the whole world. It is also not one of the judgments specifically recognized by Section 41 of the Evidence Act. It has been held that the challenge to an election is only a statutory right. An election petition is not a suit of a general nature or a representative action for adjudication of the status of a person. Even if we take it that the earlier judgment is admissible in the evidence, on that, no objection was raised even at the trial, it could

A be brought in under Section 42 of the Evidence Act on the basis that it relates to a matter of a public nature or under Section 43 of the Evidence Act. In either case, not being inter-parties, the best status that can be assigned to it is to say that it is of high evidentiary value, while considering the case of the parties in the present election petition.

B 11. In fact, learned senior counsel concentrated his fire on the contention that the earlier judgment in E.P. 13 of 1983 is a judgment in rem. He referred to the decision in *Inamati Mallappa Basappa* v. *Desai Basavaraj Ayyappa and Ors.* [1959] SCR 611. He relied on the portions of the judgment wherein their Lordships indicated the nature and scope of an election petition. Quoting C from the decision in *K. Kamaraja Nadar* v. *Kunju Thevar and Ors.*, [1959] SCR 583 their Lordships held that an election petition is not a matter in which the persons interested are the candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of democratic process. An election petition is not a suit between D two persons but is a proceeding in which the constituency itself is the principal party interested. He also referred to the decision of the Madras High Court in *A. Sreenivasan* v. *Election tribunal, Madras and Anr.* (Vol. XI E.L.R. 278) wherein the above two decisions were followed.

12. With respect to learned senior counsel, these decisions do not show E that the judgment in an election petition could be treated as a judgment in rem. Obviously, the whole of the constituency concerned is interested in the outcome of an election petition, since it either affects the choice they have already made, or their right to have the freedom of a fresh choice. But since a challenge to an election petition is only a statutory challenge under the F Representation of the People Act and since the acceptance of the challenge or the rejection of it in a given case would be based on facts and law available therein, and since an adjudication therein is not one which comes directly within the purview of Section 41 of the Act, the same could not be treated as a judgment in rem. In fact, if it were a judgment in rem, the ratio of the decision of this Court in *C.M. Arumugam* v. *S. Rajgopal and Ors.*, [1976] 1 G SCC 863 earlier referred to, would not have been rendered, since the adjudication in the earlier election petition would have barred the consideration of the question even if it be based on additional facts. We, therefore, overrule the argument that the judgment in E.P. 13 of 1983, should be held to be a judgment in rem binding on the whole world including the election petitioner H herein, even though he was not a party to the earlier proceeding.

13. The argument that the earlier decision must be treated to be a judicial precedent cannot also be accepted. The decision in the earlier election petition depended upon the pleadings and the evidence adduced in that case and their appreciation. The essential finding was that the election petitioner therein had not established the plea set up by him. It was not a case where a particular document was interpreted in a particular manner by the highest court of the land and the interpretation of the same document was again involved in a subsequent litigation between those who were not parties to the earlier litigation. In *Kharkan and Ors.* v. *State of Uttar Pradesh,* AIR (1965) SC 83 this Court held that an earlier judgment can only be relevant if it fulfills the conditions laid down by the Indian Evidence Act in Sections 40 to 43. The earlier judgment is, no doubt, admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of the evidence. What happened in E.P. 13 of 1983 was that the documentary and oral evidence adduced in that case were appreciated by the High Court and the learned Judge came to the conclusion that the election petitioner had failed to prove that the present appellant did not belong to a Scheduled Tribe. No doubt, at the end of the judgment, there was also a sentence to the effect that the appellant belonged to a Scheduled Tribe. What we intend to point out is that, that appreciation of evidence has no relevance in the present election petition and, in our view, the High Court rightly held that the present election petition has to be tried on the pleadings and the evidence available in this case.

14. Now we will come to the merits of the case. The evidence on the side of the election petitioner consisted of Exhibits A1 to A27 and the oral evidence of PWs 1 to 8. Exhibits C1 to C10 were also cited and marked through CW1. On behalf of the appellant, Exhibits B1 to B5 were marked and RWs1 to 9 were examined. The learned Judge trying the election petition, held rightly that the initial burden was on the election petitioner to substantiate his assertion that the appellant did not belong to a Scheduled Tribe and was not entitled to contest from a constituency reserved for Scheduled Tribes. On the basis of Exhibits A2 to A11 read with Exhibits A23, the oral evidence on the side of election petitioner, the learned Judge held that the burden had shifted to the appellant to show that he belonged to a Scheduled Tribe, namely, the Konda Dora Tribe. The learned Judge noticed that the appellant had not adduced any documentary evidence to establish that he belonged to the Konda Dora Tribe. He held that the Gazetteer and the other historic materials produced by the appellant, did not show that the family of the appellant belonged to the Konda Dora Tribe. The oral evidence on the side

A of the appellant was not sufficient to establish that the appellant belonged to the Konda Dora Tribe. On the other hand, there were a series of documents executed by the members of the family of the appellant and by the appellant containing an assertion that the family was a 'Kshatriya' family and the school leaving certificates of the appellant and that of his paternal cousin, indicated that he and the appellant were 'Kshatriyas' and hence did not B belong to a Scheduled Tribe and since these assertions were admissions in the present case and were not rebutted or shown to be a wrong by the appellant, it must be held that the election petitioner had established that the appellant did not belong to a Scheduled Tribe. The learned Judge, therefore, allowed the election petition and declared the election of the appellant from C the concerned constituency, void.

15. Learned senior counsel for the appellant made a strenuous attempt to contend that the learned Judge of the High Court had wrongly placed the burden of proof in the case. We cannot agree. The trial judge has rightly proceeded on the basis that the initial burden was on the election petitioner D to establish his plea that the appellant did not belong to a Scheduled Tribe. Though in a prior statement, an assertion in one's own interest, may not be evidence, a prior statement, adverse to one's interest would be evidence. In fact, it would be the best evidence the opposite party can rely upon. Therefore, in the present case, where the appellant is pleading that he is a Konda Dora, the statement in the series of documents, pre-constitution and post E constitution, executed by his ancestors and members of his family including himself describing themselves as 'Kshatriyas', would operate as admissions against the interest of the appellant in the present case. These admissions also strengthened the admission of the appellant that in his school leaving certificate also, he is described as a 'Kshatriya' and his paternal uncle's son F is also described as a 'Kshatriya' in his school leaving certificate and that uncle's son was also held to be a 'Kshatriya' on an enquiry made in that behalf. Therefore, in our view, the trial judge was correct in holding that the election petitioner had discharged the initial burden placed on him and the burden shifted to the appellant to establish that he belonged to the 'Konda Dora' Tribe.

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16. Appreciating the evidence on the side of the appellant, the trial judge held that no document has been produced by him to show that the appellant belonged to a Scheduled Tribe or that earlier, their claims have been recognized as a Scheduled Tribe except the judgment in E.P. 13 of 1983. The H trial Judge having taken the view that the judgment in E.P. 13 of 1983 would

not operate as a *res judicata* and could not be taken to be a judgment in rem, proceeded to hold that even though in that case an election petitioner therein had failed to establish that the appellant was not a Konda Dora, in the present case, the available evidence indicated that the family of the appellant did not belong to the Konda Dora Tribe. The trial judge found that the evidence of RWs 1 to 9 was not adequate to establish that the appellant was a Konda Dora. Having gone through the evidence of RWs 1 to 9 we also agree with the trial judge that the evidence of RWs 1 to 9 is totally insufficient to establish that the appellant belonged to the Konda Dora Tribe. On a scrutiny of the evidence of PWs 1 to 8, also, we do not see anything in their evidence that would justify our holding that the appellant has established his claim.

17. In this position, learned counsel for the appellant submitted that the gazetteer and the historical documents produced on the side of the appellant clearly showed that the appellant belonged to the Konda Dora Tribe. We must say that the High Court has considered these materials in detail and has found that even going by those materials the best that could be said on behalf of the appellant was that the family of the appellant, the Marangi family, belonged to Konda Raju caste, but the very material relied by the appellant to show that he belonged to the 'Konda Raju' tribe, also showed that the tribe 'Konda Raju' was different from the tribe 'Konda Dora'. In paragraphs 84 and 85 of his judgment the trial judge has dealt with this aspect. On going through the detailed discussion therein and the materials read out to us by leaned counsel for the appellant, it is not possible to hold that these documents establish that the appellant belonged to the 'Konda Dora' tribe.

18. As against the admissions contained in Exhibits A2 to A11 and the evidence furnished by the other documents produced on behalf of the election petitioner, no positive evidence could be adduced by the appellant to show that he belonged to the Konda Dora Tribe. He relied on a caste certificate issued to him under the Andhra Pradesh (Scheduled Castes Scheduled Tribe and Backward Classes) Regulation of Issue of Community Certificate Act, 1993 in support of his claim. The trial judge found that there was no due enquiry on the application of the appellant for the issue of a caste certificate as prescribed under this Act, and the certificate was issued to him based on a recommendation made the same day as the date of the application, by the concerned authority. On an appreciation of the evidence of CW1 in the light of Ex. C.1 to C.10 the trial judge found that even the application for issuance of the certificate was filled up by the official concerned after obtaining the

A signature of the applicant therein, the appellant, in a blank form and the certificate was issued without following the proper procedure. CW1 in fact confessed in the court that the certificate was issued because he was told that in view of the decision in E.P. 13 of 1983 he was bound to issue the certificate asked for by the appellant. On going through the evidence of CW1 and on scrutinizing Exhibits C1 to C10 and the reasoning adopted by the trial judge, B we are satisfied that the trial judge was fully justified in discarding the caste certificate relied on by the appellant.

19. The evidence of the appellant examined as RW1 clearly shows that the family of the appellant had always considered itself to belong to a C superior strata of society and as a ruling or satrap family. The title of 'Satrucharala', conqueror of enemies, had been conferred on an ancestor of the appellant and the members of the family were using that title. The evidence of PWs 1 to 8 and RWs 1 to 9 shows that most of the practices followed by the family differed from that of 'Konda Doras'. In fact, learned counsel for the appellant could only emphasis that there was no evidence to show that D 'Homa' and 'Saptapadi', the essentials of a 'Kshatriya' marriage were being performed in the marriages in the family. But learned counsel could not contradict that the male members were having thread ceremony. No doubt, mere assertion or a claim by a tribal that he is a 'Kshatriya' cannot make him a 'Kshatriya'. But what is involved here is a series of assertions which are E admissions in terms of the Evidence Act and other evidence that tribal customs differed from the practices of the family of the appellant. The position in *V.V. Giri* v. *Dippala Suri Dora and Ors.*, [1960] 1 SCR 426 differs, in that, in that case, Dora was admitted to be originally a tribal and what was asserted was that subsequently, he had become a 'Kshatriya', having adopted their customs and practices. That is not the case here and there is no admission F in this case that the family of the appellant originally was tribal. Evidence in the case on hand also indicates that the family of the appellant had marital relationship mostly with the Zamindar families outside the present State of Andhra Pradesh and their way of life was also not that of the tribals. No positive acceptable evidence could also be adduced to show that the family entered into marital relationship with 'Konda Dora' tribals. The evidence also G shows that the family of the appellant did not have any close relationship with the Konda Doras of the locality. The admissions of RW.1 show that quite a few of the customs the family was following had no relations to the customs generally followed by the Konda Dora Tribe and some of the practices clearly differed from that of the tribe and was more consistent with the practices H followed by Kshatriya and higher castes. The trial judge has carefully analysed

these aspects and we do not see any justification in differing from his appreciation of the oral as well as documentary evidence in the case. A

20. In a sense, the appellant wants the best of two worlds. Though, he would like to contest from a constituency reserved for the Scheduled Tribes, he would want to lead the life of a forward caste and have the trappings of that caste. The purpose of reservation of constituencies is to ensure representation in the legislatures to such tribes and castes who are deemed to require special efforts for their upliftment. The person seeking election from such constituencies must be the true representative of that tribe. The evidence shows that the appellant could not be considered to be a true representative of a tribe included in the Presidential Order deserving special protection. B C

21. What we are left with is the high evidentiary value that may be attached to the judgment in E.P. 13 of 1983. It is true that some of the documents produced in the present election petition, were also available before the judge assigned to try the previous case. But ultimately the conclusion in the previous case was based on an appreciation of the evidence adduced in that case. Some evidence may be common. But, since it is not possible to accept the contention that the earlier judgment is a judgment in rem or that it would operate as *res judicata*, we can at best proceed on the basis that on an earlier occasion, it was adjudicated that he was not shown to be disqualified to contest from a reserved constituency. But as emphasized by learned counsel for the election petitioner-respondent, that was a conclusion arrived at based on an appreciation of the evidence in that case and once that judgment could not be held to be a judgment in rem binding on the whole world or a judgment that bars the trial of the issue in the present election petition or would operate as *res judicata* between the parties, that judgment by itself is not sufficient to rebut the evidence available in the present case based on which the finding has been rendered. D E F

22. Thus, on the whole, on a re-appreciation of the pleadings and the evidence in the case, in the light of the law governing the matter, we are satisfied that the decision of the trial court does not call for any interference. We, therefore, confirm the decision of the trial court and dismiss this appeal with costs. G

V.M. Appeal dismissed.