PETITIONER:
DARYAO AND OTHERS

Vs.

RESPONDENT:
THE STATE OF U. P. AND OTHERS(and Connected Petitions)

DATE OF JUDGMENT:
27/03/1961

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
SARKAR, A.K.
WANCHOO, K.N.
GUPTA, K.C. DAS
AYYANGAR, N. RAJAGOPALA

CITATION:
1961 AIR 1457 1962 SCR (1) 574
CITATOR INFO :

RF	1962 SC1621	(15,75,78,111,132)
R	1963 SC 996	(2)
R	1964 SC 782	(4,5)
D	1964 SC1013	(17)
RF	1965 SC1150	(7)
R	1965 SC1153	(5,27,53)
RF	1967 SC 1	(59)
RF	1967 SC1335	(4)
E	1968 SC 985	(4)
E	1968 SC1196	(4,5,6,7)
R	1970 SC 898	(3,4,36,37A,54,57)
RF	1974 SC 532	(11)
R	1975 SC 202	(16)
RF	1977 SC1680	(7)
R	1978 SC1283	(10)
F	1979 SC1328	(9,10)
RF	1981 SC 728	(5,7,8,9,10)
RF	1981 SC 960	(13)
RF	1981 SC2198	(13,33)
E&D	1987 SC 88	(8)
F	1987 SC 522	(24)
R	1988 SC1531	(126)
R	1990 SC 53	(15)
R	1990 SC1607	(35)
RF	1991 SC1309	(3)

ACT:
Fundamental Right-Res judicata-Dismissal of writ Petition by High Court-If and when bar to petition in Supreme Court-Constitution of India, Arts. 32, 226.

HEADNOTE:
Where the High Court dismisses a writ petition under Art. 226 of the Constitution after hearing the matter on the merits on the ground that no fundamental right was proved or contravened or that its contravention was constitutionally justified, a subsequent petition to the Supreme Court under Art. 32 of the Constitution on the same facts and for the same reliefs filed by the same party would be barred by the

general principle of res judicata.
There is no substance in the plea that the judgment of the High Court cannot be treated as res judicata because it cannot
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under Art. 226 entertain a petition under Art. 32 of the Constitution.
Citizens have ordinarily the right to invoke Art. 32 for appropriate relief if their fundamental rights are illegally on unconstitutionally violated and it is incorrect to say that Art. 32 merely gives this Court a discretionary power as Art. 226 does to the High Court.
Basheshar Noth v. Commissioner of Income-tax, Delhi and Rajasthan, [1959] SUPP. 1 S.C.R. 528, referred to.
Laxmanappa Hanumantappa jamkhandi v. The Union of India, [1955] 1 S.C.R. 769, and Diwan Bahadur Seth Gopal Das Mohla v. The Union of India, [1955] 1 S.C.R. 773, considered.
The right given to the citizens to move this Court under Art. 32 is itself a fundamental right and cannot be circumscribed or curtailed except as provided by the Constitution. The expression "appropriate proceedings" in Art. 32,(1), properly construed, must mean such proceedings as may be appropriate to the nature of the order, direction or writ the petitioner seeks from this Court and not appropriate to the nature of the case.
Romesh Thappar v. The State of Madras, [1950] S.C.R. 594, referred to,
Even so the general principle of res judicata, which has it.; foundation on considerations of public policy, namely, (1) that binding decisions of courts of competent jurisdiction should be final and (2) that no person should be made to face the same kind of litigation twice over, is not a mere technical rule that cannot be applied to petitions under Art. 32 of the Constitution,
Duchess of Kingston’s case, 2 Smith Lead. Cas. 13th E-d. 644, referred to.
The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Art. 226 passed after a hearing on merits as aforesaid must bind the parties till set aside in appeal as provided by the Constitution and cannot be circumvented by a petition under Art. 32.
Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha, [1961] 1 S.C.R. 96 and Raj Lakshmi Dasi v. Banamali Sen, [1053] S.C.R. 154, relied on.
Janardan Reddy v. The State of Hyderabad, [1951] S.C.R. 344, Syed Qasion Rezvi v. The State of Hyderabad, [1953] S.C.R. 589 and Bhagubhai Dullabhabhai Bhandari v. The District magistrate, Thana, [1956] S.C.R. 533, referred to.
It was not correct to say that since remedies under Art. 226 and Art. 32 were in the nature of alternate remedies the adoption of one could not bar the adoption of the other,
Mussammat Gulab Koer v. Badshah Bahadur, (1909) 13 1197 held inapplicable.
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Consequently, (1) where the petition under Art. 226 is considered on the merits as a contested matter and dismissed by the High Court, the decision pronounced is binding on the parties unless modified or reversed by appeal or other appropriate proceedings under the Constitution;
(2) Where the petition under Art. 226 is dismissed I not on the merits but because of laches of the party applying for the writ or because an alternative remedy is available to

him, such dismissal is no bar to a subsequent petition under Art. 32 except in cases where the facts found by the High Court may themselves be relevant even under Art. 32;
(3) Where the writ petition is dismissed in limine and an order is pronounced, whether or not such dismissal is a bar must depend on the nature of the order;
(4) if the petition is dismissed in limine without a speaking order, or as withdrawn, there can be no bar of res judicata.

JUDGMENT:
ORIGINAL JURISDICTION: Writ Petitions Nos. 66 and 67 of 1956, 8 of 1960, 77 of 1957, 15 of 1957 and 5 of 1958.
Writ Petitions under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.
Naunit Lal, for the petitioner in W. Ps. Nos. 66 and 67 of 1956.
C. P. Lal, for respondent No. 1 in W. Ps. Nos. 66 and 67 of 1956.
Bhawani Lal and P. C. Agarwal, for respondents Nos. 3a and 4 in W. Ps. Nos. 66 and 67 of 1956.
C. B. Agarwala and K. P. Gupta, for the petitioner in W. P. No. 8 of 1960.
Veda Vayasa and C. P. Lal, for respondent in W. P. No. 8 of 1960.
Pritam Singh Safeer, for the petitioner in W. P. No. 77 of 1957.
S. M. Sikri, Advocate-General, Punjab, N. S. Bindra and D. Gupta, for respondent No. 1 in W. P. No. 77 of 1957.
Govind Saran Singh, for respondent. No. 2 in W. P. No. 77 of 1957.
A. N. Sinha and Raghunath, for petitioner in W. P. No. 15 of 1957.
C. K. Daphtary, Solicitor-General for India, N. S Bindra and R. H. Dhebar, for respondent in W.P. No 15 of 1957.
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B. R. L. lyengar, for the petitioner in W. P. No. 5 of 1958.
C. K. Daphtary, Solicitor-General for India, R. Gana- Dar pathy Iyer and R. H. Dhebar, for the respondent in W. P. No. 5 of 1958.
1961. March 27. The Judgment of the Court was delivered by GAJENDRAGADKAR, J.-These six writ petitions filed Gaje, under Art. 32 of the Constitution have been placed before the Court for final disposal in a group because though they arise between separate parties and are unconnected with each other a common question of law arises in all of them. The opponents in all these petitions have raised a preliminary objection against the maintainability of the writ petitions on the ground that in each case the petitioners had moved the High Court for a similar writ under Art. 226 and the High Court has rejected the said petitions. The argument is that the dismissal of a writ petition filed by a party for obtaining an appropriate writ creates a bar of res judicata against a similar petition filed in this Court under Art. 32 on the same or similar facts and praying for the same or similar writ. The question as to whether such a bar of res judicata can be pleaded against a petition filed in this Court under Art. 32 has been adverted to in some of the reported decisions of this Court but it has not so far been fully considered or finally decided; and that is the preliminary question for the decision of which the six writ petitions have been placed together for disposal in a group.

In dealing with this group we will set out the facts which give rise to Writ Petition No. 66 of 1956 and decide the general point raised for our decision. Our decision in this writ petition will govern the other writ petitions as well. Petition No. 66 of 1956 alleges that for the last fifty years the petitioners and their ancestors have been the tenants of the land described in Annexure A attached to the petition and that respondents 3 to 5 are the proprietors of the said land. Owing to communal
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disturbances in the Western District of Uttar Pradesh in 1947, the petitioners had to leave their village in July, 1947; later in November, 1947, they returned but they found that during their temporary absence respondents 3 to 5 had entered in unlawful possession of the said land. Since the said respondents refused to deliver possession of the land to the petitioners the petitioners had to file suits for ejectment under s. 180 of the U. P. Tenancy Act, 1939. These suits were filed in June, 1948. In the trial court the petitioners succeeded and a decree was passed in their favour. The said decree. was confirmed in appeal which was taken by respondents 3 to 5 before the learned Additional Commissioner. In pursuance of the appellate decree the petitioners obtained possession of the land through Court. Respondents 3 to 5 then preferred a second appeal before the Board of Revenue under s. 267 of the U. P. Tenancy Act, 1939. On March 29, 1954, the Board allowed the appeal preferred by respondents 3 to 5 and dismissed the petitioner's suit with respect to the land described in Annexure A, whereas the said respondents' appeal with regard to other lands were dismissed. The decision of the Board was based on the ground that by virtue of the U. P. Zamindary Abolition and Land Reforms (Amendment) Act XVI of 1953 respondents 3 to 5 had become entitled to the possession of the land.

Aggrieved by this decision the petitioners moved the High Court at Allahabad under Art. 226 of the Constitution for the issue of a writ of certiorari to quash the said judgment. Before the said petition was filed a Full Bench of the Allahabad High Court had already interpreted s. 20 of the U. P. Land Reforms Act as amended by Act XVI of 1953. The effect of the said decision was plainly against the petitioners' contentions, and so the learned advocate who appeared for the petitioners had no alternative but not to press the petition before the High Court. In consequence the said petition was dismissed on March 29, 1955. It appears that s. 20 has again been amended by s. 4 of Act XX of 1954. It is under these
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circumstances that the petitioners have filed the present petition under Art. 32 on March 14, 1956. It is plain that at the time when the present petition has been filed the period of limitation prescribed for an appeal under Art. 136 against the dismissal of the petitioners' petition before the- Allahabad High Court had already expired. It is also clear that the grounds of attack against the decision of the Board which the petitioners seek to raise by their present petition are exactly the same as the grounds which they had raised before the Allahabad High Court; and so it is urged by the respondents that the present petition is barred by res judicata.

Mr. Agarwala who addressed the principal arguments on behalf of the petitioners in this group contends that the 'principle of res judicata which is no more than a technical rule similar

to the rule of estoppel cannot be pleaded against a petition which seeks to enforce the fundamental rights guaranteed by the Constitution. He argues that the right to move the Supreme Court for the enforcement of the fundamental rights which is guaranteed by Art. 32(1) is itself a fundamental right and it would be singularly inappropriate to whittle down the said fundamental right by putting it in the straight jacket of the technical rule of res judicata. On the other hand it is urged by the learned Advocate-General of Punjab, who led the respondents, that Art. 32(1) does not guarantee to every citizen the right to make a petition under the said article but it merely gives him the right to move this Court by appropriate proceedings, and he contends that the appropriate proceedings in cases like the present would be proceedings by way of an application for special leave under Art. 136 or by way of appeal under the appropriate article of the Constitution. It is also suggested that the right to move which is guaranteed by Art. 32(1) does not impose on this Court an obligation to grant the relief, because as in the case of Art. 226 so in the case of Art. 32 also the granting of leave is discretionary.

In support of the argument that it is in the discretion of this Court to grant an appropriate relief or refuse to do so reliance has been placed on the observations

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made in two reported decisions of this Court. In Laxmanappa Hanumantappa Jamkhandi v. The Union of India & Another (1), this Court held that as there is a special provision in Art. 265 of the Constitution that no tax shall be levied or collected except by authority of law, cl. 1 of Art. 31 must be regarded as concerned with deprivation of property otherwise than by imposition or collection of tax and as the right conferred by Art. 265 is not a fundamental right conferred by Part III of the Constitution, it cannot be enforced under Art. 32. In other words, the decision was that the petition filed before this Court under Art. 32 was not maintainable; but Mahajan, C.J.., Who spoke for the Court, proceeded to observer that "even otherwise in 'the peculiar circumstances that have arisen it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court". The learned Chief Justice has also added that when this position was put to Mr. Sen he fairly and rightly conceded that it was not possible for him to combat this position. 'To the same effect are the observations made by the same learned Chief Justice in Dewan Bahadur Seth Gopal Das Mohta v. The Union of India & Another (2). It will, however, be noticed that the observations made in both the cases are obiter, and, with respect, it would be difficult to treat them as a decision on the question that the issue of an appropriate writ tinder Art. 32 is a matter of discretion, and that even if the petitioner proves his fundamental rights and their unconstitutional infringement this Court nevertheless can refused. to issue an appropriate writ in his favour Besides, the subsequent decision of this Court in Basheshar Nath v. The Commissioner of Income-tax, Delhi and, Rajasthan (3) tender to show that if a petitioner makes out a case of illegal contravention of his fundamental rights he may be entitled to claim an appropriate relief and a plea of waiver cannot be raised against his claim. It is true that the question of res judicata did not fall to be considered in that case but the tenor of all the judgments, which no doubt disclose a

(1) [1955] 1 S.C.R. 760, 772, 773- (2) [1955] 1 S.C.R. 773,

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(3) [1959] SUPP. 1 S.C.R. 528
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difference in approach, seems to emphasise the basic importance of the fundamental rights guaranteed by, the Constitution and the effect of the decision appears to be that the citizens are ordinarily entitled to appropriate relief under Art. 32 once it is shown that their fundamental rights have been illegally or unconstitutionally violated. Therefore, we are not impressed by the argument that we should deal with the question of the applicability of the rule of res judicata to a petition under Art. 32 on the basis that like Art. 226 Art. 32 itself gives merely a discretionary power to the Court to grant an appropriate relief.
The argument that Art. 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case seems to us to be unsound. It is urged that in a case where the petitioner has moved the High Court by a writ petition under Art. 226 all that he is entitled to do under Art. 32(1) is to move this Court by an application for special leave under Art. 136; that, it is contended, is the effect of the expression "appropriate proceedings" used in Art. 32(1). In our opinion, on a fair construction of Art. 32(1) the expression "appropriate proceedings" has reference, to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by appropriate proceedings. That is why we must proceed to deal with the question of res judicata on the basis that a fundamental right has been guaranteed to the citizen to move this Court by an original petition wherever his grievance is that his fundamental rights have been illegally contravened. There can be no doubt that the fundamental right guaranteed by Art. 32(1) is a very important safeguard for the protection of the fundamental rights of the citizen, and as a result of the said guarantee this
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Court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in Romesh Thappar v. The State of Madras (1), in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Art. 32 on the ground that as a matter of orderly procedure the petitioner should first have resorted to the High Court under Art. 226, and observed that "this Court in thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of Ruch rights". Thus the right given to the citizen to move

this Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of res judicata this aspect of the matter had no doubt to be borne in mind.

But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt, some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is

(1) [1950] S.C.R. 594.

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founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts' of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32.

In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William de Grey, (afterwards Lord Walsingham) in the leading Duchess of King8ton's case (1). Said Sir William de Grey, (afterwards Lord Walsingham) "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose". As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation" (2). Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause" (p. 187, paragraph 362). "Res judicata", it is observed in Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds embodied in various maxims of the common law; the one,

(1) 2 Smith Lead. Cas. 13th Ed., pp. 644, 645.

(2) Halsbury's Laws of England, 3rd, Ed., Vol. 15, para. 357, P. 185.

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public policy and necessity, which makes it to the, interest of the State that there should be an end to s litigation interest republican ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for

the same cause-nemo debet bis vexari pro eadem causa" (1). In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel. "Estoppel rests on equity able principles and res judicata rests on maxims which are taken from the Roman Law" (2). Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted.

The same question can be considered from another point of view. If a judgment has been pronounced by a court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law. Therefore, if a judgment has been pronounced by the High Court in a writ petition filed by a party rejecting his prayer for the issue of an appropriate writ on the ground either that he had no fundamental right as pleaded by him or there has been no contravention of the right proved or that the contravention is justified by the Constitution itself, it must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself. The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observ-ed "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences"(3). Similar is the statement of the law in Corpus Juris: "the doctrine of estoppel by judgment does not rest on any superior authority of the court rendering the judgment, and a judgment of one court is a bar to an

(1) Corpus juris, VOl. 34, P 743- (2) Ibid. P. 745-

(3) Halsbury's Laws of England, 3rd Ed., VOl. 22, P- 780, paragraph 1660.

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action between the same parties for the same cause in the same court or in another court, whether the latter has concurrent or other jurisdiction. This rule is subject to the Limitation that the judgment in the former action must have been rendered by a court or tribunal of competent jurisdiction" (1). "It is, however' essential that there should have been a judicial determination of rights in controversy with a final decision thereon" In other words, an original petition for a writ under Art. 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Art. 226. There can be little doubt that the jurisdiction of this Court to entertain applications under Art. 32 which are original cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of High Courts pronounced in writ petitions under Art. 226. Thus, on general considerations of public policy there seems to be no reason why the rule of res judicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Art,. 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a

decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained.

This Court had occasion to consider the application of the rule of res judicata to a petition filed under Art. 32 in Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha (3). In that case the petitioner had moved this

(1) Corpus juris Secundum, VOI. 50 (judgments), p. 603.
(2) Ibid. p. 608.
(3) [1961] 1 S.C.R. 96.

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Court under Art. 32 and claimed an appropriate writ against the Chairman and the Members of the Committee of Privileges of the State Legislative Assembly. The said petition was dismissed. Subsequently he filed another petition substantially for the same relief and substantially on the same allegations. One of the points which then arose for the decision of this Court was- whether the second petition was competent, and this Court held that it was not because of the rule of res judicata. It is true that the earlier decision on which res judicata was pleaded was a decision of this Court in a petition filed under Art. 32 and in that sense the background of the dispute, was different, because the judgment on which the plea was based was a judgment of this Court and not of any High Court. Even so, this decision affords assistance in determining the point before us. In upholding the plea of res judicata this Court observed that the question determined by the previous decision of this Court cannot be reopened in the present case and must govern the rights and obligations of the parties which are substantially the same. In support of this decision Sinha, C. J., who spoke for the Court, referred to the earlier decision of this Court in Raj Lakshmi Dasi v. Banamali Sen (1) and observed that the principle underlying res judicata is applicable in respect of a question which hag been raised and decided after full contest, even though the first Tribunal which decided the matter may have no jurisdiction to try the subsequent suit and even though the subject-matter of the dispute was not exactly the same in the two proceedings. We may add incidentally that the Court which tried the earlier proceedings in the case of Raj Lakshmi Dasi (1) was a Court of exclusive jurisdiction. Thus this decision establishes the principle that the rule of res judicata can be invoked even against a petition filed under Art. 32.

We may at this stage refer to some of the earlier decisions of this Court where the presedt problem was posed but not finally or definitely answered. In Janardan Reddy v. The State of Hyderabad (2), it

(1) [1953] S.C.R. 154
(2) [1951] S.C.R. 344, 370-

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appeared that against the decision of the High Court a petition for specialleave had been filed but the, same had been, rejectedand this was followed by petitions under Art. 32.These petitions were in fact entertained though on the merits they were dismissed, and in doing so it was observed by Fazl Ali, J., who delivered the judgment of the Court, that "it may, however, be observed that in this case we have not considered it necessary to decide whether an application under Art. 32 is maintainable after a similar

application under Art. 226 is dismissed by the High Court, and we reserve our opinion on that question". To the same effect are the observations made by Mukherjea, J., as he then was, in Syed Qasim Razvi v. The State of Hyderabad (1). On the other hand, in Bhagubhai Dullabhabhai Bhandari v. The District Magistrate, Thana (2) the decision of the High Court was treated as binding between the parties when it was observed by reference to the said proceedings that "but that is a closed chapter so far as the Courts including this Court also are concerned inasmuch as the petitioner's conviction stands confirmed as a result of the refusal of this Court to grant him special leave to appeal from the judgment of the Bombay High Court". In other words, these observations seem to suggest that the majority view was that if an order of conviction and sentence passed by the High Court would be binding on the convicted person and cannot be assailed subsequently by him in a proceeding taken under Art. 32 when it appeared that this Court had refused special leave to the said convicted person to appeal against the said order of conviction.

The next question to consider is whether it makes any difference to the application of this rule that the decision on which the plea of res judicata is raised is a decision not of this Court but of a High Court exercising its jurisdiction under Art. 226. The argument is that one of the essential requirements of s. 11 of the Code of Civil, Procedure is that the Court which tries the first suit or proceeding should be competent

(1) [1953] S.C.R. 589-

(2) [1956] S.C.R. 533.

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to try the second suit or proceeding, and since the High Court cannot, entertain an application under Art. 32 its decision cannot be treated as res judicata for the purpose of such a petition. It is doubtful if the technical requirement prescribed by s. 11 as to the Competence of the first Court to try the subsequent suit is an essential part of the general rule of res judicata; but assuming that it is, in substance even the said test is satisfied because the jurisdiction of the High Court in dealing with a writ petition filed under Art,. 226 is substantially the same as the jurisdiction of this Court in entertaining an application tinder Art. 32. The scope of the writs, orders or directions which the High Court can issue in appropriate cases under Art. 226 is concurrent with the scope of similar writs, orders or directions which may be issued by this Court under Art. 32. The cause of action for the two applications would be the same. It is the assertion of the existence of a fundamental right and its illegal contravention in both cases and the relief claimed in both the cases is also of the same character. Article 226 confers jurisdiction oil the High Court to entertain a suitable writ petition, whereas Art. 32 provides for moving this Court for a similar writ petition for the same purpose. Therefore, the argument that a petition under Art. 32 cannot be entertained by a High Court under Art. 226 is without any substance; and so the plea that the judgment of the High Court cannot be treated as res judicata on the ground that it cannot entertain a petition under Art. 32 must be rejected.

It is, however, necessary to add that in exercising its jurisdiction under Art. 226 the High Court may sometimes refuse to issue an appropriate writ or order on the ground that the party applying for the writ is guilty of laches and in that sense the issue of a high prerogative writ may

reasonably be treated as a matter of discretion. On the other hand, the right granted to a citizen to move this Court by appropriate proceedings under Art. 32(1) being itself a fundamental right this Court ordinarily may have to issue an appropriate writ or order provided it is shown that
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the petitioner has a fundamental right which has been illegally or unconstitutionally contravened. It is not unlikely that if a petition is filed even under Art. 32 after a long lapse of time, considerations ma arise whether rights in favour of third parties which may, have arisen in the meanwhile could be allowed to be' affected, and in such a case the effect of laches on the, part of the petitioner or of his acquirence may have to be considered; but, ordinarily if a petitioner makes out a case for the issue of an appropriate writ or' order he, would. be entitled to have such a writ or, order under Art. 32 and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Art. 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if -the High, Court has refused to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleaded in support of the bar of res judicata. if, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Art. 32.
In this connection reliance has been placed on the fact that in England habeas corpus petitions can be filed one after the other and the dismissal of one habeas corpus petition is never held to preclude the making of a subsequent petition, for the same reason. In our opinion, there is no analogy between the petition for habeas corpus: and petitions filed either under Art. 226 or under Art. 32. For historical reasons the writ for habeas corpus is treated as standing in -a category by itself; but, even with regard to a habeas corpus petition it has now been- held in England in Re, Hastings (No. 2) (1) that "an applicant for a writ
(1) (1958) 3 All E.R. Q.B.D. 625.
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of habeas corpus in a criminal matter who has once been heard by a Divisional Court of the Queen's Bench Division is not entitled to be heard a second time by another Divisional Court in the same Division, since a decision of a Divisional Court of the Queen's Bench Division is equivalent to the decision of all the judges of the Division, just as the decision of one of the old common law courts sitting in bank was the equivalent of the decision of all the judges of that Court." Lord Parker, C. J., who delivered the judgment of the Court, has elaborately examined the historical genesis of the writ, several dicta pronounced by different judges in dealing with successive writ petitions, and has concluded that "the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court" (p. 633), so that even in regard to a habeas corpus petition it is now settled in England that an applicant cannot move one Divisional Court of the Queen's Bench Division after ano-ther. The-said decision has been subsequently applied in Re

Hastings (No. 3) (1) to a writ petition filed for habeas corpus in a, Divisional Court of tile Chancery Division. In England, technically an order passed on a petition for habeas corpus is not regarded as a judgment and that places the petitions for habeas corpus in a class by themselves. Therefore we do not think that the English analogy of several habeas corpus applications can assist the petitioners in the present case when they seek to resist the application of res judicata to petitions filed under Art. 32. Before we part with the topic we would, however, like to add that we propose to express no opinion on the question as to whether repeated applications for habeas corpus would be competent under our Constitution. That is a matter with which we are not concerned in the present proceedings.

There is one more argument Which still remains to be considered. It is urged that the remedies available to the petitioners to move the High Court under Art. 226 and this Court under Art. 32 are

(1) [1959] 1 AR E.R. Ch.D. 698.

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alternate remedies and so the adoption of one remedy cannot bar the adoption of the other. These remedies are not exclusive but are cumulative and so no bar of res judicata can be pleaded when a party who has filed a petition under Art. 226 seeks to invoke the jurisdiction of this Court under Art. 32. In support of this contention reliance has been placed on the decision of the Calcutta High Court in Mussammat Gulab Koer v. Badshah Bahadur (1). In that case a party who had unsuccessfully sought for the review of a consent order on the ground of fraud brought a suit for a similar relief and was met by a plea of res judicata. This plea was rejected by the Court on the ground that the two remedies though co-existing were not inconsistent so that when a party aggrieved has had recourse first to one remedy it cannot be precluded from subsequently taking recourse to the other. In fact the judgment shows that the Court took the view that an application for review was in the circumstances ail inappropriate remedy and that the only remedy available to the party was that of a suit. In dealing with the question of res judicata the Court examined the special features and conditions attaching to the application for review, the provisions with regard to the finality of the orders passed in such review proceedings and the limited nature of the right to appeal provided against such orders. In the result the Court held that the two remedies cannot be regarded as parallel and equally efficacious and so no question of election of remedies arose in those cases. We do not think that this decision can be read as laying down a general proposition of law that even in regard to alternate remedies if a party takes recourse to one remedy and a contest arising therefrom is tried by a court of competent jurisdiction and all points of controversy are settled the intervention of the decision of the court would make no difference at all. In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect. Thus considered there can be no doubt that if a writ petition filed by a party has been dismissed on the merits

(1)(1909) 1 3 C.W.N. 1197.

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by the High Court the,, judgment thus pronounced is binding between the parties and it cannot be circumvented or by-passed by his taking recourse to Art. 32 of the Constitution. Therefore, we are not satisfied that the

ground of alternative remedies is well founded.

We, must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as &-contested matter, and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide

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what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar The petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent Gaj petition under Art. 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res jadirata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us.

In Petition No. 66 of 1956 we have already seen that the petition filed in the High Court was on the same allegations and was for the same relief The petitioners had moved the High Court to obtain a writ of certiorari to quash the decision of the Revenue Board against them, and when the matter was argued before the High Court in view of the previous decisions of the High Court their learned counsel did not press the petition. In other words, the points of law raised by the petition were dismissed on the merits. That being so, it is a clear case where the writ petition has been dismissed on the merits, and so the dismissal of the writ petition creates a bar against the competence of the present petition under Art. 32. The position with regard to the companion petition, No. 67 of 1956, is exactly the same. In the result these two petitions fail and are dismissed; there would be no order as to costs.

In Writ Petition No. 8 of 1960 the position is substantially different. The previous petition for a writ filed by the petitioner (No. 68 of 1952) in the Allahabad High Court was withdrawn by his learned counsel and the High Court therefore dismissed the said petition with the express observation that the merits had not been considered by the High Court in dismissing it and so no order is to costs was passed. This order the writ petition withdrawn which was
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passed on February 3, 1955, cannot therefore support the plea of res judicata against the present petition. It appears that a co-lessee of the petitioner had also filed a similar Writ Petition, No. 299 of 1958. On this writ petition the High Court no doubt made certain observations and findings but in the end it came to the conclusion that a writ petition was not the proper proceeding for deciding such old disputes about title and so it left the petitioner to obtain a declaration about title from a competent civil or revenue court in a regular suit. Thus it would be clear that the dismissal of this writ petition (on 17-3-1958) also cannot constitute a bar against the competence of the present writ petition. The preliminary objection raised against this writ petition is therefore rejected and it is ordered that this writ petition be set down for hearing before a Constitution Bench.

In Petition No. 77 of 1957 the petitioner has stated in paragraph 11 of his petition that he had moved the High Court of Punjab by a writ petition under Arts. 226 and 227 but the same was dismissed in limine on July 14, 1957. It is not clear from this statement whether any speaking order was passed on the petition or not. It appears that the petitioner further filed an application for review of the said order under O. 47, r. 1 read with s. 151 of the Code but the said application was also heard and dismissed in limine on March 1, 1957. It is also not clear whether a speaking order was passed on this application or not. That is why, on the material as it stands it is not possible for us to deal with the merits of the preliminary objection. We' would accordingly direct that the petitioner should file the two orders of dismissal passed by the Punjab High Court. After the said orders are filed this petition may be placed for hearing before the Constitution Bench and the question of res judicata may be, considered in the light of our decision in the present group.

In Petition No. 15 of 1957 initially we had a bare recital that the writ petition made by the petitioner in the Punjab High Court had been dismissed. Subsequently, however, the said order itself has been
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produced and it appears that it gives no reasons for dis-missal. Accordingly we must hold that the said order does not create a bar of res judicata and so the petition will have to be set down for hearing on the merits.

In Writ Petition No. 5 of 1958 the position is clear. The petitioner had moved the Bombay High Court for an appropriate writ challenging the order of the Collector in respect of the land in question. The contentions raised by the petitioner were examined in the light of the rejoinder made by the Collector and substantially the petitioner's case was rejected. It was held by the High Court that the power conferred on the State Government by s. 5(3) of the impugned Act, the Bombay Service Inam (Useful to the Community) Abolition Act, 1953, was not arbitrary nor was its exercise in this particular case unreasonable, or

arbitrary. The High Court also held that the land of the petitioner attracted the relevant provisions of the said impugned statute. Mr. Ayyangar 'for the petitioner realised the difficulties in his way, and so he attempted to argue that the contentions which he wanted to raise in his present petition are put in a different form, and in support of this argument he has invited am attention to grounds 8 and 10 framed by him in paragraph X of the petition. We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same. Therefore the decision of the High Court pronounced by it on the merits of the petitioner's writ petition under Art. 226 is a bar to the making of the present petition, under Art. 32. In the result this writ petition fails and is dismissed. There would be no order as to costs.

Petition dismissed.

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