

(1986) 01 KL CK 0001
In the High Court Of Kerala
Case No : W.A. No. 159 of 1980

B. Thankappan

APPELLANT

Vs

Trivandrum Dist. Co-operative Bank Ltd., Trivandrum and
Others

RESPONDENT

Date of Decision : 06-01-1986

Acts Referred:

Citation : AIR 1987 Ker 1 : (1987) 1 ILR (Ker) 20

Hon'ble Judges : V.S. Malimath, C.J;K. Sukumaran, J

Bench : Division Bench

Advocate : Pirappancode V. Sreedharan Nair, S.P. Aravindakshan Pilla and P.S. Nandan, for the Appellant; P. Sukumaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

Sukumaran, J.—An important question concerning the Construction of Section 82 of the Co-operative Societies Act, 1969 (hereinafter referred to as "the Act") arises for decision in this writ appeal. The question is: When could it be said that an award of an Arbitrator had been made the subject-matter of an appeal before the Co-operative Appellate Tribunal?

2. The appellant-writ petitioner was party to a dispute before the Arbitrator appointed under the Act. The decision turned out to be adverse to him. Aggrieved by the decision, he filed an appeal That was, however, beyond the prescribed time. A petition for condonation of delay in filing of the appeal was duly considered by the appellate Tribunal The intrinsic contradictions in the application were such that the Tribunal was not convinced of any sufficient cause for the delay in filing the appeal. That circumstance, however, did not dash the hopes of the appellant. He attempted to salvage his cause -- successfully as it then turned out -- by a revision u/s 84. He was, initially, confronted with a preliminary plea that the revision was not maintainable. The Tribunal, however, overruled it. Later it went into the merits, and decided the matter to the substantial satisfaction of the appellant. It followed, as a corollary, that the

Society was, in equal measure, unsatisfied with the revisional decision of the Tribunal. The two orders of the Tribunal, the preliminary one sustaining the maintainability of the revision, and the later one on merits, were both challenged before this Court.

3. The learned single Judge took the view that the revision was not maintainable. Consequently the revisional orders of the Tribunal were quashed. It is this judgment of the learned single Judge that is attacked in the appeal.

4. Having regard to the limited nature of the issue involved, it is only necessary to advert to such of those provisions of the Act which have a bearing on and relevance to the issue under consideration.

5. As is well-known, disputes between the members of the Society, or between a member and the society, and the like, are statutorily consigned for adjudication by an Arbitrator. That decision, however, is not the final one. Appeals are provided against the decision, some appeals to the Government and some to the Tribunal. Even as regards the remedy before a Tribunal, a dichotomy is maintained. The Tribunal is also invested with a power of review, subject to the conditions contained in that behalf. Provisions with which we are directly concerned are Sections 82 and 84. The former provides for an appeal to the Tribunal. A time limit of sixty days is prescribed for such appeal. Rule 106 provides for rejection of an appeal in respect of which defects pointed out remain uncured. There is no specific provision for condoning the delay in the filing of the appeal. As regards a revision before the same Tribunal, situations are somewhat different. No time limit is prescribed in filing a revision. That, however, does not mean that it is not conditional upon other factors. Those factors are made mention of in Sub-section (b) of Section 84. That sub-section reads :

"Provided that the Tribunal shall not take any action under this section if-

XX XX XX XX (b) the decision or order has been made the subject matter of an appeal:"

An examination of these provisions would reveal that the legislature had conferred two remedies on a person aggrieved by the award of an Arbitrator, the choice of which was entirely dependant upon the preference of the party. The underlying idea of conferring the appellate and revisional power in the same authority, is not easily understandable. Similarly, a fixation of an inflexible time limit for preferring an appeal on the one hand and the absolute absence of any time factor in relation to the invocation or exercise of the revisional power, may also appear to be eluding logical explanatory base. The Court is not, however, concerned with the inartistic draftsmanship of a statutory provision. The difficult legal situation that has resulted by the operation of the two provisions and the invocation of both the provisions by a party, has posed the problem which the Court has now to answer.

6. A reading of Section 84 makes some matters very clear. The Tribunal cannot

entertain a revision during the interval of time, between the passing of the award and the expiry of the period of limitation, a temporary disability. It has a perennial disability to resort to revisional power, the moment the order of the Arbitrator has been made the subject matter of an appeal. Both provisions impose fetters on the revisional jurisdiction of the Tribunal. One is geared to a point of time. The other is linked with an event and an act, in relation to the order of the inferior authority. That a party cannot have both the appeal and the revisional remedy is, however, absolutely clear. He cannot at the same time have the cake and eat it.

7. The limited question before us is whether, in the present case, the appellant has forfeited his right of revision, by the filing of an appeal confessedly beyond the permitted time and consequently doomed to failure. (Once the appeal is filed beyond time, there is no escape route whatever for the appeal to be entertained by the Tribunal, according to the decision of this Court in *Lalithamma v. M. S. Co-operative Society* 1979 KLT 894. It held that Section 5 of the Limitation Act is unavailable. No other specific provision for excusing the delay in the presentation of the appeal has been engrafted in the Act.) Confronted with the desperate situation, the party clutched at whatever was available in the legal armoury. The contention was then raised that the order of the inferior authority had not been made the subject matter of an appeal before the Tribunal. According to the appellant, when there is an order or decision of an inferior authority, it could be the subject matter of an appeal, only if the appellate authority passes an order or renders a decision in that appeal and on the merits. The appeal must in that context mean an effective appeal, and an appeal dealt with and decided by the Tribunal. An appeal rejected at the threshold is no appeal at all in the eye of law. In that view of the matter, the order of the Arbitrator has not been made the subject matter of an appeal. The difficulty flowing from Section 84(b) does not fasten to such a party or to such a situation -- contended counsel.

8. The question in turn calls for a consideration of the concept of an appeal, and the various facets of the act of appealing. An appeal naturally posits the existence of a superior forum, with competence to deal with the subject matter of the appeal. The superior forum must have the power not only to confirm but also to modify, or to set aside if need be, the order of the inferior authority. A remedy by way of appeal is a statutory bounty. The modality of the exercise of the right is conditioned by the provision which confers that right. The creation of the appellate remedy is a matter of substance. The modality of the exercise of the appeal is a matter of procedural or adjectival-law. When an aggrieved party approaches the appellate forum with a prayer for a modification of the order of the inferior authority, there would be an appeal. The appeal may have very many defects or disabilities; some of them may be even fatal. The defects and disabilities of the appeal would not obliterate the factual existence of the appeal. In a sense, it may be a still born one, never having had a life in it, when it was presented before the appellate venue. Still the law would deem that there was an appeal carried right up to the portals of the appellate forum. This appears to be

the legal position in relation to the birth, life and the ultimate end of an appeal, as gatherable from judicial decisions which have sought to explain the different facets of the concept during the past few centuries.

9. Westbury C, in A.G. v. Sillam (1864) 33 LJ E 209, referred to appeal as "the right of entering a superior court and invoking its aid and interposition to redress the error of the court below." According to him, it was a paramount right. That a right of appeal is a matter of substance has been emphasised in the well-known case, Colonial Sugar Refining Co. v. Irving (1905) A. C. 369. Even in regard to belated appeals and their rejection on the ground of delay, the highest court of India has spoken on various occasions. The decision in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, is nearest to the point and perhaps more exhaustive than many others. The Supreme Court was posing and answering a question arising under the Income Tax Act, The points posed were :

"(1) when an appeal is presented out of time and there has been a refusal to condone delay u/s 30(2), is an order rejecting it as time-barred one passed in appeal; and

(2) if it is, is such an order one confirming the assessment within Section 31(3)(a)?"

The question whether an appeal which is filed beyond the period of limitation is, in the eye of law, no appeal, unless and until there is a condonation of delay, thus pointedly arose for decision in that case. Para 9 of the judgment referred to the substantive character of the right of appeal and about the rules of limitation pertaining to the domain of adjectival law. The ultimate conclusion of the Supreme Court was :

"On the principles laid down in these decisions, it must be held that an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal."

10. The observations contained in the earlier decision, Raja Kulkarni v. State of Bombay AIR 1954 SC 73, are only general in character. The observations read :

"Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine, and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g., when it is held to be barred by limitation or that it does not lie before that court or is concluded by a finding of fact u/s 100 of the Civil Procedure Code. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court."

That decision dealt with the interpretation of the term "during the pendency of an appeal before the Appellate Tribunal" as occurring in Section 24(b) of the Industrial Disputes (Appellate Tribunal) Act, 1950 which prohibited the strike of a

workman during the pendency of such appeal. The argument was that the appeal visualises a valid and competent appeal. That was not upheld by the Supreme Court. The appeal in that case was a perfectly competent and a valid one. The effect of an appeal filed out of time and in respect of which there was no provision for condonation of delay did not arise in that case. Similarly, the general observations made by Sir Dinshah Mulla while handing down the decision, AIR 1932 165 (Privy Council) , have to be understood in the factual context available in that case. The observations were made in relation to the words "where there has been an appeal" occurring in Article 182(2) of the Indian Limitation Act, 1908, and were to the effect :

"There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say."

These observations have to be understood in the light of the earlier factual finding that the appeal in question had been dismissed both on the ground of irregularity and upon the merits. (vide observations in Page 166 col. 2) The latest pronouncement of the Supreme Court on an analogous provision (Explanation to Order 9, Rule 13 of the CPC wherein the words "where there has been an appeal" occur) is contained in the decision in Rani Choudhury v. Suraj Choudhury AIR 1902 SC 1397. The Supreme Court held that a belated and therefore barred appeal would also come within the term "where there has been an appeal." (See particularly para 14 of the judgment.)

11. In the light of the above pronouncements and observations of the Supreme Court, we are clearly of the view that when the Arbitrator's award had been attempted to be challenged by an appeal (though belated and rejected on that ground ultimately), that award had been made the subject matter of an appeal before the Tribunal. It would then follow that u/s 82(b) of the Act, a revision to the Tribunal would stand barred.

12. It is only necessary to refer to one more decision of the Supreme Court -- The Board of Revenue, Madras Vs. Raj Brothers Agencies, -- an appeal from Raj Brothers Agencies v. Board of Revenue (1972) 30 STC 410 (Mad), where the self-same words occurring in the Madras General Sales Tax Act had been construed by the Madras High Court. The Madras High Court held that the expression "the order has been made the subject of an appeal" appearing in Section 34(2)(b) meant that the order must be the subject of an effective appeal and that the appeal dismissed by the Appellate Tribunal on the ground of limitation was not an appeal. A revision u/s 34, it was held, had not been taken away in such circumstances. The correctness of the decision was challenged before the Supreme Court. It would have been ordinarily thought that the decision of the Madras High Court was not compatible with the views expressed by the Supreme Court on earlier occasions. In that context, it is significant to note that the decision was upheld by the Supreme Court not on principle or on precedent, but only on the basis of stare decisis. The decision, therefore, cannot be treated as

an authority in other situations. That is the view taken by the Madras High Court itself, in its later decision, *Arunachalam Pillai & Sons v. State of T. N.* 1980 TLR 1618 : 1980 NOC 75 (FB).

13. In the result, for the reasons aforesaid, we confirm the conclusion of the learned single Judge and dismiss the appeal, but without any order as to costs.