

(1981) 05 KL CK 0002

In the High Court Of Kerala

Case No : T.R.C. No's. 149, 154, 157 and 158 of 1979

M. Syed Alavi and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 05-05-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105, 97

Citation : (1981) 2 ILR (Ker) 144 : (1981) 48 STC 150

Hon'ble Judges : P. Subramonian Poti, Acting C.J.; P. Janaki Amma, J; George Vadakkal, J

Bench : Full Bench

Advocate : T.L. Viswanatha Iyer, P.S. Narayanan, K.S. Menon and S.R. Dayananda Prabhu, for the Appellant; The Advocate-General, for the Respondent

Judgement

P. Janaki Amma, J.—The petitioners were assessed to sales tax under the Kerala General Sales Tax Act (hereinafter referred to as the Act) in connection with a contract entered into by them for slaughter-tapping of rubber trees. Before the assessing authority (the Sales Tax Officer, Nedumangad) they contested their liability for being taxed on the ground that they were associations of persons who had discontinued their business on the expiry of the period of the contract. The assessing authority overruled the objection and assessed the petitioners to the best of its judgment. Against this order they preferred appeals before the Appellate Assistant Commissioner, Trivandrum, u/s 34 of the Act. The Appellate Assistant Commissioner as per order dated 12th April, 1976, confirmed the order of the assessing authority regarding liability to assessment but remanded the cases to the assessing authority with a direction to pass fresh assessment orders in the light of certain observations made in the appellate order. Even after remand, the petitioners took the stand that they were not liable to be assessed. The assessing authority held that the plea was not available to them in the light of the order of the Appellate Assistant Commissioner. A fresh assessment order was accordingly passed. The petitioners again preferred appeals before the Appellate Assistant Commissioner, during the hearing of which their objection

regarding liability to assessment was reiterated. The Appellate Assistant Commissioner refused to consider the point. The appeals were dismissed. Against the order of dismissal Tax Appeals Nos. 817 to 820 of 1977 were filed u/s 39 of the Act before the Kerala Sales Tax Appellate Tribunal. The Tribunal held that since no appeals had been filed against the orders of the Appellate Assistant Commissioner dated 12th April, 1976, those orders became final so far as the liability to sales tax was concerned and that it was not open to the petitioners to reagitate the matter in the appeals against the final orders of assessment. The above conclusions were reached basing on the analogy in Section 105(2) of the Code of Civil Procedure. In these revision cases the petitioners challenge the orders of the Appellate Tribunal.

2. The Act, as already noted, provides an appeal to the Appellate Assistant Commissioner u/s 34 from an assessment order u/s 17(3) and a second appeal to the Appellate Tribunal u/s 39 against the appellate order of the Appellate Assistant Commissioner. Section 34(3) and Section 39(4) of the Act contemplate remand of cases by the Appellate Assistant Commissioner and the Appellate Tribunal respectively for fresh enquiry and disposal. The question that arises for consideration in these cases is whether the principles underlying Section 105(2) of the CPC are to be applied as part of the general law to orders of remand by the Appellate Assistant Commissioner and the Appellate Tribunal. It is only proper that we should refer to Section 105 of the CPC at this stage. Section 105 of the CPC reads:

105. Other orders."-(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

It is noted that Section 105 in its present form found a place in the CPC only when it was re-enacted in the year 1908. (For the history of the section see Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another,). u/s 363 of the Code of 1859, no appeal could be filed against any order passed in the course of a suit; but if the decree be appealed against, any error, defect or irregularity in such order affecting the merits of the case or the jurisdiction of the court could be set forth as a ground of objection in the memorandum of appeal. u/s 591 of the Code of 1877, no appeal lay from any order passed by any court in the exercise of its original or appellate jurisdiction except as provided in Chapter 43, which dealt with appeals against certain orders; but the right to put forward any error, defect or irregularity in "such order" affecting the decision of the case was retained in the above enactment and also in the Code of 1882.

There was controversy regarding the scope of the words "such order", whether they had application to appealable orders. The dispute was set at rest by the Privy Council which held that the section applied to all orders. There is no scope for doubt that an order of remand is an interlocutory order. u/s 591, a party who omitted to file an appeal from an order of remand could object to its validity in an appeal filed against the final decree in the case. It is only in Section 105(2) of the present Code that a special provision is made to the effect that if an appeal lay from the order of remand and an appeal was not filed the correctness of the order of remand is not liable to be challenged in an appeal from the final decision. The above resume of the history of Section 105 makes it clear that the principle contained therein is not part of the general law in relation to appeals but is confined to cases governed by the Code of Civil Procedure.

3. Neither Section 34 nor Section 39 contains any provision to the effect that on failure to file an appeal against an order of remand the assessee would be precluded from challenging any finding entered by the Appellate Assistant Commissioner in the order of remand. There is no case for either side that the CPC as such has application in respect of proceedings under the Act. Section 53 of the Act specifies the provisions of the CPC which are applicable to proceedings before the assessing authority, the appellate authority and the revisional authority including the Appellate Tribunal. The powers mentioned relate to summoning of witnesses and production of documents. Regulation 57 of the Appellate Tribunal Regulations dealing with residuary provision mentions some other matters where the provisions of the CPC are made applicable. Suffice to say that there is nothing in the Act itself which indicates that the principles underlying Section 105(2) of the CPC are applicable to proceedings under the Act. It follows that the finality of an order of remand by an appellate authority under the Act could be governed only by general principles of law based on expediency as was the case in matters governed by the CPC prior to the enactment of Section 105(2). Judicial precedents are consistent with the above conclusion.

4. The Privy Council had occasion to consider this aspect in the case decided as early as in 1859 in *Maharajah Moheshur Singh v. Bengal Government* (1865) 7 M.I.A. 283. The Right Hon. Dr. Lushington, speaking on behalf of the Privy Council, observed :

We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing ; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon

his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

The dictum was laid down in connection with proceedings of the Sadar Diwani Adalat sitting as Special Commissioners of Revenue. The above decision was followed by the Privy Council in the later cases, *Alexander John Forbes v. Ameeroonissa Begum* (1866) 10 M.I.A. 340, *Sheonath, alias Burray Kaka v. Ramnath, alias Chotay Kara* (1866) 10 M.I.A. 413 and *Shah Mukhun Lull v. Baboo Sree Kishen Singh* (1869) 12 M.I.A. 157. In all these cases the reasoning adopted was that an interlocutory order did not dispose of the cause and therefore the failure to file an appeal therefrom did not preclude the party aggrieved from challenging its correctness in an appeal against the final decree or order. No reference is seen made to the provisions of the Code of Civil Procedure.

5. The Supreme Court had occasion to consider the matter as early as in 1960 in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, . The point that arose for decision was whether in a case where the order of remand made by the High Court, after entering findings on some of the points in issue, was not appealed against, it was open to the party aggrieved to challenge those findings in an appeal against the final decree before the .Supreme Court. The Supreme Court, after adverting to the decisions of the Privy Council already referred to, observed as follows :

It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision.

It is clear from the above observations that but for the provisions contained in Section 105(2) of the CPC the findings entered by the court which passed the order of remand could be challenged in appeal.

6. In *U.P.E. Supply Co. v. T.N. Chatterjee* [1972] 42 F.J.R. 1 (S.C.), a similar question arose in a case under the Industrial Employment (Standing Orders) Act, 1946, in connection with an appeal by special leave from an award of the Industrial Tribunal, Allahabad. There was an earlier order of the High Court quashing an award and directing the Industrial Tribunal to rehear the case and give an award in accordance with law. The question arose whether the order quashing the award would debar a fresh consideration of points taken up on the ground of *res judicata*. The Supreme Court held, relying on the decision in

Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , that a party is not bound to appeal against every interlocutory order which is a step in the procedure that leads up to a final decision or award. It was observed that the order of remand did not finally terminate any proceedings and that the proceedings terminated only by the award which was appealed against. The plea that there was res judicata was turned down. It is to be noted that the decision in the above case did not arise in connection with a suit or a proceeding in respect of which the CPC had application.

7. The question as to the applicability of Section 105, Civil Procedure Code, in a case arising under the Payment of Wages Act came up before a Division Bench (sic) of the Punjab and Haryana High Court in Hans Raj v. Sangrur Municipality [1974] 45 F.J.R. 311. Sarkaria, J., as he then was, speaking on behalf of the Bench, observed :

The system of the Code, permitting round after round of legal battle over a decree, in a hierarchy of appellate courts, on a vast front, fought with weapons forged of errors picked from the entire gamut of the proceedings right from the institution of the suit, is scarcely an unmixed blessing. It is tardy, cumbersome, expensive and wasteful. It tends to bring in its wake circuitry of action and a degree of disconcerting unpredictability in the administration of justice. The framers of the Act were conscious of these evils inherent in the system of the Code, and have endeavoured to keep the proceedings under the Act free from that reproach.

8. A similar question arose under the Madras Plantations Agricultural Income Tax Act (V of 1955) in Senniappa v. Government of Madras ILR (1965) Mad. 397. In that case a return of income by an assessee was objected to and an assessment was made on best judgment basis. The Appellate Tribunal remanded the case on one point while accepting the case on other points. After remand, an appeal was filed against the decision of the Income Tax Officer on all points. The question arose whether the provision contained in Section 105(2) of the CPC would apply. After a review of the case law the court observed :

The rule in Section 105(2) of the CPC thus laying down the restriction against raising contentions in a subsequent appeal when the original order of remand had not been appealed from does not lay down any rule of general application to other proceedings not governed by the Civil Procedure Code, as for example, proceedings before the hierarchy of quasi-judicial tribunals under a tax enactment as we have in this case.

See also AIR 1981 707 (SC) .

9. There are two rulings of this High Court, wherein this particular aspect has been considered. In Ayammed v. Parameswaran Namboodiri 1976 KLT 788, the question arose u/s 72-F of the Kerala Land Reforms Act. A preliminary order was passed by the Land Tribunal, holding that the petitioners were tenants under the Kerala Land Reforms Act; and subsequently a final order was passed with regard

to purchase of the landlord's right. An appeal was filed against the final order, in the course of which challenge was made against the finding of the Land Tribunal on the question of tenancy. It was contended on behalf of the petitioners that the landlord was precluded from challenging the above finding in view of the fact that no appeal was filed against the preliminary order. The objection was overruled. After a discussion of the case law on the point beginning from Maharajah Moheshur Singh v. Bengal Government (1865) 7 M.I.A. 283, Balagangadharan Nair, J., observed that in the absence of restrictive provisions like those contained in sections 97 and 105(2) of the Code of Civil Procedure, 1908, the orders of remand or preliminary decrees could be challenged in appeals from final decrees. A somewhat similar view was taken by one of us (George Vadakkell, J.) in K.S.E. Board v. Pylee 1979 KLT 647. In that case the issue was whether in the absence of a revision against the preliminary finding whether that finding could be challenged in an appeal filed against the final decision in the case. Following the decisions in Maharajah Moheshur Singh v. Bengal Government (1865) 7 M.I.A. 283 and Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , the issue was answered in the affirmative.

10. The principle recognised in all these decisions is that the appealability of an order passed in the course of a proceeding and the liability of that order being challenged in appeal against the ultimate order are two distinct things. The present case stands on a par with the decisions referred to above. It therefore follows that the principles underlying Section 105(2) of the CPC do not stand in the way of the petitioners in raising the question of liability to assessment before the Appellate Tribunal.

11. The further question is whether there is the bar of res judicata based on general principles of that doctrine. The argument put forward by the learned Advocate-General is that inasmuch as an appeal lay against the order of remand and no appeal was filed, the decision of the Appellate Assistant Commissioner became res judicata and a further adjudication of the question is barred. The contention overlooks the fact that res judicata presupposes the finality of the earlier decision which is put forward as a bar for the subsequent decision. If the previous decision itself, is liable to be challenged at a subsequent stage of the litigation the fact that no appeal was filed at an earlier stage will not make it res judicata.

12. A plea based on res judicata was raised in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, . Reference was made to three decisions of the Privy Council, Ram Kirpal Shukul v. Rup Kuari (1884) 11 I.A. 37, Bani Ram v. Nanhu Mal (1884) 11 I.A. 181 and Hook v. Administrator General of Bengal AIR 1921 P.C. 11. The Supreme Court held that the facts of those cases differed from those of the case which that court was dealing. In the first of those cases the question raised was whether the decree that was being executed awarded mesne profits. The District Judge decided the question in the affirmative. When the question was again raised on execution it was held by the Privy Council that the

former decision was binding on the executing court being *res judicata*. This decision was followed in *Bani Ram v. Nanhu Mal* (1884) 11 I.A. 181 and in *Hook v. Administrator General of Bengal* AIR 1921 P.C. 11. The Supreme Court observed that in all the three cases though in form the later proceeding in which the question was sought to be raised again was a continuation of the previous proceeding, it was in substance an independent subsequent proceeding and that the fact that the Privy Council described the order of the District Judge in *Ram Kirpal Shukul*'s case (1884) 11 I.A. 37 as an interlocutory judgment did not justify the contention that all kinds of interlocutory orders not appealed from become *res judicata*. The Supreme Court then stated:

Interlocutory orders which have the force of a decree must be distinguished from other interlocutory orders which are a step towards the decision of the dispute between parties by way of a decree or a final order. *Moheshur Singh*'s case (1865) 7 M.I.A. 283, *Forbes*' case (1866) 10 M.I.A. 340 and *Sheonath*'s case (1866) 10 M.I.A. 413 dealt with interlocutory judgments which did not terminate the proceedings and led up to a decree or final order. *Ram Kirpal Shukul*'s case (1884) 11 I.A. 37, *Bani Ram*'s case (1884) 11 I.A. 181 and *Hook*'s case AIR 1921 P.C. 11 deal with judgments which though called interlocutory, had, in effect, terminated the previous proceedings. These cases are therefore of no assistance to the learned counsel for the respondent in his argument that the order of remand made by the High Court not having been appealed from to this court the correctness of that order cannot be challenged now.

13. It may be recalled that the plea of *res judicata* was raised also in *U.P.E. Supply Co. v. T.N. Chatterjee* [1972] 42 F.J.R. 1 (S.C.) already referred to and that it was turned, down following *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, .

14. The Appellate Tribunal, referred to the decision in *Jasraj Inder Singh Vs. Hemraj Multanchand*, , in coming to the conclusion that the finding in the order of remand is not liable to be challenged. But, a reading of the above decision will show that it does not lend support to the conclusions arrived at by the Appellate Tribunal, as will be clear from the following observations:

Viewed simplistically, the remand order by the High Court is a finding in an intermediate stage of the same litigation. When it came to the trial court and escalated to the High Court, it remained the same litigation. The appeal before the Supreme Court is from the suit as a whole and, therefore, the entire subject-matter is available for adjudication before us. If, on any other principle of finality statutorily conferred or on account of *res judicata* attracted by a decision in an allied litigation the matter is concluded, we too are bound in the Supreme Court. Otherwise, the whole Us for the first time comes to this court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by this court. Intermediate stages of the litigation and orders passed at those stages have a provisional finality.

15. The question of *res judicata* was again considered by the Supreme Court in *Smt. Sukhrani (Dead) by L.R.S. and Others Vs. Hari Shanker and Others*, . In that case there was a proceeding for setting aside an arbitration award made in the course of a partition suit. The trial court's order setting aside the award was upheld by the High Court. The matter was not pursued further. In the course of the appeal to the Supreme Court on the final judgment it was argued that the finding of the High Court in the proceeding to set aside the award was binding on the parties during the subsequent stages of the litigation. The Supreme Court observed :

It is true that at an earlier stage of the suit, in the proceeding to set aside the award, the High Court recorded a finding that the plaintiff was not entitled to seek reopening of the partition on the ground of unfairness when there was neither fraud nor misrepresentation. It is true that the plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed to the trial of his suit. It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. But it is equally well-settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher court is not precluded from considering the matter again at a later stage of the same litigation.

16. The learned Advocate-General referred to a number of passages from "The doctrine of *res judicata*" by Spencer Bower and Turner. None of them, however, deals with the issue involved in the case. We do not therefore propose to refer to them in extenso. Suffice to say that finality is an essential condition for a decision to be *res judicata* both under the Indian law and under the English law. A finding on an issue at a preliminary stage is not final if it is liable to be challenged in an appeal against the ultimate decision of the case. , To adopt the language of the Supreme Court it is only provisionally final. It will become really final only if no appeal is filed against the ultimate decision of the case or if an appeal is filed, it is confirmed in such appeal.

17. In the instant case, it is true that no appeal was filed against the decision dated 12th April, 1976, of the Appellate Assistant Commissioner. The effect of non-filing of an appeal is that the finding is binding on the assessing authority when the case went back to that authority and also on the Appellate Assistant Commissioner while disposing of the appeal from the revised decision of the assessing authority. It is not binding on the Appellate Tribunal in the appeal filed u/s 39 against the decision of the Appellate Assistant Commissioner. The Appellate Tribunal was free to arrive at its own decision on the question of liability of the petitioners to assessment to sales tax.

18. It is thus clear that it was under an erroneous interpretation of the law that the Appellate Tribunal held that it had no jurisdiction to decide the issue regarding the petitioners' liability to assessment. The order of the Appellate Tribunal is, therefore, set aside. The cases are remitted to the Appellate Tribunal

for fresh disposal on the merits. The revision cases are disposed of accordingly.