

(1971) 02 GUJ CK 0001
In the Gujarat High Court

Case No : Spl. Civil Application No"s. 1464 to 1467 of 1970

Mer Arjan Lakha and Another

APPELLANT

Vs

The Administrator, Ghed Bagasara Kheti Vishayak Karyakari
Sahkari Mandali Ltd. and Others

RESPONDENT

Date of Decision : 10-02-1971

Acts Referred:

Gujarat Co-operative Societies Act, 1961 — Section 150(9)

Citation : AIR 1972 Guj 1 : (1972) 13 GLR 221

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : J.R. Nanavaty, for the Appellant; D.U. Shah, for the Respondent

Judgement

1. These four petitioners have been filed under Article 227 of the Constitution by two petitioners the first of whom was the President of Ghed Bagasara Kheti Vishavak Karyakari Sahakari Mandli Ltd., operating in the village Ghed Bagasara of Mangrol Taluka under Junagadh district and the second of whom was the Secretary of that society. The respondent No.1 is the Administrator of that society and the respondent No.2 is a member of the said Society.

2. The Society and the respondent No. 2 filed against the petitioners four arbitration cases under the Gujarat Co-operative Societies Act, 1961 for recovery of certain amounts alleged to have been due from the petitioners. Those cases were tried by the Registrar's nominee who by his order dated 28th June 1969 dismissed all of them. The society which is the respondent No. 1 to the petition and the respondent No.2 filed appeals to the Co-operative Tribunal against the nominee's decisions in all the four cases. The appeal were filed beyond time. On 9th April 1970 they were heard on the question as to limitation and it appears from the record that the Tribunal orally declared on that day that the appeals were dismissed on the ground that they were barred by time. On 24th April 1970 they pronounced their written order in that behalf Prior thereto, on 16th April 1970 the respondents Nos. 1 and 2 made applications to the Tribunal for

converting their four appeals into four revision applications. Those applications were heard on 3rd September 1970 after the appeals were dismissed in limine on the ground of limitation on 24th April 1970. The Tribunal by its order dated 3rd September 1970 granted all the four applications.

3. Against the orders of the Tribunal granting the four applications by which it converted the appeals into revision applications these four petitioners have been filed in this Court.

4. Mr. Nanavaty appearing for the petitioners has raised only one contention before me. His contention is that when appeals have been filed and decided by a judgment, the Tribunal has no power or jurisdiction to entertain any revision application. In order to make good his submission before me he has invited my attention to sub-section (9) of S. 150 of the Gujarat Co-operative Societies Act, 1961. It is in the following terms :-

"The Tribunal may call for and examine the record of any proceeding in which an appeal lies to it for the purpose of satisfying itself as to the legality or propriety of any decision or order passed. If in any case, it appears to the Tribunal that any such decision or order should be modified, annulled or reversed, the Tribunal may pass such order thereon as it may deem just."

Now sub-sections (1) to (5) of Sec 150 deal with the constitution of the Gujarat State Co-operative Tribunal and the constitution of its benches. Sub-section (6) lays down the procedure where the members of the Tribunal are equally divided. Sub-section (7) deals with the framing of Regulations for the Tribunal for regulating its procedure and for the disposal of its business. Sub-section (8) provides for publication of the Regulations in the Official Gazette. Sub-section (9) which I have quoted above confers upon it revisional jurisdiction. Sub-s. (10) confers upon it power to make interlocutory orders in appeals filed u/s 102 of the said Act. Sub-section (11) accords finality and conclusiveness to the orders passed by the Tribunal in appeal or in revision under sub-section (9), or in review u/s 151 and lays down that they shall not be called in question in any Civil or Revenue Court. Sub-section (12) confers upon the Tribunal all powers of an appellate Court which an appellate Court enjoys u/s 97 and Order XLI in the First Schedule of the Code of Civil Procedure, 1908. So far as appeals to Tribunal are concerned, they are provided by Section 102 in cases specified in that section and by Section 153 in case specified therein. Sub-section (9) confers upon the Tribunal revisional jurisdiction in those cases in which appeal lies to it. Therefore if an appeal does not lie to the Tribunal from any particular decision, it cannot exercise the revisional jurisdiction in that matter. Next, for the exercise of revisional jurisdiction, there is no period of limitation which has been prescribed. Undoubtedly, the Tribunal can exercise this revisional jurisdiction either suo motu or at the instance of an aggrieved party. The fact, however, remains that it is the power of the Tribunal which can be exercised by it if it so thinks fit. It does not confer any right upon litigants. The expression "..... in which an appeal lies to it" gives rise to three types of cases: (a) cases in which

appeal lies but appeal has not been preferred (b) cases in which appeal lies and appeal has been preferred but it has not been decided on merits but has been decided in limine on such questions as to limitation or where it has been dismissed for default (c) - cases in which appeal lies and appeal has been preferred and has been decided on merits. So far as the third type of cases are concerned, there is no dispute before me that the Tribunal will have no revisional jurisdiction under sub-section (9) because, if it has decided an appeal on merits, it cannot revise its own order. It has not been given any jurisdiction to do so. Once the Tribunal records an appellate decision, the original decision from which the appeal has been filed merges with the appellate decision and it is the appellate decision which exists in the eye of law and holds the field, sub-section (9) does not enable or empower the Tribunal to write two contradictory judgments in the same matter; one in exercise of its appellate jurisdiction and another in exercise of its revisional jurisdiction. Therefore, so far as its appellate decisions on merits are concerned subject to the provisions of Section 151, it cannot revise them, Similarly, in cases where appeal lies to it but appeal has not been preferred by an aggrieved party, the Tribunal can exercise revisional jurisdiction under sub-section (9) suo motu or otherwise in order to satisfy itself as to the legality or propriety of a decision or order. In such exercise of its power, it can modify, annul or reverse such a decision. That is what sub-section (9) inter alia provides.

5. The question, however, which has been raised for my consideration is this: Does the Tribunal have revisional jurisdiction under sub-section (9) in cases where an appeal lies, where it has been preferred but where it has not been decided on merits ? Mr. Nanavaty has contended that the Tribunal has no revisional jurisdiction in such cases. In order to fortify his argument he has invited my attention to sub-section (11) of Section 150. It is in the following terms.

"An order passed in appeal, or in revision under sub-section (9), or in review u/s 151, by the Tribunal, shall be final and conclusive, and shall not be called in question in any Civil or Revenue Court."

He has with reference to sub-section (11), emphasized the finality and conclusiveness of an appellate order made by the Tribunal. He has also invited my attention to sub-section (6) of Section 153. It is in the following terms.

"Save as provided in this Act, no appeal shall lie against any order decision or award passed in accordance with this Act; and every such order, decision or award shall be final, and where any order passed on appeal shall be final and no further appeal shall lie against it."

With reference to the provisions of this sub-section he has laid particular emphasis on the expression "..... any order passed on appeal shall be final...." According to him all orders passed on appeal are final and conclusive and subject in the provisions of Section 151 the Tribunal has which their

conclusiveness or finality may be disturbed. The material question which in this context arises relates to the exact connotation of the expression "order" used in sub-section (11) of Section 150 or "any order or decision" used in sub-section (6) of Section 153. According to Mr. Nanavaty, the word "order" used in sub-section (11) of Section 150 or in sub-section (6) of Section 153 means any order passed in exercise of the appellate jurisdiction irrespective of whether it has been an order made on merits or an order made in limine. According to him. Once a final order is made in appeal, the appellate power comes to an end and the original order against which the appeal was preferred merges with the appellate order. According to him therefore, it is the appellate order which holds the filed and not the original order.

6. He has invited my attention to three decisions of the Supreme Court. In *Somnath Sahu Vs. The State of Orissa and Others*, , the Supreme Court has explained the applicability of the doctrine of merger. In that case, the question arose in the context of two administrative orders one original and another appellate. The principle which the Supreme Court has laid down has been stated by it in the following terms.

"There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a tribunal the decision of the appellate authority is the operative decision in law if the appellate authority modifies or reverses it. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement." Does this principle apply to cases where there is no appellate decision on merits, e.g. in cases where an appeal has been dismissed for default of appearance or where an appeal has been dismissed on the ground of limitation?

7. He has invited my attention to another decision of the Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, . In that case, indeed. Their Lordships were considering the applicability of the principle of *res judicata* to cases where an appeal has been dismissed not on merits but otherwise. In that case, there were two decrees against which two First Appeals were filed in the District Court. They were later on transferred to the High Court. One of them was dismissed by the High Court on the ground that it was barred by time and another was dismissed by the ht, on the ground that the appellant had failed to apply for translation and printing or record as required by the Rules of the High Court. It was inter on contended in two other cross-appeals that the title of one Smt. Daryao Kunwar who was respondent to the aforesaid two appeals to the suit property had become final on account of the dismissal of the those appeal. The contention was upheld by the High Court. In appeal while upholding the decision of the High Court the principal which the Supreme Court has laid down has been stated in the following terms.

"Our conclusion on the question of res judicata raised in the present appeal is this. Where the trial Court has decided two suits having common issues on the merits and there are two appeal therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal court be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial Court given on merits, and if that is so the decision of the appeal court will be res judicata whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal court does not result in the confirmation of the decision of the trial court given on the merits, as for example, where the appeal court holds that the Court had no jurisdiction and dismisses the appeal, even though the trial Court might have dismissed the suit on the merits."

Indeed, what the Supreme Court has laid down in this decision has a direct bearing on the applicability of the doctrine of res judicata. I, however, cannot overlook an important proposition which has been stated in that decision. That proposition is that even where an appeal has been dismissed on a preliminary ground like limitation or default in printing, the appeal court is deemed to have heard and finally decided the matter. It is only when such a deeming fiction comes into existence that the application of the doctrine of res judicata can be extended to such a case. It has, therefore, been further laid down in that decision that where an appeal is deemed to have been heard and finally decided even though it has been dismissed on some preliminary ground like limitation or default in printing the result of the decision of the appeal court is to confirm the decision of the trial Court given on merits.

8. The third decision to which Mr. Nanavaty has invited my attention is in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, . In that case, a party, in the first instance, invoked the revisional jurisdiction of the High Court and invited its decision on the merits of its case. Thereafter, a Writ petition was filed by the party against whom the decision in the revision application was recorded. That Writ petition was allowed. Against that decision there was an appeal to the Supreme Court. After having dealt with the decision of the High Court of Bombay in K.B. Sipahimalani Vs. Fidahussein Vallibhoy, in which a right of appeal is distinguished from the exercise of revisional jurisdiction, the Supreme Court has laid down the principle in the following terms.

"Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction on the High Court as a superior Court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and

exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior courts in those of superior courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal."

It appears that the distinction which was drawn by the High Court of Bombay between the right of appeal and the exercise of revisional jurisdiction has been removed by the Supreme Court by that decision.

9. The material principle, however, which emerges from *Sheodan Singh Vs. Smt. Daryao Kunwar*, is that even though an appeal has not been finally heard on merits and even though it may have been dismissed in limine on the ground of default or limitation, the appeal court is deemed to have heard the appeal finally and its decision operates to confirm the original decision. What has happened in the instant case is that the Tribunal dismissed the appeals on the ground that they were barred by time. Indeed, it has stated in its appellate order that it is confirming the judgment and award of the nominee. Even if it had not done so, in terms of the principle laid down by the Supreme Court in *Sheodan Singh's* case, the effect of the decision, in my opinion, would have been the same, viz, that it would be deemed to have heard that appeals finally and confirmed that decision of the nominee. If the effect of the appellate order which it has made is, therefore, to confirm the judgment and award of the nominee, can it again entertain a revisional jurisdiction ? in my opinion, sub-section (9) of section 150 does not empower it to do so.

10. Mr. Shah, appearing for the respondent No. 1, has invited my attention to Order 47, Rule 1 of the Code of Civil its language with the language of sub-section (9) of section 150. Clause (a) of sub-rule (1) of Rule 1 of Order 47 uses the expression "..... from which an appeal is allowed, but from which no appeal has been preferred". He tries to emphasize the fact that sub-section (9) of section 150 does not use an expression similar to the expression "..... from which no appeal has been preferred" occurring in clause (a) of sub-rule (1) of Rule 1 of Order 47. Mr. Shah, indeed, is correct in his submission that the language used in sub-section (9) of section of the Gujarat Co-operative Societies Act is different from the language used in subrule (1) of Rule 1 of Order 47 of the Code of Civil Procedure. Similar, though slightly different, is the case with the language of section 115 of the Code of Civil Procedure. Therein also the expression which has been used is "..... in which no appeal lies thereto.." . However, the comparison of the language used in clause (a) of sub-rule (1) of R. 1 of Order 47 and section 115 of the CPC on one hand and the language used in sub-section (9) of section 150 on the other hand does not help Mr. Shah in distinguishing the clear and unequivocal principal laid down by the Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, . It is true that in *Sheodan Singh's* case the Supreme Court was dealing with the question of res judicata but, in my opinion, the principle laid down in regard to the applicability of the doctrine of res judicata cannot be disregarded for the present purpose because

the principle underlying the facts of the present case and the facts in Sheodan Singh's case appear to me to be the same. Viz., whether an appellate order which does not decide an appeal on merits but which disposes it of in limine can be said to mean that the appeal has been finally heard and whether it has the effect of confirming the original order from which it has been preferred. The answer to the question which the Supreme Court has recorded is very clear and, in my opinion, it applies to both the situations.

11. Mr. Shah has invited my attention to the decision of this Court in T.P. Kumaran Vs. R. Kothandaraman, Commissioner of Income Tax, Gujarat, . The first principle which has been laid down by a Division Bench in that decision is that a decree of the lower Court merges on appeal into the decree of the appellate Court. It is only on a judicial determination that the order of the lower Court becomes merged in the decision of the Court of appeal. No merger takes place when the Court of appeal does not judicially determine the appeal but dismisses it on a mere preliminary ground, such as limitation or maintainability. When the revision Court interferes, it sets aside or modifies the order of the lower Court or authority but there is no merger of the original order in the order passed by the revisional authority. It has also been further laid down that the original order of the inferior authority ceases to have an independent existence once the appeal or revision is disposed of and it merges in the order of the superior authority. The principle laid down by this High Court in the aforesaid decision is slightly different from the principle laid down by the Supreme Court in Sheodan Singh's case, AIR 1966 SC (supra). In my opinion, the principle laid down by the Supreme Court in Sheodan Singh's case, (supra) is binding upon me and is more apposite. Therefore, it should govern the decision of this case.

12. Mr. Nanavaty has further argues that the expression "... in which an appeal lies to it ..." used in sub-section (9) of section 150 can also be looked at from a different angle. That expression presupposes that an aggrieved party has a subsisting right of appeal. If an aggrieved party exercises his right to appeal and fails, can it be said, even for the purpose of invoking the revisional jurisdiction under sub-section (9) that an appeal still to the Tribunal? A party which has a right of appeal exhausts its right it files that appeal and when the appeal is decided either on merits or in limine. Thereafter, since no fresh or further appeal lies to the Tribunal, the Tribunal, according to Mr. Nanavaty, has no jurisdiction under sub-section (9) of section 150 to invoke its revisional jurisdiction because its appellate jurisdiction, with the disposal of the appeal, has been exhausted. According to him, the scheme underlying sub-section (9) of Section 150 is that the appellate jurisdiction of the Tribunal operate on the same filed and in the same area under the same circumstances and the Tribunal can exercise its revisional jurisdiction provided its appellate jurisdiction has not been availed of by an aggrieved party. The argument which Mr. Nanavaty has raised appears to be quite a plausible argument. However, I do not propose to express any final opinion on that point because, as I understand, in light of the principle laid down by the Supreme Court in Sheodan Singh Vs. Smt. Daryao Kunwar, the only

interpretation which I can place upon sub-section (9) of Section 150 is that once an appeal has been preferred to the Tribunal and once it has been decided either on merits or in limine on the ground as to limitation or default, it has the effect of confirming the original order from which it has been preferred. In such a case, under sub-section (9) of section 150 the Tribunal cannot invoke its revisional jurisdiction and undo what it has done. In other words, by invoking its revisional jurisdiction, it cannot reverse or modify what it is deemed to have confirmed in exercise of its appellate jurisdiction.

13. It may be noted that the Tribunal in this case indeed entertained the applications for converting the appeals into revision applications on 16th April 1970 when they were pending before it but unfortunately it first decided the appeals on 24th April 1970 and dismissed them on the ground that they were time-barred and thereafter granted the applications for converting those dismissed appeals into revision applications. Once the Tribunal dismissed the appeals there was no appeal pending on its file. It is difficult to imagine what it was converting into a revision application if there was no appeal pending on its file. If it really wanted to invoke its revisional jurisdiction in these matters it ought to have decided the appeals and the applications together converted the proceedings into revisional proceedings without finally recording any order in the appeals having the effect of confirming the original orders made by the nominee.

14. In the view which I have taken the Tribunal was indeed followed a wrong course. It appears to have put the cart before the horse. But that is what it is. It is difficult to help the situation. Under these circumstances, in my opinion, the four impugned orders made by the Tribunal have been made without jurisdiction. They are, therefore, liable to be quashed and set aside.

15. I, therefore, quash and set aside the four impugned orders made by the Tribunal and dismiss the four applications made before it for converting the four appeals into revisional proceedings, Rule is made absolute in each of the four petitions. In the circumstances of the case. I direct that there shall be no order as to in all the matters.

16. Petition allowed.