IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5210-5216 OF 2002

C.K. Gangadharan & Anr. .... Appellants

Versus

Commissioner of Income Tax, Cochin ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. By order dated 13.3.2008, a reference was made to larger Bench and that is how these cases are before us. The order, of reference, inter-alia, reads as follows:

> " xxx xxx xxx
>
> In view of the aforesaid position, we are of the opinion that matter requires consideration by a larger Bench to the extent whether revenue can be precluded from defending itself by relying upon the contrary decision.
>
> We make it clear that we are not doubting the correctness of the view taken by this Court in the cases of Union of India v. Kaumudini Narayan Dalal (2001)10 SCC 231, CIT v. Narendra Doshi (2004) 2 SCC 801 and CIT v. Shivsagar Estate (2004) 9 SCC 420 to the effect that if the revenue has not challenged the correctness of the law laid down by the High Court and accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assesses, without just cause.
>
> Registry is directed to place the papers before the Hon'ble Chief Justice of India for appropriate orders."

2. In terms of the reference what is required to be decided is whether revenue can be precluded from defending itself by relying upon the contrary decisions. It is to be noted that various High Courts have taken contrary views. While some of

the courts have decided in favour of the assessee, other High Courts have decided in favour of the revenue.

3. For deciding the issue few decisions of this Court need to be noted.

4. In Bharat Sanchar Nigam Ltd. and Anr. v. Union of India and Ors. (2006 (3) SCC 1), it was noted as follows:

> "20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to

the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.

22. A decision can be set aside in the same lis on a prayer for review or an application for recall or Under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra (2002 (4) SCC 388). As we have said overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a Court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in State of U.P. v. Union of India (2003 (3) SCC 239) related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a Larger Bench. This Bench being of superior strength, we can, if we so find, declare that the earlier decision does not represent the law. None of the

> decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."

5. In State of Maharashtra v. Digambar (1995 (4) SCC 683), the position was highlighted by this Court as follows:

> "16. We are unable to appreciate that objection raised against the prosecution of this appeal by the appellant or other S.L.Ps filed in similar matters. Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the High Court rendered in Writ petitions when they are considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefore. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper advice or negligence or improper conduct of officers concerned. It is further possible, that even where S.L.Ps are filed by the State against judgments of High Court, such S.L.Ps may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the

> State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some S.L.Ps in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an S.L.P. or S.L.Ps in other similar matters where it is considered on behalf of the State that non-filing of such S.L.P. or S.L.Ps and pursuing them is likely to seriously jeopardise the interest of the State or public interest."

6. In Government of W.B. v. Tarun K. Roy and Ors. (2004 (1) SCC 347) reference was made to the judgment in Digambar case (supra) and State of Bihar and Ors. v. Ramdeo Yadav and Ors. (1996 (3) SCC 493). It was noted as follows:

> "28. In the aforementioned situation, the Division Bench of the Calcutta High Court manifestly erred in refusing to consider the contentions of the appellant on their own merit, particularly, when the question as regard difference in the grant of scale of pay on the ground of different educational qualification stands concluded by a judgment of this Court in Debdas Kumar (1991 Supp (1) SCC 138) (supra). If the judgment of Debdas Kumar (supra) is to be followed & finding of fact was required to be arrived at that they are similarly situated to the case of Debdas Kumar (supra) which in turn would mean that they

are also holders of diploma in engineering. They admittedly being not, the contention of the appellants could not be rejected. Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See State of Maharashtra v. Digambar 1995 (4) SCC 683).

29. In State of Bihar and Ors. v. Ramdeo Yadav and Ors. (1996 (3) SCC 493) wherein this Court noticed Debdas Kumar (supra) holding:

> "Shri B.B. Singh, the learned counsel for the appellant contended that though an appeal against the earlier order of the High Court has not been filed, since larger public interest is involved in the interpretation given by the High Court following its earlier judgment, the matter requires consideration by this Court. We find force in this contention. In the similar circumstances, this Court in State of Maharashtra v. Digambar, (1995) 4 SCC 633) and in State of West Bengal v. Debdas Kumar, (1991) Suppl. SCC 138), had held that though an appeal was not filed against an earlier order, when public interest is involved in interpretation of law, the Court is entitled to go into the question. "

7. In Ramdeo's case (supra) reference was made to State of W.B. v. Debdas Kumar (1991 Suppl. (1) SCC 138), wherein it was observed at para 5 as follows:

> "5. It is then contended that Section 3(2) and (3) make distinction between the employees covered by those provisions and the employees of the aided schools taken over under Section 3(2). Until the taking over by operation of Section 3(4) recommendation is complete, they do not become the employees of the Government under Section 4 of the Act. The Government in exercise of the power under Section 8 constituted a committee and directed to enquire and recommend the feasibility to take over the schools. On the recommendation made by them, the Government have taken decision on January 13, 1981 by which date the respondents were not duly appointed as the employees of the taken over institution. Therefore, the High Court cannot issue a mandamus directing the Government to act in violation of law."

8. In Commissioner of Central Excise, Raipur v. Hira Cement (2006 (2) SCC 439) at para 24 the position was reiterated.

9. In Chief Secretary to Government of Andhra Pradesh and Anr. v. V.J. Cornelius and Ors. (1981 (2) SCC 347) it was observed that equity is not relevant factor for the purpose of interpretation.

10. It will be relevant to note that in Karam Chari v. Union of India and Ors. (2000 (243) ITR 143) and Union of India v. Kaumudini Narayan Dalal and Anr. (2001 (249) ITR), this Court observed that without a just cause revenue cannot file the appeal in one case while deciding not to file appeal in another case. This position was also noted in Commissioner of Income Tax v. Shivsagar Estate (2004 (9) SCC 420).

11. The order of reference would go to show that same was necessary because of certain observations in Berger Paints India Ltd. V. Commissioner of Income Tax, Caluctta (2004 (12) SCC 42). The decision in Union of India and Ors. v. Kaumudini Narayan Dalal and Anr. (2001 (10) SCC 231) was explained in Himalatha Gargya v. Commissioner of Income

Tax, A.P. and Anr. (2003 (9) SCC 510) at para 14. It has been stated in the said case that the fact that different High Courts have taken different views and some of the High Courts are in favour of the revenue constituted "just cause" for the revenue to prefer an appeal. This Court took the view that having not assailed the correctness of the order in one case, it would normally not be permissible to do so in another case on the logic that the revenue cannot pick and choose. There is also another aspect which is the certainty in law.

12. If the assessee takes the stand that the revenue acted mala fide in not preferring appeal in one case and filing the appeal in other case, it has to establish mala fides. As a matter of fact, as rightly contended by the learned counsel for the revenue, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of decision is revenue neutral there may not be any

need for preferring the appeal. All these certainly provide the foundation for making a departure.

13. In answering the reference, we hold that merely because in some cases the revenue has not preferred appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher Court when divergent views are expressed by the Tribunals or the High Courts.

14. The matter shall be placed before the concerned Bench for disposal of the appeals.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi,

July 21, 2008