

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEAL NO. 72/2015****COMMISSIONER OF INCOME TAX**Aayakar Bhavan,
Patto Plaza, Panaji – Goa.

... APPELLANT

VERSUS**V. M. SALGAONKAR BROTHERS****PRIVATE LIMITED**Suvarna Bandekar Building
P. B. No. 11, Swatantra Path
Vasco da Gama.

... RESPONDENT

Ms. Amira Razaq, Junior Standing Counsel for the Appellant.
Shri P. Pardiwala, Senior Advocate with Shri Ryan Menezes, Advocate for
the Respondent.

**Coram :- M.S. SONAK &
DAMA SESHADRI NAIDU, JJ.**

Reserved on : 30th September 2020

Pronounced on : 13th October 2020

JUDGMENT : (*Per Dama Seshadri Naidu, J.*)

Introduction:

The Revenue is the appellant in this tax appeal; it was dissatisfied with the order, dated 4 September 2014, of the Income Tax Appellate Tribunal. On 7 January 2016, this Court admitted the matter after framing two substantial questions of law. Then, the Revenue wanted this Court to frame a third substantial question of law on a specific issue. But, through a reasoned order, this Court refused.

2. When we took up the matter for final hearing, the Revenue filed a miscellaneous application. It again wanted us to frame "the same" or "similar" substantial question of law. According to it, this Court earlier

refused to frame that substantial question of law, oblivious of the Supreme Court judgment on an identical issue.

3. Now the question before us is this: can we—a Bench of different composition but of the same strength, though—reconsider the issue, disregarding its earlier refusal, and frame a substantial question of law, afresh?

Facts:

4. The disputed tax is less than ₹ one crore. Suppose we confine ourselves to the two substantial questions of law already framed. In that case, we need not adjudicate them on the merits because of the Circular the Revenue has issued earlier, setting out the Revenue's policy not to contest the matters with less than one crore disputed tax. So, unless we are persuaded to frame the third substantial question of law, there is no scope for adjudication.

5. In these circumstances, we set out the facts, first, to decide whether we should reconsider framing the third substantial question of law. If the Revenue has the third substantial question of law framed, then we will get into other aspects of the matter.

6. The respondent-assessee deals in mining, processing, and exporting of iron ore. For the assessment year 2008-09, it filed the returns. The Revenue processed the return and selected it for scrutiny. In August 2009, as a preliminary step, the Revenue issued to the assessee notice under Section 143 (2) of the Income Tax Act ("Act"). Through the order, dated 13 December 2010, the Assessing Officer disallowed certain expenditure under section 14 A of the Act.

7. Aggrieved, the assessee appealed to the Commissioner of Income Tax (A). In November 2013, the appellate authority partly allowed the appeal. Then, though the assessee and the Revenue filed appeals before the Income Tax Appellate Tribunal ("the Tribunal"). Through its order, dated

31 October 2014, the Tribunal dismissed the Revenue's appeal but allowed the assessee's. In that context, the Revenue filed this Tax Appeal.

The Substantial Questions of Law before this Court:

8. In its appeal, the Revenue framed three substantial questions of law: (a) to (c). This Court accepted two and reframed them: (a) and (c). Through order, dated 7 January 2016, it refused to accept one substantial question of law: (b).

The Renewed Effort:

9. The Revenue, now, has come up with a Miscellaneous Application. It wants the Court to frame a few more questions of law. But the respondent-assessee objects to it. It contends these substantial questions of law are identical to what this Court earlier refused to frame. So we have taken up as a preliminary issue whether we should frame the additional substantial question of law despite this Court's earlier rejection on that count.

Arguments:

The Revenue:

10. Ms Amira A. Razaq, the learned Standing Counsel for the Revenue, has submitted that the taxation jurisprudence does not recognise the common law principle of *res judicata*. According to her, if the Court finds a vital issue affecting the case outcome, it must frame a substantial question of law at any stage of the proceedings. Its earlier disinclination or rejection notwithstanding, the Court ought to reframe the issue in the interest of justice.

11. Ms Razaq has forcefully argued in the alternative, too: the issue then rejected to be framed and the issue now pressed into service are different; the latter is more comprehensive. According to her, this Court earlier erred in holding that the substantial question (b) was based on *Dr Prafulla Hede v. Asst. Commissioner of Income Tax, Circle-1(1), Panaji*. But

the fact remains, Ms Razaq adds, that *Dr Prafulla Hede* ignored the Apex Court's dictum in *Ambika Quarry Works v. State of Gujarat*¹ and subsequent judgments, including *Nature Lovers Movement v. State of Kerala*².

12. Ms Razaq has also drawn our attention to Section 260A of the Act. Then, she has submitted that this Court may, nay ought to, frame a substantial question of law "even at the stage of final hearing if this Hon'ble Court is satisfied that such a question arises in the matter". She has eventually argued that in *Dr Prafulla Hede*, "there was no appreciation of the decisions rendered by the Apex Court regarding grant of renewals of mining leases in forest lands after the enforcement of the Forest Conservation Act, 1980". To support her contentions, Ms Razaq has, among others, relied on *Sir Chunilal Mehta & Sons v. Century Spinning and Mfg Ltd*³.

Respondent:

13. Shri Pardiwala, the learned counsel for the respondent-assessee has submitted that this Court has already refused to frame a substantial question of law on the issue now the Revenue is trying to resurrect. According to him, the Revenue ought to have challenged this Court's order of the first refusal.

Discussion:

14. This Court admitted the Revenue's appeal through an order, dated 7 January 2016. Of the (a) to (c) substantial questions of law the Revenue had framed, this Court, then, accepted questions (a) and (c) as substantial questions law and reframed them. It has expressly refused to accept the Revenue's question (b) as a substantial question of law. That question, as framed by the Revenue, reads thus:

On the facts and in the circumstances of the case, was the Appellate Tribunal right in holding that the afforestation

¹AIR 1987 SC 1073

²(2009) 5 SCC 373

³AIR 1962 SC 1314

expenses paid are of revenue nature and not of capital nature, by ignoring the fact that compensatory afforestation charges paid to government of Goa in the nature of non-recurring expenditure and provides enduring benefit to the assessee?

15. To justify its refusal to accept the above as the substantial question of law, this Court has felt that an identical question already stands answered. To elaborate, this Court has noted that in Tax Appeal No. 15/2012, a Division Bench framed a similar issue and answered it against the Revenue. Later, the Supreme Court dismissed the Revenue's Special Leave to Appeal (C) No. 24920/2012. Besides, this Court has specifically recorded that "the learned counsel appearing for the appellant does not dispute that the issue stands covered by the said Order".

16. Now, the Revenue has once again come up with a miscellaneous application, asking this Court to frame a couple more substantial questions of law. They read:

"A. Whether the renewal of a mining lease in a forest area can be granted only if the prior mandatory requirement of Section 2 of the Forest Conservation Act, 1980, are satisfied as laid down by the Hon'ble Apex Court, in the case of *Ambika Quarry Works v. State of Gujarat*⁴ and subsequent decisions, and hence, *payment of NPV is expenditure which is necessitated for securing the renewal of the lease and thus capital in nature.*

B. Whether the decision of this Hon'ble Court dated 6 February 2012 in Tax Appeal no. 15/2012 CIT v. Dr Prafulla Hede having been rendered without appreciating the decision of the Hon'ble Supreme Court in *Ambika Quarry Works* (1987) 1 SCC 213) and subsequent decisions are required to be referred to a larger Bench?

C. Whether in the facts and circumstances of the case, the findings of the CIT (Appeals) and the ITAT are perverse findings?"

(italics supplied)

17. Faced with the objection the assessee has raised, we will examine whether the additional questions of law now the Revenue

4(1987) 1 SCC 213)

presented are the same as or similar to question (b) this Court refused to take as a substantial question of law. If it is similar, is there any bar against this Court's reframing a substantial question of law despite its earlier refusal? Before we determine this issue, let us examine a few precedents cited at the Bar.

A New, Additional Question of Law:

18. In *Commissioner of Income-tax-I, Lucknow, v. Indo-Gulf Fertilizers Ltd.*⁵, the High Court of Allahabad has framed two substantial questions of law and admitted the Revenue's appeal. During the final hearing, the Revenue's counsel wanted the Court to frame "one additional substantial of law" keeping in view the pleadings on record and the substantial question of law already framed. The Court was prepared to do so, but the assessee's counsel objected.

19. Repelling the assessee's counter assertions, *Indo-Gulf Fertilizer* has held that "formulation of a new question keeping in view the letter and spirit of sub-section (4) of Section 260 A shall not amount to review of earlier order". The mandate of proviso of sub-section (4) of Section 260 A is, according to *Indo-Gulf Fertilizer*, "to formulate a new question in addition to question already framed and not to review, modify or annul the question originally framed". It has also noted that if the High Court "is satisfied that it has escaped or missed to frame some substantial question of law which is necessary to be formulated and framed for substantial justice or for the ends of justice, it may do so".

20. Indeed, in *Indo-Gulf Fertilizer*, the Allahabad High Court wanted to frame "a new question in addition to questions already framed". And it was so because it was satisfied that "it has escaped [omitted?] or missed to frame some substantial question of law". We respectfully agree with that proposition. But here, the case is on the converse. We were not asked to frame a new substantial question of law that has missed our

5[2012] 26 taxmann.com 66 (Allahabad)

attention. Instead, we were asked to reconsider what we had earlier rejected. It is a different ball game.

What is a Substantial Question of Law?

21. In *Sir Chunilal V. Mehta*, a Constitution Bench of the Supreme Court has considered the proper test for determining whether a question of law raised in the case is substantial. First, what we should look at is whether the question “is of general public importance” or of inter-party importance. Second, if the question substantially affects the rights of the parties, then has the question been settled by the precedential Court or does it still admit of alternative judicial views? In the former instance, it no longer remains a substantial question of law.

22. Here, this Court earlier felt that the question (b) raised by the Revenue stood already answered. So it cannot be treated as a substantial question of law requiring adjudication. According to Ms Razaq, it was not. To that extent, the Court is said to have erred. Even if we accept that—which we do not, though—can we revisit the question we had refused to frame. Here comes into play the “law of the case doctrine”.

Law-of-the-Case Doctrine:

23. The doctrine of the Law of the Case, according to the Black's Law Dictionary⁶, holds that a decision rendered in a former appeal of a case is binding in a later appeal [of the same case.] It differs from the law of the trial, *res judicata*, or *stare decisis*. On the other hand, "Law of the Trial" is a legal theory or court ruling that is not objected to and is used or relied on in a trial.

24. In *Messenger v. Anderson*⁷ Justice Holmes observes that in the absence of statute, the phrase, "law of the case," as applied to "the effect of previous orders on the later action of the court rendering them in the

69th Edn.
7225 U.S. 436, 444 (1912)

same case," merely expresses the practice of courts generally refusing to reopen what has been decided. It is not a limit to their power, though.

25. The law-of-the-case doctrine is said to come in at least two forms. One form, also called the mandate rule, forestalls "relitigation in the trial court of matters that were explicitly or implicitly decided by an early appellate decision in the same case. Once an appellate court decides an issue, then it stands settled in further proceedings in the trial court and controls the case. The other form generally binds a court to its own earlier ruling in the same case—in the absence of an intervening ruling by a higher court on the same issue. This doctrine wants the courts to "display disciplined self-consistency" throughout the case⁸. It distinguishes itself from *res judicata* (for instance, Section 11 of CPC) and 'issue estoppel' (as seen in Order 2, Rule 2 of CPC), both of which are much more rigid⁹.

26. To put this doctrine in perspective, we may observe that the interpretative intricacies in understanding a precedent differ from those involved in understanding the law of the case. A precedent binds to the extent the holding accords with the facts on hand. The law of the case, on the other hand, fetters a later Bench in the same case from taking a contrary stand to that taken earlier by the previous Bench. Of course, this constraint flows down to the lower judicial echelons or applies to coordinate Benches, but not appellate or higher fora¹⁰.

Indian Scenario:

27. In *Arjun Singh v Mohindra Kumar*¹¹, Supreme Court elaborately discussed how interlocutory orders attain finality and, consequently, how the principle of *res judicata* or estoppel applies to them. *Arjun Singh*

⁸The Law of Judicial Precedent, Bryan A. Garner et al., Thomson Reuters (2016), p.442

⁹*State of Kerala v. K. K. Mathai*, AIR 2018 Kerala 18 (DB)

¹⁰*Ibid*

¹¹AIR 1964 SC 993, as quoted in *K. K. Mathai*

classifies the interlocutory orders into three types: (a) orders like staying proceedings, injuncting parties, appointing receivers; (b) orders like restoring proceedings, as under Order 9, Rule 7 of CPC; (c) orders like those that cannot be reopened or reconsidered unless fresh facts emerge.

28. Type (a) orders preserve the status quo pending the litigation and ensure that the parties are not prejudiced by the procedural delays. They do not, in that sense, decide the merits of the controversy in issue. Type (b) orders do not preclude the aggrieved person from challenging them in the appeal taken against the final decree and judgment. In that sense, the trial court's refusal "to permit the defendant to 'set the clock back' does not attain finality. Indeed, Section 105 of CPC statutorily acknowledges this position.

29. Type (c) orders concern those that bind the 'same' Court at later stages, precluding it from reconsidering the decision. *Arjun Singh* observes that "[e]ven if the rule of res judicata does not apply, it would not follow that on every subsequent day which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts."

30. Indeed, in *In Prahlad Singh v. Col. Sukhdev Singh*¹², the Supreme Court has quoted with approval its earlier dictum in *Satyadhyan Ghosal v. Deorajin Debi*¹³. It is for the proposition that the principle of res judicata also applies between two stages in the same proceedings if a party to the proceedings wants to reagitate the matter at a later stage, despite a court deciding the matter at an earlier stage.

31. Let us examine *Commissioner of Income-tax v. Biju Patnaik*¹⁴. There, the Orissa High Court has considered the relative scope of sub-sections (1) and (2) of Section 256, a provision deleted in 2005. Under sub-section (1), either an assessee or the Commissioner may require the

¹²(1987) 1 SCC 727

¹³AIR 1960 SC 941

¹⁴[1978] 112 ITR 555 (ORI.)

Appellate Tribunal to refer to the High Court any question of law. Then, the Tribunal, in its discretion, draws up a statement of the case and refers it to the High Court. On the other hand, if Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner may apply under sub-section (2) of Section 256 to the High Court. In such an event, the High Court may require the Tribunal to state the case and to refer the questions to it.

32. On facts, we may notice that the Revenue applied to the Tribunal under section 256(1) of the Act. But it rejected that application. Then, the Revenue moved the Orissa High Court under section 256(2) of the Act; it wanted the High Court to direct the Tribunal to frame five questions of law. But the High Court wanted the Tribunal to frame only one question. Once the Tribunal referred the question, the High Court took up the final hearing. Then, the Revenue once again wanted the High Court to frame the same substantial questions of law which the High Court had earlier rejected. The Revenue, in fact, argued that “the Bench hearing the matter at the final stage is not bound by the view expressed at the preliminary hearing”.

33. In the above context, Orissa High Court in *Biju Patnaik* has referred to this Court’s judgment in *Jethabhai Hirji and Co. v. Commissioner of Income-tax* [1949] 17 ITR 533. In *Jethabhai Hirji*, this Court’s Division Bench (per Chagla C. J), has held that, on the Tribunal’s refusal under Section 256 (1) of the Act, “it is for the High Court alone to indicate to the Tribunal what the questions of law are”. And the Tribunal’s only function “to formulate proper questions which arise out of those questions of law and to state a case which is germane to the questions of law indicated by the High Court.” Then, the High Court may either answer the questions as formulated by the Tribunal or may reframe or modify the questions and answer those questions.

34. Thus, taking aid of *Jethabhai Hirji*, Orissa High Court has, on facts, noted that the Revenue has not asked for reframing or modification of the question. It has further noted that at the preliminary hearing, the Court held that no question of law arose regarding the items omitted. So,

[T]he effect of that order really is that the application by the Revenue for stating a case with regard to those questions was not entertained. Reviving matters which are closed cannot come within the ambit of reframing the question or making a suitable modification so as to bring the true dispute into the picture. . . . Accordingly, we decline to reopen the matter at this stage, and the present reference shall be confined to consideration of the question referred by the Tribunal for the opinion of the Court.

35. Finally, we may refer to *Kishanchand v. Ramkrishna*¹⁵. There, Madhya Pradesh High Court, per R. C. Lahoti J (as his Lordship then was), considered under Section 100 of CPC an identical question as has arisen now before us. In a second appeal arising out of eviction proceedings, Madhya Pradesh High Court chose a few questions from the memorandum of appeal and framed them into substantial questions of law. But it has rejected a few others from the appeal memorandum. During the final hearing, the appellant wanted the Court to reframe those questions of law the Court had omitted earlier.

36. In that context, *Kishanchand* has noted that the appellant may state the questions of law and press the High Court to formulate those questions as the substantial questions of law. It must be at the stage of the motion hearing. Then, the High Court may either agree or disagree with the appellant's prayer. The Proviso protects, *Kishanchand* notes, the High Court's powers "to hear such other question of law which might not have been formulated by it, if it is satisfied that such a question, the case involves". But the "proviso contemplates hearing being permitted on such question not formulated by [the High Court], but not on question refused to be formulated earlier by it".

37. In other words, if the High Court felt that a particular question did not arise for hearing or was not a substantial question of law worth being heard at the final hearing, that was the end. And that “would deprive the High Court of its jurisdiction to permit a rehearing on that question at the stage of final hearing”. That is, the additional question may be formulated and heard if at an earlier stage the question has been left out from being formulated because it was either not raised or escaped the attention of the Court at that stage. The substantial question of law, left out *sub silentio*, as neither argued nor considered by the Court, can always be permitted to be formulated at a later stage, but not when it has been abandoned “or refused to be formulated by the Court positively”.

38. We respectfully agree with *Kishanchand*. True, *Kishanchand* interprets Section 100 CPC. But Section 260A of the Income Tax Act is analogous to—and more exhaustive than—Section 100 CPC. The provision reads:

S. 260A. Appeal to High Court.—(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal

...

(2) ...

(2A) ...

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on *any other substantial question of law not formulated by it*, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or
 (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

(italics supplied)

39. Seen from the above extract, sub-section (4) of Section 260A, especially the proviso appended to it, liberates the High Court to formulate and hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it. But it does not, despite the Revenue's insistence, empower the High Court to reconsider its earlier view in the same proceedings and reformulate a question of law which it had refused to formulate. In other words, (1) a question that escaped the Court's earlier attention, or (2) a question the appellant not presented to the Court, or even (3) a question that cropped up because of subsequent developments stands on a different footing. But a question the High Court consciously refused to treat as a substantial question of law fails to qualify under none of the above three categories.

40. The Revenue ought to have challenged this Court's order, dated 7 January 2016, which refused to frame a particular question as a substantial question of law. That said, the Revenue is not remediless. If it chooses to question the High Court's judgment under Section 260A of the Act before the Apex Court, it may have its options open. It may comprehensively contend even on the grounds that the High Court has erred in not formulating a substantial question of law at the stage of admission.

Res Judicata and Tax Disputes:

41. The second contention the Revenue has advanced is that the concept of res judicata is alien to the tax jurisprudence. So it wants us to

reformulate the substantial question of law despite the Court's earlier rejection.

42. In *Commissioner of Income-Tax-I v. Forest Development Corporation of Maharashtra Ltd.*¹⁶, for the AY 2003-04, the Tribunal dismissed the Revenue's appeal. To do that, it simply relied on its order for the AY 2002-03. It recorded no independent reasons "except stating the issue stood concluded against the revenue" by its earlier order. Granted, the Revenue filed no appeal against the Tribunal's order for AY 2002-03, but it did against the order for the AY 2003-04.

43. In the above context, in *Forest Development Corporation of Maharashtra Ltd.*, the Revenue contended that in matters of tax laws, there was no question of *res judicata*. Then, a Division Bench of this Court has held that even if the appellant has not appealed against an earlier order, it may appeal against the second order. But that appeal against the second order must be "supported by the averments or submissions showing distinction in the facts and/or in law". That distinction must give rise to a substantial question of law "in the backdrop of the distinctive features in the subsequent order".

44. In this regard, *Forest Development Corporation of Maharashtra Ltd.*, has stressed two aspects. One concerns consistency; it is the law's cardinal virtue. That is, even if the principle of *res judicata* does not apply to tax matters, yet consistency and certainty of law would require the State to take a uniform position and not change their stand in the absence of change in facts and/or the law. The second one concerns the distinct factors that differentiate one order from the other. That is, a mere change in the assessment year, will not warrant an appeal. The appellant should show "distinctive features either in facts or in law" warrant a different treatment to the order in the succeeding assessment year.

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45. On fact, however, *Forest Development Corporation of Maharashtra Ltd.*, found “no distinction in facts or law” between the orders for AY 2002-03 and AY 2003-04. Unquestionable as the proposition of law in *Forest Development Corporation of Maharashtra Ltd.*, we wonder how it relates to the issue before us. Regrettably, this case does not help the Revenue’s cause.

46. As we have already noted, what we have been faced with may not be termed *res judicata per se*. In some jurisdictions, it is called the law of the case: entertaining what has been rejected earlier in the same proceedings. And we have addressed that principle above. So even if we were to hold that *res judicata* is alien to adjudication under taxation regime, that plea is unavailable for the Revenue here.

The Circular:

47. Ministry of Finance, the Government of India, has issued Circular No.17/2019. It reveals the Revenue’s policy decision. To file appeals before the High Court, the Central Board of Direct Taxes has fixed the limit of Rs.1,00,00,000/-. Here, the disputed tax falls short of that amount. In tune with the Revenue’s consistent policy, the learned Standing Counsel has already told us that if this Court does not find favour with the Revenue on the additional substantial questions of law it wanted us to frame, there is nothing further in this matter to be adjudicated.

Result:

Accordingly, we dismiss the Miscellaneous Application under Stamp No.1499 of 2020.

Consequences:

48. Given this Court’s earlier refusal to frame a third substantial question of law, now it has been left with only two questions of law. And because of the Circular CBDT No.17/2019, dt. 08.08.2019 and

clarification dated 20.08.2019, these questions of law need no adjudication, for the disputed tax falls below Rs.1 Crore.

Result:

As a result, we dismiss this appeal. No order on costs.

DAMA SESHADRI NAIDU, J.

M.S. SONAK, J.

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