

P. Vs. Doshi V. Commissioner of Income-tax, Gujarat.

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Court : Gujarat

Decided On : Aug-03-1977

Reported in : [1978]113ITR22(Guj)

Appeal No. : Income-tax Reference No. 8 of 1975

Appellant : P.

Respondent : Doshi V. Commissioner of Income-tax, Gujarat.

Judgement :

JUDGEMENT

J. B. METHA J. - At the instance of the assessee the Tribunal has posed in this reference the following three questions :

'Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that once the Tribunal passed an order the matter became final with regard to the point which was settled by the Appellate Assistant Commissioner and was not agitated before the Tribunal unless it was taken up to the High Court ?

2. Whether the Tribunal was right in holding that the previous order of the Tribunal dated June 21, 1969, restoring the case to the file of the Income-tax Officer meant that the only point that was open was in respect of the addition of Rs. 19,421 and not the legal or jurisdictional aspect whether the reassessment proceedings were correctly initiated under section 147/148 ?

3. Whether, on the facts, the assessee was justified at this late stage in re-agitating the matter whether the case was rightly reopened (which is purely a legal matter going to the very root of the jurisdiction), after having raised and not pressed the point before the Appellate Assistant Commissioner when the matter was taken up before the Appellate Assistant Commissioner for the first time ?'

The assessment year in question was 1960-61 corresponding to the relevant accounting year ending March 31, 1960. The original assessment order was passed for that year on December 2, 1961. Thereafter, in the assessment year 1961-62, the Income-tax Officer noticed that the assessee had sold gold worth Rs. 19,421 and the fund for acquisition of gold represented the income of the assessee. A show-cause notice was issued on January 11, 1962, and the assessee had given his explanation. The proceedings for reassessment under section 147 were initiated by the noticed dated September 3, 1963, in response to which the assessee filed his return on October 3, 1963. The assessee raised objections about the validity of the notice and also on merits challenging this reassessment by relying upon the affidavit of one Shri Kanji Vora in support of the plea that gold ornaments had been converted into gold bullion. The order of reassessment was passed by the Income-tax Officer on March 27, 1965, adding the aforesaid amount of Rs. 19,421 as the assessee's contentions were not accepted. In appeal, before the Appellate Assistant Commissioner, however, the contention about the validity of notice was given up and on merits the Appellate Assistant Commissioner dismissed the appeal, by the order dated October 15, 1965. In the assessee's appeal before the Tribunal the only controversy was as regards the acceptance of the evidence of Shri Vora and the Tribunal found that as the department was not given an opportunity to cross-examine Shri Vora, his affidavit could not have been accepted and, therefore, the Tribunal restored the case to the file of the Income-tax Officer by its order dated June 21, 1969, with a direction to cross-examine the witness, Shri Vora, on his affidavit and then to complete the reassessment proceeding in the light of the evidence so recorded, as read with the other evidence already recorded after the assessment.

When the matter came back to the Income-tax Officer, two written statements were filed by the assessee on December 12, 1969, and January 15, 1970, raising

even the question of validity of the proceeding because there was a mere change of opinion. The Income-tax Officer, by the order dated January 31, 1970, rejected this contention about the validity of proceedings which had been faintly raised as the assessee knew the facts from January 17, 1962, when the show-cause notice was first issued. On merits, he again added the aforesaid amount of Rs. 19,421. In appeal before the Appellate Assistant Commissioner the assessee again took up the point that the Income-tax Officer had erred in reopening the completed assessment under section 147 and on merits also the addition of Rs. 19,421 as income from undisclosed sources was challenged. The appellate Assistant Commissioner pursued the original order sheet and he found that as per the mandatory requirement of section 148(2), no reasons had been recorded by the Income-tax Officer before issuing notice for reassessment. He found that the entry on the order sheet dated September 3, 1963, simply contained the direction, 'issue notice under section 148'. He, therefore, held that, in the absence of reasons for reassessment, the Income-tax Officer had no jurisdiction to reopen the assessment. He further found that the Income-tax Officer had not specified under which sub-section of section 147 he reopened the assessment. There were no reasons recorded by the Income-tax Officer for reopening assessment even when an enquiry in that connection as to the source of investment had been made by that officer after receiving the reply of the assessee of August 22, 1963. This omission on the part of the assessee assumed great importance as the Income-tax Officer was proceeding on totally different grounds after receiving the explanation regarding the source of investment in gold ornaments from the assessee. He also considered that the assessee had shown gold ornaments worth Rs. 45,000 in his wealth-tax return and, therefore, the source of the investment in gold ornaments having been explained, on that ground also the notice should be considered to be had in law. Therefore, his final conclusion was that the subsequent reopening of the assessment was only on account of the change of opinion as to whether there had been actually sale of ornaments and, therefore, on that ground reopening of assessment was not justified. He, therefore, annulled the order of reassessment by his order, dated February 16, 1972. The department in its appeal specifically raised this question that the assessee having given up the contention regarding validity of notice under section 148 read with section 147

before the Appellate Assistant Commissioner in the original proceeding and the matter having become final by the remand order of the Tribunal, the said question could not be reopened before the appellate Assistant Commissioner. The Tribunal agreed that this was purely a legal question going to the root of jurisdiction and it would have been competent to the assessee to raise this point at any stage but because he had once raised this question and given up the same before the Appellate Assistant Commissioner on the earlier occasion, that ground having been given up by the assessee, it could not be said that the assessee was aggrieved by the said decision. That is why at the earlier stage before the Tribunal this ground was not even mentioned in the grounds of appeal. The Tribunal, therefore, took the view that once the Tribunal passed a final order, the matter became final with regard to the point which was settled by the Appellate Assistant Commissioner and which was not agitated before the Tribunal, unless it was taken up to the High Court. The Tribunal also held that the order restoring the case to the file of the Income-tax Officer with clear directions only to cross-examine the witness on the affidavit and then complete the reassessment proceedings meant that the only point that was left open was in respect of the addition of Rs. 19,421 and not the legal or jurisdictional aspect whether the reassessment proceedings were correctly initiated under section 147/148 or not. The assessee having raised that point and then having given it up could not revive the point. Therefore, the departmental appeal was allowed on that point. As the assessee had filed cross-objections because the Appellate Assistant commissioner had not dealt with the facts of the case, the Appellate Assistant Commissioner was directed to decide whether the addition of Rs. 19,421 was justified on the facts of the case or not, by allowing the cross-objections. As the departmental appeal was accordingly allowed, the assessee has come in the present reference.

In order to consider whether such a question going to the root of the jurisdiction by initiating proceeding of reassessment under section 147 could be waived or not, it would be proper at this stage to consider the settled legal position as to the nature of this reassessment proceeding under section 147 or the corresponding section 34 of the earlier Act in the light of the safeguards which have been laid down as conditions precedent or as fetters on the jurisdiction of the authority in wider public interest. Section 147 provides for reassessment of the income escaping

assessment as under :

'147. If -

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).'

It is not necessary to consider the Explanation. Section 148 provides for issue of notice where income has escaped assessment as under :

'148. (1) Before making the assessment, reassessment or recomputation under section 147, the Income-tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income-tax Officer shall, before issuing any notice under this section, record his reasons for doing so.'

Section, 149 provides for time limits for such notice. Section 151 provides as under :

'(1) No notice shall be issued under section 148 after the expiry of eight years from the end of the relevant assessment year, unless the Board is satisfied on the

reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice.

(2) No notice shall be issued under section 148 after the expiry of four years from the end of the relevant assessment year, unless the Commissioner is satisfied on the reasons recorded by the the Income-tax Officer that it is a fit case for the issue of such notice.'

The provision being for reopening the finally concluded assessment this special provision has been considered as properly hedged in by these various statutory safeguards, because the income has escaped the original assessment even when the procedure of original assessment contemplated such wide powers of appeal, revision and even rectification under the various provisions of the Act. That is why the conditions laid down for the reasonable belief to be reached by the Income-tax Officer under sub-clause (a) or under sub-clause (b), and his recording of the reasons under section 148(2), and for the sanction before issuing the said notice under section 148 by the higher authorities under section 151 have been considered as mandatory conditions. The reasons which are now in terms under section 148(2) required to be recorded by the Income-tax Officer have not to be communicated to the assessee but they are to be available for the authorities who have to give the sanction.

In *Kasturbhai Lalbhai v. R.K. Malhotra*, Income-tax Officer Bhagwati C.J. (as he then was) in terms pointed out at page 191 that it must be remembered that section 147 empowered the Income-tax Officer to disturb the finality of an assessment already made and to assess or reassess the income of the assessee. Such an action is bound to result in considerable anxiety and harassment to the assessee and the legislature has, therefore, imposed certain conditions subject to which alone the Income-tax Officer can reopen an assessment which is already concluded. These conditions are succinctly stated their Lordships in *Johri Lal (HUF) v. Commissioner of Income-tax*. There the question had arisen because the Income-tax Officer had proceeded on the basis of section 34(1)(b) of the old Act and not on the basis of section 34(1)(a) and therefore, it was held that in the absence of material on record to show that the Income-tax Officer had formed the

requisite belief, recorded his reasons for taking action under section 34(1)(a) and obtained the sanction of the Central Board of Revenue or the Commissioner, as the case may be, it is not open to the Appellate Tribunal to justify the proceedings taken by the Income-tax Officer under section 34(1)(a). Three conditions were found to be mandatory by their Lordships. At page 441, it was pointed out that before proceedings under section 34(1)(a) could be validly initiated, the Income-tax Officer must have reasons to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profit and gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject-matter of excessive relief under the Act, or excessive loss or depreciation allowance have been computed. The formation of the required opinion by the Income-tax Officer is a condition precedent. Without formation of such an opinion he will not have jurisdiction to initiate proceedings under section 34(1)(a). The fulfillment of this condition is not a mere formality but it is mandatory. The failure to fulfill that condition would vitiate the entire proceedings. As per the settled legal position, the Income-tax Officer would be acting without any jurisdiction if the reason for his belief that the conditions are satisfied did not exist or was not material or relevant to the belief required by that section. Courts would not go into the sufficiency of the reasons which persuaded the Income-tax Officer to initiate proceedings under section 34(1)(a) of the Act but the courts would examine the relevancy of the reasons which persuaded the Income-tax Officer to take proceedings under section 34(1)(a). It was further pointed out that the formation of the required belief was not the only requirement. The Income-tax Officer was further required by section 34 to record his reasons for taking action under section 34(1)(a) and obtain the sanction of the Central Board of Revenue or the Commissioner, as the case may be. It was pointed out that the Commissioner or the Board of Revenue, while granting sanction would have to examine the reasons given by the Income-tax Officer and come to an independent decision and the authority in question should not act mechanically. The Income-tax Officer having himself proceeded only under section 34(1)(b) and not on the basis of section 34(1)(a), the order in those circumstances

could not be justified under section 34(1)(a). Therefore, it was held that without the three relevant conditions precedent being first fulfilled, the proceedings could not be initiated for reassessment under section 34(1)(a). The same would be true for section 34(1)(b) where the Income-tax Officer had in consequence of information in his possession to form that belief that income chargeable to tax had escaped assessment for any assessment year. Therefore, these three conditions precedent having been introduced by way of safeguards in wider public interest so that the finally concluded proceeding which at the time of original assessment could be reopened through initial procedure of appeal, revision or rectification before the assessment became final could not be lightly reopened, with the consequent hardship to the assessee and also unnecessary waste of public time and money in such proceedings. Therefore, these are treated as fetters on the jurisdiction of the authority reopening the proceedings under sections 147 and 148 read with section 151. That is why in *Commissioner of Income-tax v. Kurban Hussain Ibrahimji Mithiborwala*, their Lordships pointed out that it was well-settled that the jurisdiction of the Income-tax Officer to reopen assessment under section 34 was dependent upon the issuance of a valid notice. If the notice issued by him was invalid for any reason, the entire proceedings taken by him would become void for want of jurisdiction. Therefore, the view taken by this court was upheld that the notice in question by the Income-tax Officer which sought to reopen the assessment of the assessee for the assessment year 1948-49, when in fact he reopened the assessment for the year 1949-50, being an invalid notice, the Income-tax Officer had no jurisdiction to revise the assessment of the assessee for the year 1949-50. In *S. Narayanappa v. Commissioner of Income-tax*, their Lordships pointed out that the proceeding for assessment or reassessment under section 34(1)(a) started with the issue of a notice and it was only after the service of the notice that the assessee, whose income was sought to be assessed or reassessed, became a party to those proceedings. The earlier stages of the proceeding for recording the reasons of the Income-tax Officer and for obtaining the sanction of the Commissioner were administrative in character and were not quasi-judicial. There was no requirement in any provisions of the Act or any section laying down as a condition for the initiation of proceedings that the reasons which induced the Commissioner to accord section 34 must also be

communicated to the assessee. The Income-tax Officer need not communicate to the assessee the reasons which led him to initiate the proceedings under section 34. These reasons have to be considered as pointed out by their Lordships in the other decision, when the matter comes for sanction by the authority. That itself makes it clear that the scheme of these provisions is to lay down these safeguards in the wider public interest by way of fetters on the jurisdiction of the authority itself and they could not be said to be merely for the private benefit of the individual assessee concerned as the assessee concerned is not even intended to be supplied with the reasons for reopening the assessment and the entire matter is looked upon as an administrative matter, at the earlier stages where the Income-tax Officer is to record his reasons and obtain sanction of the Commissioner.

The legal position about waiver of such a mandatory provision created in the wider public interest to operate as fetter on the jurisdiction of the authority is well settled that there could never be waiver, for the simple reason that in such cases jurisdiction could not be conferred on the authority by mere consent, but only on conditions precedent for the exercise of jurisdiction being fulfilled. If the jurisdiction cannot be conferred by consent, there would be no question of waiver, acquiescence or estoppel or the bar of resjudicate being attracted because the order in such cases would lack inherent jurisdiction unless the conditions precedent are fulfilled and it would be a void order or a nullity is now well brought out in the decision between invalidity and nullity is now well brought out in the decision in *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh* , 1304, where their Lordships had gone into this material question as to whether the act in breach of the mandatory provision is per force a nullity. The passage in *Macnamara on Nullities and Irregularities*, referred to in *Ashutosh Sikdar v. Bihari Lal Kirtania* [1907] ILR 35 Cal 61 , was in terms relied upon as under :

'....no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.'

Thereafter, their Lordships pointed out that whether a provision fell under one category or the other was not easy of discernment, as in the ultimate analysis, it depended upon the nature, scope and object of the particular provision. Their Lordships in terms approved a workable test laid down by Justice Coleridge in *Holmes v. Russel* [1841] 9 Dowl 487 as under :

'It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.'

Thereafter it was pointed out that a waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction could not be waived, for consent could not give a court jurisdiction where there was none. Even if there was inherent jurisdiction, certain provisions could not be waived. What can be waived would be only those provisions which are for the private benefit and protection of an individual in private capacity, which might be dispensed with without infringing any public right or public policy.

This settled legal position was again reiterated in *Superintendent of Taxes v. Onkarmal Nathmal Trust*, where the question had arisen in the context of the Assam Taxation (on Goods Carried by Road and on Inland Waterways) Act, 1961. The assessee had obtained an injunction order against the State in a writ petition challenging the validity of the Act. The assessee had not submitted the return under section 7(1) and under section 7(2) a notice had to be issued only within two years from the end of the return period. The procedure of best judgment assessment was laid down in section 9(4) and the question arose whether, in view of the injunction order obtained by the assessee, ignoring the two years limit laid down as a fetter for issuance of the notice under section 7(2), the best judgment assessment procedure was permissible. At page 2070, the learned Chief Justice first held that if a return under section 7(1) was not made, the service of a notice under section 7(2) of the Act was the only method for initiation of a valid assessment proceeding under the Act. The period of two years under section 7(2) was a fetter on the power of the authority and was not just a bar of time. It was the

scheme of the Act that the service do notice within two years from the end of the return period was an imperative requirement for initiation of assessment proceeding as also reassessment proceeding under the Act. Further proceeding, at page 2071, their Lordships pointed out the settled legal distinction between the provisions which conferred jurisdiction and provisions which regulated procedure, because jurisdiction could neither be waived nor treated by consent, while a procedural provision could be waived by conduct or agreement. Their Lordships pointed out that in that case the assessee could not be said to have waived the provisions of the statute because there could not be any waiver of a statutory requirement or provision which went to the jurisdiction of assessment. The origin of assessment was either as assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction did not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act related to the exercise of jurisdiction under the Act in all cases. The learned Chief Justice in terms pointed out that the revenue statutes are based on public policy. The revenue statutes protect the public on the one hand and confer power on the State on the other. Therefore, even in the context of such a revenue statute like a taxation measure such fetter on the jurisdiction being a fetter laid to protect public, on wider ground of public policy, it was held that such provisions which confer jurisdiction on assessment and reassessment could never be waived for the simple reason that jurisdiction could neither be waived nor created by consent. In the concurring judgment his Lordship, Beg. J., at page 2077, also pointed out that if the notice under section 7(2) was a condition precedent to the exercise of jurisdiction to make the best judgment assessment, the doctrine of waiver could never confer jurisdiction so as to enable the parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. This decision completely settles the legal position. It makes a distinction between the provisions which confer jurisdiction and provisions which merely regulate the procedure by holding that such provisions which confer jurisdiction or such mandatory provisions which are enacted in public interest on ground of public policy even in such revenue statutes could not be waived, because of the underlying principle that jurisdiction could neither be waived nor created by consent.

The decision in Director of Inspection of Income-tax v. Pooran Mall & Sons , which is so vehemently relied upon by the learned standing counsel, does not detract from the aforesaid ratio, and in fact, reiterates the same. In that case, the question had arisen regarding the waiver of a provision in section 132(5) of the Income-tax Act which permitted the Income-tax Officer to pass an order of seizure within 90 days. The provision was held to be not a mandatory provision and at page 400 it was also pointed out that there was no question of the period of limitation under section 132(5) involving public interest. It was intended for the benefit of the parties. The settled principle which had been stated on Craies on Statute Law, 6th edition, at page 259, was as under :

'As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court.'

Therefore, the period of limitation prescribed under section 132(5) being intended for the benefit of the person concerned, it was held that the assessee could waive that provision. That decision could not, therefore, be invoked in the present context of such a jurisdictional provision which is also a mandatory provision enacted in public interest in this revenue statute as earlier pointed out and which could never be waived.

Besides, the question of waiver could never be raised if the person had no knowledge of his legal rights so that he could make any such conscious waiver. In the present case, the Appellate Assistant Commissioner in his order had pointed out that it was when he perused the order sheet that he found that there were no reasons recorded by the Income-tax Officer for issuing notice under section 148. The entry on the order sheet dated September 3, 1963, simply contained the direction : 'Issue notice under section 148', and no reasons were recorded by the Income-tax Officer before reopening the assessment. Even the relevant sub-section of section 147 under which the assessment was sought to be reopened

was not mentioned. These facts, prima facie, disclosed that the reasons came to the notice of the assessee for the first time when the Appellate Assistant Commissioner perused this order sheet and brought this fact to the notice of the assessee. Even on that ground, therefore, there can be no question of any waiver on the facts of the present case.

Even the alternative ground of finality of this order of the Tribunal suffers from the same infirmity, as the Tribunal has failed to notice this material distinction between a mere procedural provision which could be waived and such jurisdictional provision or a mandatory provision enacted in public interest which could not be waived, because by consent no jurisdiction could be conferred on the authority unless the conditions precedent were first fulfilled. In *DasaMuni Reddy v. Appa Rao*, , such a question of waiver was examined also in the context of the bar of estoppel or of res judicata. At page 2091, it was us exercise of jurisdiction. If there is want of jurisdiction the whole proceeding is coram non judice. The absence of a condition necessary to found the jurisdiction to make an order to give a decision deprives the order or decision of any conclusive effect. (See Halsburys Laws of England, 3rd edition, volume 15, paragraph 384). Further proceeding at page 2092, it was pointed out that just as the courts normally did not permit contracting out of the Acts so there could be no contracting in. A status of control of premises under the Rent Control Acts could not be acquired either by estoppel or by res judicata. Their Lordships in terms held that the principle was that neither estoppel nor res judicata could give the court jurisdiction under the Acts which those Acts said it was not to have. Therefore, bar of res judicata or estoppel or waiver were negatived in such a case where the plea was outside the ambit of the Rent Control Act, for the simple reason that as one could not confer jurisdiction by consent, similarly one could not by agreement waive exclusive jurisdiction of the rent courts over the buildings in question. It is true that section 254(4) in terms provides that save as provided in section 256 (which provides for the reference to the High Court), orders passed by the Appellate Tribunal on appeal shall be final. That finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be avoid order as per the settled legal position which could never have any finality or conclusiveness. If the original order

is without jurisdiction it would be only a nullity confirmed in further appeals. If the essential distinction is borne in mind in such cases when there is such defect of jurisdiction because the conditions to found jurisdiction are absent, the Tribunal also would be suffering from the same defect and it could not confer any jurisdiction on the Income-tax Officer by making the remand order, because of the settled legal principle that consent could not confer jurisdiction when jurisdiction could be created only by fulfilment of the condition precedent as in the present case. Therefore, no question of finality of the remand order could ever arise in the present context, if the mandatory conditions for founding jurisdiction for initiating reassessment proceeding were absent. This is the view in *Commissioner of Income-tax v. Nanalal Tribhovandas* , agreeing with the Madras view that there would be no such finality by remand because consent could not confer jurisdiction, and so, such objection in regard to the validity of the notice under section 34 could be raised before the Appellate Assistant Commissioner.

The learned standing counsel in this connection marshalled in aid the decision in *Northern Railway Co-operative Credit Society Ltd. v. Industrial Tribunal, Rajasthan* , which could hardly be invoked in the present case. There the High Court in writ jurisdiction had held at the earlier stage that the dispute in question was an industrial dispute and, therefore, the reference being a competent reference, the writ petition was dismissed. The order of the High Court was a final judgment which terminated the independent writ proceeding. It was held at page 1186 that order having not been appealed before the Supreme Court, it had become final and it was no longer open to the parties to raise a plea of jurisdiction in appeal against the subsequent award given by the Industrial Tribunal after exercising jurisdiction which the Tribunal was permitted to exercise by the order of the High Court. These were competent proceedings and the independent writ proceeding was also finally terminated and, therefore, this final order precluded the parties from reagitating the same question before the Industrial Tribunal. Their Lordships distinguished the earlier decision in *Satyadhyan Ghosal v. Smt. Deorajin Debi* , where the question had arisen about the applicability of section 28 of the *Calcutta Thika Tenancy Act, 1949*, and the plea having been rejected by the munsif trying a suit, revision, the High Court had held that operation of section 28 of the Act was not affected by the subsequent amendment Act and the case was

remanded to the munsif for disposal according to law. After the final decree was passed by the munsif and the appeal finally came to the Supreme Court, it was held by the Supreme Court that the order of the High Court holding section 28 to be applicable could not operate as res judicata in appeal before the Supreme Court, because the High Courts order of remand was merely an interlocutory order, which did not terminate the proceeding pending before the munsif and which did not terminate the proceeding pending before the munsif and which had not been appealed from at that stage. Consequently, in the appeal from the final decree or order it was open to the party concerned to challenge the correctness of the High Courts decision. The two special features which distinguished that case were : one, that the order of the High Court which was relied upon to invoke the principle of res judicata was an interlocutory order, and the other, that it was made in a pending suit which as a result of that order did not finally terminate. In the present case also the remand order did not terminate the proceedings at the earlier stage. In fact, no question of any bar of res judicata even at the subsequent stage of the same proceeding could arise in the present case for the simple reason that the original order is said to be without jurisdiction. The first condition in invoking any bar of res judicata is the condition about the competence of the court. Similarly, the provision of finality in this relevant provision in section 254(4) could also not be attracted in such a case, where the question admittedly, went to the root of the jurisdiction and if that contention was upheld, it would have made all the proceedings of reassessment totally void and without jurisdiction. As per the aforesaid settled legal position such a point could not be waived and there can be no question of the earlier remand order operating as a final order, because if such a jurisdictional point could not be waived, even the fact of passing of the remand order by the Tribunal could not confer jurisdiction on the Income-tax Officer, if the conditions to found his jurisdiction were absent.

Therefore, if this settled position was borne in mind, the Tribunals view was clearly erroneous that the matter became final when the Tribunal passed the earlier remand order so that this point of jurisdiction got finally settled, which could not be agitated unless the assessee had come in the reference to this court at that stage. The Tribunals view was also incorrect that in restoring the case to the file of the Income-tax Officer by the earlier order, the only point left open was in respect of

addition of Rs. 19,421 on merits and that the legal or jurisdictional aspect whether the reassessment proceedings were legally initiated was not kept open. Even on the third question the Tribunals view was erroneous that even though this point went to the root of the jurisdiction and was a pure question of law, merely because the point was initially raised and not pressed when the matter was taken up before the Appellate Assistant Commissioner, it could be waived and it could not be reagitated. Therefore, in view of the settled legal position our answers on questions Nos. 1 and 2 are in the negative, while our answer on question No. 3 is in the affirmative, that is to say, all the questions are answered against the revenue and in favour of the assessee. The reference is accordingly disposed of and the Commissioner shall pay the costs of the assessee.

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