

SUPREME COURT OF INDIA

Khoday Distilleries Ltd.

Vs.

Mahadeshwara S.S.K. LTD.

S.L.P.(Civil) No.490 of 2012

(K.S. Radhakrishnan and Dipak Misra JJ.)

19.10.2012

ORDER

1. This special leave petition has been filed against the order of the High Court of Karnataka at Bangalore dated 9.9.2011 in RP No.96/2011 in RFA No.427 of 2006. On 20.1.2012 notice was issued on the special leave petition as well as on the prayer of interim relief. The respondent entered appearance and filed a detailed counter affidavit and raised a preliminary objection about the maintainability of the special leave petition.

2. Shri Rajesh Mahale, learned counsel appearing for the respondent submitted that the petitioner had earlier challenged the judgment and order dated 12.11.2008 in RFA No.427 of 2006 before this Court. The same came up for hearing before this Court on 4.12.2009 and the respondent entered appearance and opposed the petition. This Court, while condoning the delay in filing SLP, dismissed the SLP on the same day. Later the petitioners filed Review Petition NO.96 of 2011 for reviewing the Judgment dated 12.11.2008 in RFA No.427 of 2006 before the High Court of Karnataka at Bangalore. Review petition was dismissed by the High Court by the impugned order dated 9.9.2011. Learned counsel placed considerable reliance on the three Judge Bench Judgment of this Court in Abbai Maligai Partnership Firm and another v. K. Santhakumaran and others (1998) 7 SCC 386 and contended that decision would squarely apply to the facts of this case and the High Court has rightly dismissed the review petition by holding that when the Judgment and decree passed by the High Court was confirmed by the Supreme

Court by dismissing the SLP, there was no question of entertaining the review petition.

3. Mr. Gopal Jain, learned counsel appearing for the petitioners submitted that the High Court has committed an error in dismissing the review petition since the earlier SLP was dismissed by this Court on 4.12.2009 without stating any reason. Reliance was placed on a three Judge Bench Judgment of this Court in Kunhay Ammed and others v. State of Kerala and another (2000) 6 SCC 359. Learned counsel pointed out that since the SLP was dismissed at the admission stage by a non-speaking order it would not constitute res-judicata and does not culminate in merger of the impugned judgment and the High Court has committed a grave error in dismissing the review petition.

4. We notice that large number of review petitions are being filed by the parties even after dismissal of the SLPs by this Court, either by non-speaking orders or on merits, and depending upon the out-come of the review petitions again SLPs are being filed before this Court and both sides place reliance on the reasoning of the three Judge Bench Judgment in Abbai Maligai Partnership Firm and another (supra) or Kunhay Ammed and others (supra), in respect of their rival contentions on maintainability.

5. We notice applying the ratio of the Judgments in Abbai Maligai Partnership Firm and another (supra) or Kunhay Ammed and others (supra) conflicting views are being expressed in few of the subsequent judgments of this Court. In Meghamala and others v. G. Narasimha Reddy and others (2010) 8 SCC 383, this Court after referring to Abbai Maligai Partnership Firm and another (supra) and Kunhay Ammed and others (supra) expressed the following view:

“25. Thus, the law on the issue stands crystallised to the effect that in case a litigant files a review petition before filing the special leave petition before this Court and it remains pending till the special leave petition stands dismissed, the review petition deserves to be considered. In case it is filed subsequent to dismissal of the special leave petition, the process of filing review application amounts to abuse of process of the court.

26. In view of the above, we are of the considered opinion that filing of such a review application by the respondents at a belated stage amounts to abuse of process of the court and such an application is not maintainable. Thus, the

High Court ought not to have entertained the writ petition against the order of dismissal of the review application by the Special Court and the order of the High Court to that extent is liable to be set aside.”

6. In *Palani Raman Catholic Mission v. S. Bagirathi Ammal* (2009) 16 SCC 657 this Court has taken the view that review petition can be filed if no leave has been granted to file an appeal and until there is no appeal in the eye of law in the superior court, review can be preferred in the High Court under Order 47 Rule 1. This Court, in that case, set aside the judgment of the High Court and directed the High Court to consider the review petition in accordance with law.

7. Again in *Bhakra Beas Management Board v. Krishan Kumar Vij and another* (2010) 8 SCC 701 this Court held that the mere dismissal of a special leave petition at a preliminary stage does not constitute a binding precedent, and any order passed by the High Court placing reliance on earlier order, can still be challenged subsequently.

8. In *K. Rajamouli v. A.V.K.N. Swamyi* (2001) 5 SCC 37 following the Judgment in *Abbai Maligai Partnership Firm and another* (supra) and *Kunhay Ammed and others* (supra) this Court further explained the principle of res- judicata and held as follows:

“Following the decision in the case of *Kunhayammed* we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the High Court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation the filing of review would be an abuse of the process of the law. We are in agreement with the view taken in *Abbai Maligai Partnership Firm*¹ that if the High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as an affront to the order of the Supreme Court. But this is not the case here. In the present case, the review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed

the special leave petition against the main judgment of the High Court. We, therefore, overrule the preliminary objection of the counsel for the respondent and hold that this appeal arising out of special leave petition is maintainable.”

9. A different note was struck by this Court in *Gangadhara Palo v. Revenue Divisional Officer* and another (2011) 4 SCC 602 and after referring to the Judgment in *K. Rajamouli* (supra) held as follows: “We regret, we cannot agree. In our opinion, it will make no difference whether the review petition was filed in the High Court before the dismissal of the special leave petition or after the dismissal of the special leave petition. The important question really is whether the judgment of the High Court has merged into the judgment of this Court by the doctrine of merger or not.

When this Court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.”

10. We notice that in *K. Rajamouli* (supra) this Court has followed *Kunhay Ammed and others* (supra) and distinguished *Abbai Maligai Partnership Firm and another* (supra) and in *Gangadhara Palo* (supra) later Bench did not accept the view expressed in *K. Rajamouli* (supra). To this extent, there is some conflict between the Judgments in *Gangadhara Palo* (supra) and *K. Rajamouli* (supra) which calls for resolution by a larger Bench.

11. We may also point out, in this connection, that Article 136 of the Constitution does not confer any right of appeal on any party but it confers a discretionary power on the Supreme Court to interfere in suitable cases. Clause 1 of Article 136 of the Constitution confers very wide and extensive powers on the Supreme Court. Article commences with a non- obstante clause, the words are of over-riding effect and clearly indicate the intention of the framers of the Constitution that it is a

special jurisdiction and residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. The jurisdiction under Article 136 of the Constitution, of course, cannot be barred by statute since it is extraordinary power under Article 136. Article 136 is an extra-ordinary power which cannot be taken away by legislation.

12. We also notice that several statutes confer on aggrieved parties right of appeal to the Supreme Court in contra distinction with the powers conferred on the Supreme Court under Article 136 of the Constitution, for instance, Section 15Z of the Securities and Exchange Board of India Act (SEBI), 1992 confers a right of appeal to any person aggrieved by any decision or order of the Securities Appellate Tribunal. So also various regulatory legislations provide for statutory right of appeal. To what extent, the principle of res-judicata and merger would apply in respect of a decision rendered by this Court while exercising its statutory power of appeal as well as the one rendered while entertaining an appeal invoking Article 136 is not seen considered by the larger bench either in Abbai Maligai or Kunhay Ammed' case, which is also, in our view, an issue to be considered by the larger Bench.

13. We notice considerable arguments are being raised before this Court as well as before various High Courts in the country on the maintainability of review petitions after the disposal of the special leave petition without granting leave but with or without assigning reasons on which also conflicting views are also being expressed by the two-Judge Benches of this Court. In order to resolve those conflicts and for proper guidance to the High Courts, we feel it would be appropriate that this matter be referred to a larger bench for an authoritative pronouncement.

ORDER IN THE PROCEEDING PORTION

Counsel for the petitioner pressed for an interim stay of the judgment of the High Court. Learned counsel for the petitioner submits that he has paid the entire amount and the dispute is only with regard to the interest portion which roughly would come to Rs.1.62 crores. Considering the facts and circumstances of the case we are inclined to give a direction to the petitioner to pay Rs.1 crore to the respondent within a period of six weeks from today.

There will be stay of realization of balance amount till the issue is decided finally.