
(2012) 06 GAU CK 0157
In the Gauhati High Court
Case No : Review Petition No. 9 of 2012

Anup Kumar Roy and Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 20-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 1(1), Order 47 Rule 1(a), 114

Constitution of India, 1950 — Article 136, 136(1), 141, 226

Citation : AIR 2012 Guw 163

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : Somik Deb, D.C. Nath and S. Datta, for the Appellant; N.C. Paul, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—With the help of this review petition, made under Article 226 of the Constitution of India, read with Section 114 and Order XLVII of the Code of Civil Procedure, the petitioners have sought for review of the judgment and order, dated 15-09-2006, passed in Civil Rule 400/1996, whereby the Notification, dated 15-12-1995, and the order, dated 24-07-1996, which stood impugned in the said writ petition, have been set aside and quashed. I have heard Mr. Somik Deb, learned counsel for the review petitioners, and Mr. N. C. Pal, learned Senior Government counsel, appearing for the State respondents.

2. While considering the present review petition, it needs to be noted that, aggrieved by the judgment and order, which the petitioners seek to get reviewed, the petitioners had preferred an appeal, which gave rise to WA 66/2006, but the same was dismissed by a Division Bench of this Court by judgment and order, dated 14-11-2011.

3. The question, therefore, which arises for consideration, at the very threshold of this review petition, is: having already preferred an appeal and the appeal

having been dismissed, whether it is still open to the appellants of the said appeal to seek review of not the judgment and order, dated 14-11-2011, passed in W.A. No. 66/2006, but of the judgment and order, dated 15-9-2006, passed in Civil Rule 400/1996, against which intra-Court appeal, as mentioned above, had been preferred and dismissed?

4. While considering this review petition, it is imperative to note that undisputedly, the principles, underlying Order 47 of the Code of Civil Procedure, apply to writ petitions and writ appeals arising therefrom. An order can be reviewed, broadly speaking, by the self same Court subject to the condition that there is no appeal provided against the order, which is sought to get reviewed, or if right to appeal has been provided, no appeal has been preferred.

5. The philosophy, underlying the two conditions, indicated above, is really to maintain judicial discipline so that when a superior Court has deemed it fit to pass an order in the appeal, the same is not set at naught by the Court against whose order the appeal had been preferred.

6. Thus, when an appeal is dismissed before the review petition is filed and/or decided, the Court, whose order is sought to get review, ceases to have jurisdiction to review such an order, for, the order to be reviewed, in such a situation, stands merged into the appellate order and does not survive independent of, and distinct from, the appellant order. This proposition of law does not remain in doubt if one carefully reads the principles, governing the jurisdiction of a Court to review its own order vis-a-vis the appellate orders, in such matters, as laid down by the Supreme Court, way back in 1964, in its decision in *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, . The relevant observations made in *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, , are reproduced hereinbelow :

Order XLVII R. 1 (1) of the CPC permits an application for review being filed "from a decree or order from which an appeal is allowed but from which no appeal has been preferred. In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore, the terms of O. XLVII R. 1(1) did not stand in the way of the petition for review being entertained. Learned counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The terms of O. XLVII R. 1(1) are satisfied on the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.

7. What follows from the observations made in *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, is that if, before the making of an

application for review, an appeal from the judgment, sought to be reviewed, has already been preferred and is pending, then, the Court has no jurisdiction to entertain the review application; but in a case, where the application for review is first made and, thereafter, an appeal is preferred, the review application can be entertained and disposed of, provided that the appellate Court has not disposed of the appeal before the review application is taken up for disposal. In other words, if the appellate Court has disposed of the appeal, no review application can be entertained by the Court, whose order was appealed against.

8. Though, at the first blush, the submissions made on behalf of the review applicants, that in order to secure the ends of justice, a Court, if satisfied, that the ground for review exists, should interfere with the order, appears quite persuasive; but on a cool and dispassionate consideration of the same, one can have no hesitation in holding that such a course, if allowed to prevail, may, instead of securing the ends of justice, destroy the very existence of the Courts and defeat thereby the ends of justice. The anxiety of a Court to ensure that justice is not defeated in the cobweb of technicality of procedural law cannot run contrary to the principles of judicial discipline; otherwise, there will be chaos and there will never be an end to any litigation. The submission that for securing the ends of justice, the Court should review its order if the same appears to be erroneous on the face of the record does not hold water in a case of present nature. Before examining the question as to whether the order needs to be reviewed or not, a Court has to be satisfied that it has the jurisdiction to review the order, in question. If the Court finds that the jurisdiction to review the order, in question, does not exist with it, it becomes immaterial how erroneous the order is. In such a case, the question of reviewing the order does not arise at all, for, any injustice, arising out of such an order, can be looked into and remedied by the Superior Court and not by the self same Court. The argument, advanced on behalf of the review applicants, that in a review matter, justice shall not be allowed to be defeated in the vortex of technicality of procedure was considered and rejected by the Supreme Court, in *M/s. Kabari Pvt. Ltd. Vs. Shivnath Shroff and Others*, , and the law on this subject has been laid down, in no uncertain words, by the Supreme Court as follows :

in our view, there is force in the contention of the learned counsel for the appellants that the expression "from which an appeal is allowed" appearing in Clause (a) of Order 47 Rule 1 of the Code of Civil Procedure, should be construed liberally keeping in mind the underlying principle involved in Order 47 Rule 1(a) that before making the review applications, no Superior Court has been moved for getting the self-same relief so that for the self same relief two parallel proceedings before two forum are not taken.

9. Bearing in mind what have been pointed out above with regard to the law relating to review jurisdiction, when I turn to the facts of the present case, I notice that there is no dispute that the judgment and order, passed in the writ petition, was appealable and that the review applicants had the opinion of either

preferring an appeal or applying for review of the order and the review applicants expressed their option by preferring appeal. With the dismissal of the appeal, which had been so preferred by the present review petitioners, the review petitioners are debarred from preferring review petition against the directions, which were given in the writ petition. Thus, the judgment and order, which were, otherwise, appealable, have been made non-appealable by the act or omission of the review petitioners themselves.

10. Having chosen to prefer appeal, as indicated above, and having got the appeal dismissed, there can be no escape from the conclusion that the judgment and order, dated 15-9-2006, passed, in Civil Rule 400/1996, merged into the judgment and order, dated 14-11-2011, passed in W.A. No. 66/2006. Consequently, the judgment and order, dated 15-9-2006, which had passed in Civil Rule 400/1996 and which is, now, sought to get reviewed, does not, in fact, exist, if I may reiterate, independent of, and separate and/or different from, the judgment and order passed in W.A. No. 66/2006.

11. I may, at this stage, pause to point out that when an appeal is provided and the appeal is preferred, the appeal stands instituted; but when a leave for appeal is applied, then, until the leave is, in such a situation, granted, there is really no appeal. Hence, the disposal of the SLP or of any petition, for leave to appeal, does not subsume the order from which the appeal arose, for, with the rejection of the petition for leave, no appeal survives.

12. Article 136 of the Constitution of India deals with "special leave to appeal", which may be granted by the Supreme Court. When special leave to appeal is dismissed by the Supreme Court with, or without a speaking order, the order from which the appeal arose does not merge into such an order, for, as already indicated above, with the dismissal of the special leave petition, no appeal stands instituted and no appeal can be said to have been considered.

13. In fact, as already indicated above, when the special leave to appeal is declined, there is no appeal. Hence, question of merger of such an order into the order, declining to grant special leave to appeal, does not arise at all. One may, in this regard, refer to Punjab State Electricity Board, Patiala and another Vs. Ashok Kumar Sehgal and others, , wherein it has been observed thus,

Article 136(1) of the Constitution provides that notwithstanding anything in Chapter IV, the Supreme Court may in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any Court or tribunal in the territory of India. If the Supreme Court, in its discretion-refuses to grant special leave to appeal, then there is no appeal. The doctrine of merger or fusing the judgment of the lower Court in that of the appellate Court does not apply to such a situation. Thus, in our view, we can proceed with these matters despite the SLP in Kuldip Singh's case having been dismissed.

(Emphasis added)

14. The above aspect of the law has been succinctly and authoritatively laid down by the Supreme Court, in *Kunhayammed and Others Vs. State of Kerala and Another*, , in the following words :--

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When tribunal or authority was subjected to remedy available under the law before superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality to put in jeopardy. Once the Superior Court has disposed of the lis before it either way whether the decree or order under appeal is set aside or modified or simply confirmed. It is the decree or order of the Superior Court, tribunal or authority which is the final binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below. However the doctrine is not universal or submitted application. The nature of jurisdiction exercised by the superior forum and content or subject-matter of challenge which could have been laid shall have to be kept in view.

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against, while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and, then, assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage. To sum up our conclusions are :--

(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter, which subsists, remains operative and is capable of enforcement in the eye of law. (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and SLP is converted into an appeal. (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing modified or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising it appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter. (iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of

merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. (v) If the order, refusing leave to appeal, is a speaking order, i.e. gives reasons for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Supreme Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting SLP or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties. (vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation, (vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 of the C.P.C.

(Emphasis added)

15. What emerges from the law laid down, in *Kunhayammed and Others Vs. State of Kerala and Another*, is that where an appeal is provided against an order passed by a Court and the appeal is preferred, then, the decision of the lower Court merges into the decision of the appellate Court and it is the latter's decision, which subsists, remains operative and is capable of enforcement in the eyes of law.

16. The position of a special leave application, made under Article 136, is, somewhat, different. The jurisdiction, conferred by Article 136 of the Constitution, is divisible into two stages. The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the SLP is converted into an appeal. The doctrine of merger is not a doctrine of universal or unlimited application.

17. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of the doctrine of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it.

18. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against only when it exercises appellate jurisdiction (i.e. after the leave to appeal is granted) and not

while it exercises the discretionary jurisdiction on the question as to whether the petition for special leave to appeal shall be granted or not. The doctrine of merger, therefore, in such cases, comes into play if the special leave to appeal is granted and not when the question as to whether the leave would be granted or not is considered and decided.

19. An order, refusing special leave to appeal, may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order, refusing special leave to appeal, does not stand substituted in place of the order under challenge. What such an order implies is that the Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed. If the order, refusing leave to appeal, is a speaking order, i.e. when reasons are assigned for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law, contained in such an order, is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court, which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Supreme Court of the country; but it does not mean that the order of the Court, tribunal or authority below has stood merged into the order of the Supreme Court rejecting SLP or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

20. Once leave to appeal has been granted and the appellate jurisdiction of Supreme Court has been invoked, the order passed, in appeal, would attract the doctrine of merger. On an appeal having been preferred or a petition, seeking leave to appeal, having been converted into an appeal before the Supreme Court, the jurisdiction of High Court to entertain a review petition is lost, thereafter, as provided by sub-rule (1) of Rule (1) of Order 47 of the Code of Civil Procedure.

21. I may, however, hasten to add and clarify that though on the refusal to grant special leave to appeal under Article 136, the order of the High Court does not merge into the order of the Supreme Court, the order of the Supreme Court remains binding on the subordinate Courts, for, the Supreme Court is the final arbiter of the matter and that is why, when a SLP is dismissed under Article 136, the order, which is sought to get opened in appeal, cannot be reviewed by the self same Court. This position of law is clear from the following observations of the Supreme Court, in *State of Maharashtra and another Vs. Prabhakar Bhikaji Ingle*, , which read as follows :

3. It is contended for the respondent that the dismissal of the SLP does not preclude the Tribunal from reviewing the order since the dismissal was a non-speaking order. We fail to appreciate the contention of the respondent. It is true that this Court has held that the dismissal of SLP without a speaking order does not constitute *res judicata*. The principle of *res judicata* is founded on public

policy that the parties cannot be permitted to have the controversy directly or substantially in issue between the same parties or those claiming under the parties in the subsequent suit in the same proceedings in the subsequent stages cannot be raised once over. It is a sound principle of public policy to prevent vexation.

4. But in this case, when the self-same main order was confirmed by this Court, the question arises whether the Tribunal has had power under Order 47 Rule 1 CPC or any other appropriate provision under the Tribunal acts to review the orders passed by it and confirmed by this Court by refusing to grant leave. We find that the exercise of the review power is deleterious to the judicial discipline. Once this Court has confirmed the order passed by the Tribunal, that becomes final. Therefore, the Tribunal cannot have any power to review the previous order which stands merged with the order passed by this Court.

22. What crystallizes from the above discussion is that the present review petitioners preferred an appeal against the judgment and order, dated 15-9-2006, passed in Civil Rule No. 400/1996, and the appeal, so preferred, which had given rise to WA No. 66/2006, was dismissed, on merit, by judgment and order, dated 14-11-2011, passed by a Division Bench and, thus, the order, passed by this Court, in the said writ petition, stood merged into the appellate order and, hence, review, if any, has to be sought of the appellate judgment and order and not of the original judgment and order, namely, judgment and order, dated 15-9-2005, passed in Civil Rule No. 400/1996, for, in the light of the law laid down by the Supreme Court, in this regard, by a catena of decisions, which have been referred to above, once an appeal is preferred against an order, passed in a writ petition, the order, passed in the writ petition, gets merged into the appellate order with the disposal of the appeal, so preferred, and, thereafter, the original order, passed in the writ petition, cannot survive for consideration independent of, and/or distinct from, the appellate order.

23. Because of what have been discussed and pointed out above, this review petition fails and the same stands dismissed. No order as to costs.