

**(2011) 11 MAD CK 0330**

**In the Madras High Court**

**Case No :** M.P. No. 1 of 2010 in Review Application SR. No. 98499 of 2009 in  
O.S.A. No. 158 of 2008

K. Pandarinathan

APPELLANT

Vs

M/s. Sri Kumaran Stores and Others

RESPONDENT

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**Date of Decision :** 15-11-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1  
Constitution of India, 1950 — Article 136, 141

**Citation :** (2011) 11 MAD CK 0330

**Hon'ble Judges :** R. Mala, J;R. Banumathi, J

**Bench :** Division Bench

**Advocate :** V. Manohar, for the Appellant; R. Thiagarajan for R1, R2, R4 to R6,  
for the Respondent

**Final Decision :** Dismissed

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**Judgement**

R. Banumathi, J.—This Petition has been filed for condoning the delay of 281 days in representing the Review Application SR. No. 98499 of 2009 in O.S.A. No. 158 of 2008.

2. Brief facts necessary for disposal of this Petition is that Review Petitioner has filed C.S.No.178 of 1997 against the Respondents for recovery of a sum of Rs.29,60,000/-with future interest at the rate of 24% towards the commission on Rs.20,00,000/-, a sum of Rs.2,72,500/-towards repayment of the loan due to Bank of Baroda with Rs.38,150/-towards interest and Rs.83,62,849/-with future interest at the rate of 18% per annum. By the judgment dated 20.12.2007, learned single Judge decreed the suit in part directing the Defendants 1 and 2 to pay to the Petitioner a sum of Rs.22,72,000/-with future interest at the rate of 6% per annum from the date of decree till the date of realisation. Aggrieved by disallowing of the claim, Petitioner has preferred O.S.A.No.158 of 2008. Challenging the judgment of the learned single Judge, Respondents have preferred O.S.A.No.173 of 2008. By the common judgment [06.10.2009], the

Division Bench while directing the amount liable to be paid by the Respondents-Defendants as Rs.22,72,500/-, modified the rate of interest from 6% to 12% per annum on the claim of Rs.22,72,500/-and dismissed both the appeals.

3. Aggrieved by the dismissal of O.S.A.No.173 of 2008, Respondents have preferred SLP before the Supreme Court with condone delay Petition. By the order dated 19.02.2010, the Supreme Court while condoning the delay, dismissed the SLP preferred by the Respondents.

4. Petitioner has filed Review Application SR No.98499 of 2009 on 27.11.2009 to review the common judgment of the Division Bench in O.S.A.No.158 of 2008 dated 06.10.2009. Review Application filed by the Review Petitioner was returned by the Registry on number of occasions for rectification and finally on 17.09.2010, Petitioner has represented the Review Application with condone delay Petition stating that he was suffering from Tuberculosis and had taken treatment at CSI Hospital, Arokiavaram, Madanapalli, Andhra Pradesh and could not contact his counsel to give instructions and comply the returns which caused the delay of 281 days in representing the Review Application.

5. Taking us through the judgment of the single Judge as well as the common Judgment of the Division Bench in O.S.A.No.158 of 2008, Mr.V.Manohar, learned counsel for the Petitioner has submitted that Court did not advert into the aspect of claiming the turnover commission for which notional value was made and paid the stamp duty to that effect which has resulted in depriving of the amount due to the Review Petitioner and Review Petitioner has substantial grounds to seek for review the common judgment dated 06.10.2009 rendered in O.S.A.No.158 of 2008. Learned counsel for Review Petitioner would further submit that Petitioner was affected with Tuberculosis and was taking treatment in Andhra Pradesh and his daughter was also affected by Typhoid fever and therefore, he could not contact his counsel to give instructions and comply the returns which has caused the delay in representation and prays for condonation of delay of 281 days in representing the Review Application. In support of his contention, learned counsel for Review Petitioner placed reliance upon Kunhayammed and Others Vs. State of Kerala and Another, .

6. Mr. R. Thiagarajan, learned counsel for Respondents has submitted that the SLP preferred by the Respondents was dismissed by the Supreme Court on 19.02.2010 and only after the dismissal of the Special Leave Petition, Petitioner had taken steps to revive the Review Application and the delay in representing the Review Application has not been satisfactorily explained. In support of his contention, the learned counsel for Respondents has also placed reliance upon the decision in Kunhayammed case.

7. In (2010) 7 MLJ 693 (SC) N. Meghmala and others v. G.Narasimha Reddy and others, the scope of Review Application before/after the dismissal of SLP was considered by the Supreme Court. Referring to Kunhayammed case and other decisions, in the said decision, in Paragraphs (12) to (18), the Supreme Court

held as under:

12. In *Abbai Maligai Partnership Firm and Another Vs. K. Santhakumaran and Others*, , a three Judge Bench of this Court considered the issue afresh and held that filing of the review petition after dismissal of the SLP by it against the self-same order amounted to an abuse of process of the Court and the entertainment of such a review application was in affront to its order and it was subversive of judicial discipline.

13. In *Kunhayammed and Others Vs. State of Kerala and Another*, a three Judge bench of this Court reconsidered the issue and all above referred judgments and came to the conclusion that dismissal of SLP in limine by a non-speaking order may not be a bar for entertaining a review petition by the Court below for the reason that this Court may not be inclined to exercise its discretion under Article 136 of the Constitution. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment. In that case, doctrine of merger would come into place and lay down the following principles:

(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 subordinate 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. The 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 the 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 of merger. The superior jurisdiction should be capable of reversing, modifying 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 its 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 Apex 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 the SLP or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

14. The Court came to the conclusion that where the matter has been decided by a non-speaking order in limine the party may approach the High Court by filing a review petition. Similar view has been reiterated in *National Housing Coop. Society Ltd. v. State of Rajasthan and Others* (2005) 12 SCC 149.

15. In *K. Rajamouli Vs. A.V.K.N. Swamy*, , this Court considered the ratio of the judgment in *Kunhayammed and Others v. State of Kerala and Another* (supra); and *Abbai Maligai Partnership Firm and Another v. K.Santhakumaran and Others* (supra) and held that if a review application has been filed before the High Court prior to filing the SLP before this Court and review petition is decided/rejected, SLP against that order of review would be maintainable. In case the review application has been filed subsequent to dismissal of the special leave petition, it would amount to abuse of process of the Court and shall be governed by the ratio of the judgment in *Abbai Maligai Partnership Firm and Another v. K.Santhakumaran and Others* (supra). The said judgment has been approved and followed by this Court in *Green View Tea and Industries Vs. Collector, Golaghat, Assam and Another*, .

16. In *Kumaran Silk Trade (P) Ltd. Vs. Devendra and Others*, , this Court held as under at p.754 of MLJ:

9. ... As a matter of fact at the earlier stage, this Court did not consider the question whether one of the appeals against the order dismissing the Review Petition on merits was maintainable. At best the order of remand and the decision in *Kunhayammed and Others v. State of Kerala and Another* (supra) would enable the petitioner to get over the ratio of the three Judge Bench decision in *Abbai Maligai Partnership Firm and Another v. K.Santhakumaran and Others* (supra) that the seeking of a review after the petition for special leave to appeal was dismissed without reserving any liberty in the petitioner was an abuse of process.

17. Thus, the law on the issue stands crystalized to the effect that in case a litigant files a review petition before filing the SLP before this Court and it remains pending till the SLP 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.

18. 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.

On perusal of the above decision, it is evident that Review Application filed subsequent to the dismissal of SLP cannot be entertained.

8. In the case on hand, Review Application was filed on 27.11.2009. SLP preferred by the Respondents was dismissed on 19.02.2010. Two things are to be borne in mind - (i) Review Application was filed by the Petitioner prior to the filing of SLP by the Respondents; and (ii) SLP was filed by the Respondents and not by the Review Petitioner. In such circumstances, filing of Review Application by the Review Petitioner cannot be said to be abuse of process of Court.

9. In Commissioner of Income Tax, Bangalore Vs. Shree Manjunatheaware Packing Products and Camphor Works, , the Supreme Court held that summary dismissal of SLP does not mean approval of the view taken by the High Court. Like wise in P. Nallammal Etc. Vs. State Rep. by Inspector of Police, , the Supreme Court held that dismissal of SLP in limine does not amount to upholding of the law propounded in the decision sought to be appealed against. In the SLP preferred by the Respondents, the Supreme Court while condoning the delay summarily dismissed the Special Leave Petition. Following the ratio of the above decisions, we hold that the Review Application filed by the Petitioner is maintainable.

10. Then the question falling for our consideration is whether the delay in representation of the Review Application is to be condoned. At the time of admission of the appeal preferred by the Respondents [O.S.A.No.173 of 2008], the Division Bench by an order dated 16.04.2008 directed the Respondents to pay the Petitioner a sum of Rs.2,72,500/-with interest at the rate of 6% by way of Demand Draft by 28.04.2008 and deposit the rest of the decretal amount of Rs.19,99,500/-with interest at the rate of 6% by way of Fixed Deposit and hand over the original Fixed Deposit Receipt to the Registrar General, High Court, Madras by 28.04.2008. It is pertinent to note that Review Petitioner has filed application for payment out [M.P.No.2 of 2008 in O.S.A.No.173 of 2008]. By the order dated 05.12.2008, Petitioner was permitted to withdraw the amount of Rs.19,99,500/-on production of immovable security and Petitioner had also withdrawn the amount.

11. As pointed out earlier, Review Application was filed on 27.11.2009 and the same was returned by the Registry for rectification of compliance. Though the

Review Application was represented on few occasions, Petitioner did not pursue the matter after October 2010. Even though the Petitioner has alleged that he was suffering from Tuberculosis and taking treatment, nothing prevented the Petitioner in contacting his counsel in taking steps. Petitioner seems to have taken steps only after the dismissal of the SLP preferred by the Respondents. Even though condonation of delay in representation is between the Court and the Petitioner, Court has to see if there is undue delay in representation of the papers. In the case on hand, the reasons stated for the delay in representation of 281 days is not convincing.

12. While considering the delay in representation, Court has to see that justice does not suffer in such cases. One of the ground raised by the Review Petitioner is that Court had no occasion to see that there was claim of the turnover commission at the rate of 1% as agreed and that the said claim was notionally valued at Rs.1,00,000/-and paid the stamp duty of Rs.1000/-and when the claim was valued notionally at the time of filing of the suit, the question of introducing a new case or claim does not arise and while so, the Bench erred in saying that the claim by way of amendment to the effect that the turnover of Respondents at Hyderabad at Rs.82,62,849/-was barred by limitation.

13. Having regard to the submissions made, we have gone through the judgment of the single Judge and also the common judgment of the Division Bench in O.S.A.Nos.158 and 173 of 2008. By perusal of the records, it is seen that the original plaint was filed on 07.04.1997 and there was no claim for Rs.82,62,849/-and only by way of subsequent amendment in Application No.2931 of 2007 dated 11.04.2007, Petitioner has amended the original plaint incorporating a sum of Rs.82,62,849/-and on that amount, Petitioner claimed that he is entitled to 1% commission of the total turnover. This aspect was considered by the learned single Judge as well as by the Division Bench and held that the claim is barred by limitation.

14. Review Application under Order 41, Rule 1 C.P.C. could be entertained only on three specified grounds viz., (i) discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order was made; (ii) mistake or error apparent on the face of the record; or (iii) for any other sufficient reason. Since the above aspect of amendment amending the plaint regarding the total turnover of the Respondents at Rs.82,62,849/-and entitlement of commission of Petitioner at 1% was already considered by both the single Judge as well as by the Division Bench, we do not find any prima facie case made out to entertain the Review Application. In such circumstances, we are not inclined to condone the delay of 281 days in representation of the Review Application SR. No. 98499 of 2009 in O.S.A. No. 158 of 2008.

15. In the result, the Petition [M.P.No.1 of 2010] for condonation of the delay of 281 in representing the Review Application SR. No. 98499 of 2009 is dismissed.

Consequently, the Review Application SR. No. 98499 of 2009 in O.S.A. No. 158 of 2008 is rejected at the S.R. stage. No costs.