

(2020) 08 MP CK 0293

In the Madhya Pradesh High Court

Case No : Writ Petition No.9940 Of 2020(S)

Madhavsingh Tomar & Ors.

APPELLANT

Vs

M. P. Power Management Co. Ltd. & Ors

RESPONDENT

Date of Decision : 29-08-2020

Acts Referred:

Constitution Of India, 1950 — Article 136, 141
Code Of Civil Procedure, 1908 — Order 47 Rule 1, Order 47 Rule 1(1)
Madhya Pradesh Revision Of Pay Rules, 2009 — Rule 9

Citation : (2020) 08 MP CK 0293

Hon'ble Judges : S. C. Sharma, J

Bench : Single Bench

Advocate : Yashpal Rathore, Shreyraj Saxena

Final Decision : Dismissed

Judgement

01- The petitioners before this Court, who are retired employees, have filed present petition claiming next annual increment. The contention of the petitioners is that their date of birth is 19/06/1956, 15/06/1956 and 04/06/1956 respectively. It has been further stated that keeping in view the fundamental rule governing the service condition of the petitioners, they were superannuated on 30/06/2016 vide order dated 17/07/2015.

02- The petitioners' contention is that under the 6th Pay Commission recommendation, the date of increment fixed for every employee is 01st July and the petitioner has worked for the whole year i.e. from 01st of July to 30th June, however, they have not been granted increment as they were retired from service on 30/06/2016.

03- Learned counsel for the petitioner has argued before this Court that in similar circumstances the Madras High Court in the case of P.Ayyamperumal Vs. The Registrar, Central Administrative Tribunal and Others (W.P.No.15732/2017, decided on 15/09/2017) has granted increment, which was due on 01/07/2015 to the employee who superannuated on 30/06/2015. It has been stated that a

SLP was dismissed in limine against the aforesaid order and therefore, the petitioners are also entitled for same relief. 04- Learned counsel for the petitioner has enclosed the orders passed by co-ordinate Benches of this Court, however, has not produced an order passed in similar circumstances by the Division Bench in Writ Appeal No.717/2016. The order passed by the Division Bench in Writ Appeal No.717/2016 on 10/07/2017 reads as under:-

"Challenge in the present intra-court appeal is to an order passed by the Single Bench on 16-03-2016 in W.P. No.13307/2012 whereby the writ petition was allowed and the petitioner-respondent was directed to be paid annual increment as due on 01-7-2010. Entire controversy is based upon Rule 9 of the M.P. Revision of Pay Rules, 2009 [hereinafter referred to as 'the Rules']. It reads when translated in English thus:

"9. Date of next increment in the revised pay structure-

There will be a uniform date of annual increment, viz. 1st July of every year. Employees completing 6 months and above in the revised pay structure as on 1st of July will be eligible to be granted the increment. The first increment after fixation of pay on 1.1.2006 in the revised pay structure will be granted on 1.7.2006 for those employees for whom the date of next increment was between 1st July, 2006 to 31 December, 2006.

Provided that in the case of persons who had been drawing maximum of the existing scale for more than a year as on the 1st day of January, 2006, the next increment in the revised pay structure shall be allowed on the 1st day of January, 2006. Thereafter, the provision of Rule 9 would apply."

The writ petitioner/respondent was born on 01-7-1950, therefore, his date of superannuation was 30-6 -2010. The annual increment as per Rule 9 of the Rules is due to those government employee on 1st July every year, who have completed more than six months of service.

The argument advanced on behalf of the writ petitioner/respondent is that since he has completed six months of service, therefore, the annual increment as on 01-7-2010 is admissible to him.

Learned Single Judge allowed the writ petition on the ground that since the writ petitioner retired only a day before the due date of annual increment, i.e. 01-7-2010 as provided in Rule 9 of the Rules and he has worked for the entire period, therefore, the benefit of annual increment cannot be denied to him.

We do not find any merit in the reasoning ascribed by the learned Single Judge. Annual increment is due only if the employee was in service on the due date, i.e. 01-7-2010. He has already been granted annual increment as due on 01-7-2009, however, an increment could have been granted to an employee only if he was in service on 1st July of that particular year. Since the writ petitioner/respondent attained the age of superannuation one day prior to the cutoff date, i.e. 30.6.2010, therefore, the appellant is not entitled for the next annual increment.

The mere fact that the writ petitioner has retired a day earlier, will not entitle him for grant of annual increment, the cutoff date, would always bar candidates from getting a benefit. The cutoff date cannot be ignored as it is sacrosanct. Therefore, the mere fact that the writ petitioner attained the age of superannuation a day before the date of grant of increment, he cannot be held entitled for the benefit of the same.

An employee who is not in service on the due date of grant of increment, cannot get the benefit of the increment. Reliance is placed by the counsel for the State on the Full Bench decision of the Andhra Pradesh High Court rendered in *Principal Accountant General, A.P. and another vs. C. Subba Rao*, 2005 LAB I.C. 1224. The relevant para of the said judgment is extracted hereunder:

"54. In support of the above observations, the Division Bench also placed reliance on Banerjee case (supra). We are afraid, the Division Bench was not correct in coming to the conclusion that being a reward for unblemished past service, Government servant retiring on the last day of the month would also be entitled for increment even after such increment is due after retirement. We have already made reference to all Rules governing the situation. There is no warrant to come to such conclusion. Increment is given (See Article 43 of CS Regulations) as a periodical rise to a Government employee for the good behaviour in the service. Such increment is possible only when the appointment is "Progressive Appointment" and it is not a universal rule. Further, as per Rule 14 of the Pension Rules, a person is entitled for pay, increment and other allowances only when he is entitled to receive pay from out of Consolidated Fund of India and continues to be in Government service. A person who retires on the last working day would not be entitled for any increment falling due on the next day and payable next day thereafter (See Article 151 of CS Regulations), because he would not answer the tests in these Rules. Reliance placed on Banerjee case (supra) is also in our considered opinion not correct because, as observed by us, Banerjee case (supra) does not deal with increment, but deals with enhancement of DA by the Central Government to pensioners. Therefore, we are not able to accept the view taken by the Division Bench. We accordingly overrule the judgment in Malakondaiah case (supra)."

Considering the aforesaid and in view of the enunciation of law in *C. Subba Rao* (supra), we find that the order passed by the learned Single Judge cannot be sustained and the same is hereby quashed and the writ petition is dismissed.

Accordingly, the writ appeal is allowed."

In the aforesaid case, in similar circumstances, the Division Bench of this Court has held that employee there is not entitled for annual increment which was due on 01/07/2010 as the employee superannuated one day prior to cut of date i.e. 30/06/2010. The judgment delivered by the Division Bench is binding upon the Single Bench and therefore, this Court cannot take a different view in the matter.

05- It has been argued by learned counsel for the petitioner that SLP was

dismissed in limine by the Hon'ble Supreme Court against the order passed by Madras High Court. In the considered opinion of this Court, the issue regarding dismissal of SLP in limine have been considered by Hon'ble Supreme Court in large number of cases and the apex Court in the case of Khoday Distilleries Ltd. Vs. Sri Mahadeshwara Sahakara (Civil Appeal No.2432 of 2019, decided on March 01, 2019) has held that dismissal at the stage of SLP without reasons does not mean that merger of the judgment of the High Court has taken place with the order passed by the Hon'ble Supreme Court. There is no res judicata and there is no merger.

06- The Hon'ble Supreme Court in the aforesaid case from paragraphs No.21 to 28 has held as under:-

"21) The Court thereafter analysed number of cases where orders of different nature were passed and dealt with these judgments by classifying them in the following categories:

(i) Dismissal at the stage of special leave petition - without reasons - no res judicata, no merger. [Proposition based on judgments in Workmen v. Board of Trustees of the Cochin Port Trust, (1978) 3 SCC 119; Western India Match Co. Ltd. v. Industrial Tribunal, AIR 1958 Mad 398; Indian Oil Corpn. Ltd. v. State of Bihar, (1986) 4 SCC 146; Rup Diamonds v. Union of India, (1989) 2 SCC 356; Wilson v. Colchester Justices, (1985) 2 All ER 97 (HL); Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187; Yogendra Narayan Chowdhury v. Union of India, (1996) 7 SCC 1; V.M. Salgaocar & Bros. (P) Ltd. v. CIT, (2000) 5 SCC 373; Sree Narayana Dharmasanghom Trust v. SwamiPrakasananda, (1997) 6 SCC 78 and State of Maharashtra v. Prabhakar Bhikaji Ingle, (1996) 3 SCC 463.]

(ii) Dismissal of the special leave petition by speaking or reasoned order - no merger, but rule of discipline and Article 141 attracted. [Penu Balakrishna Iyer v. Ariya M. Ramaswami Iyer, AIR 1965 SC 195; Abbai Maligai Partnership Firm v. K. Santhakumaran, (1998) 7 SCC 386; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, (1969) 2 SCC 74; Sushil Kumar Sen v. State of Bihar, (1975) 1 SCC 774; Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447; Junior Telecom Officers Forum v. Union of India, 1993 Supp (4) SCC 693 and Supreme Court Employees' Welfare Assn. Case, (1989) 4 SCC 187]

(iii) Leave granted - dismissal without reasons - merger results 10. [Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372.]

22) It may be pertinent to mention here that while laying down the second principle mentioned above, the Court took note of the judgment in Abbai Maligai Partnership Firm and discussed it in the following manner:

"26. The underlying logic attaching efficacy to an order of the Supreme Court dismissing SLP after hearing counsel for the parties is discernible from a recent three-Judge Bench decision of this Court in Abbai Maligai Partnership Firm v. K.

Santhakumaran [(1998) 7 SCC 386] . In the matter of eviction proceeding initiated before the Rent Controller, the order passed therein was subjected to appeal and then revision before the High Court. Special leave petitions were preferred before the Supreme Court where the respondents were present on caveat. Both the sides were heard through the Senior Advocates representing them. The special leave petitions were dismissed. The High Court thereafter entertained review petitions which were highly belated and having condoned the delay reversed the orders made earlier in civil revision petitions. The orders in review were challenged by filing appeals under leave granted on special leave petitions. This Court observed that what was done by the learned Single Judge was "subversive of judicial discipline". The facts and circumstances of the case persuaded this Court to form an opinion that the tenants were indulging in vexatious litigations, abusing the process of the Court by approaching the High Court and the very entertainment of review petitions (after condoning a long delay of 221 days) and then reversing the earlier orders was an affront to the order of this Court. However the learned Judges deciding the case have nowhere in the course of their judgment relied on doctrine of merger for taking the view they have done. A careful reading of this decision brings out the correct statement of law and fortifies us in taking the view as under."

23) It may also be of interest to note that the Court dealt with the situation where the review is filed earlier in point of time and the special leave petition is filed thereafter, and dealt with the situation in the following manner:

"37. Let us assume that the review is filed first and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in this Court.

The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree - the one before review - becomes infructuous."

24) After elaborate discourse on almost all the aspects, the Court gave its conclusions and also summed up the legal position from paragraphs 39 to 44. We reproduce the same hereunder:

"39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point at issue. It is clear that as amongst the several two-Judge Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (i) Article 141 of the Constitution, (ii) doctrine of merger, (iii) res judicata, and

(iv) rule of discipline flowing from this Court being the highest court of the land.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are - "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-68.)

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.

44. 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 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 upto 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 special leave petition is converted into an appeal.

(iii) The 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 special leave petition 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 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 CPC."

25) Having noted the aforesaid two judgments and particularly the fact that the earlier judgment in the case of Abbai Maligai Partnership Firm is duly taken cognisance of and explained in the latter judgment, we are of the view that there is no conflict insofar as ratio of the two cases is concerned. Moreover, Abbai Maligai Partnership Firm was decided on its peculiar facts, with no discussion on any principle of law, whereas Kunhayammed is an elaborate discourse based on well accepted propositions of law which are applicable for such an issue. We are, therefore, of the view that detailed judgment in Kunhayammed lays down the correct law and there is no need to refer the cases to larger Bench, as was contended by the counsel for the appellant.

26) While taking this view, we may also point out that even in K. Rajamouli this

Court took note of both these judgments and explained the principle of res judicata in the following manner:

"4. Following the decision in Kunhayammed [(2000) 6 SCC 359] 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 [(1998) 7 SCC 386] 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."

27) From a cumulative reading of the various judgments, we sum up the legal position as under:

(a) The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.

(b) We reiterate the conclusions relevant for these cases as under:

"(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 special leave petition 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 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 CPC."

(c) Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case.

28) Applying the aforesaid principles, the outcome of these appeals would be as under:

Civil Appeal arising out of Special Leave Petition (Civil) No. 490 of 2012: In the instant case, since special leave petition was dismissed in limine without giving any reasons, the review petition filed by the appellant in the High Court would be maintainable and should have been decided on merits. Order dated November 12, 2008 passed by the High Court is accordingly set aside and matter is remanded back to the High Court for deciding the review petition on merits. Civil Appeal disposed of accordingly. Civil Appeal arising out of Special Leave Petition (Civil) No. 13792 of 2013: In this case, we find that the special leave petition was dismissed with the following order passed on January 05, 2012:

"We find no ground to interfere with the impugned order. The special leave petition is dismissed."

Here also, special leave petition was dismissed in limine and without any speaking order. After the dismissal of the special leave petition, the respondent in this appeal had approached the High Court with review petition. Said review petition is allowed by passing order dated December 12, 2012 on the ground of suppression of material facts by the appellant herein and commission of fraud on the Court. Such a review petition was maintainable. Therefore, the High Court was empowered to entertain the same on merits. Insofar as appeal of the appellant challenging the order dated December 12, 2012 on merits is concerned, the matter shall be placed before the regular Bench to decide the same.

In the present case also the judgment delivered by the Division Bench of Madras High Court dated 15/09/2017 was subjected to judicial scrutiny and the SLP was dismissed in limine without reasons and therefore, there was no res judicata and no merger. Once there is no res judicata and there is no merger, the judgment delivered by the Division Bench of Madras High Court is only having persuasive value and especially in light of the judgment delivered by the Division Bench of

own High Court in Writ Appeal No.717/2016. No case for interference is made out in the matter. The writ petition is accordingly dismissed.

Certified copy as per rules.