

(2016) 11 AP CK 0029
In the Andhra Pradesh High Court
Case No : Writ Appeal No.1175 of 2016

N. Sessaiah

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-11-2016

Acts Referred:

Constitution of India, 1950 — Article 141, Article 144

Citation : (2017) 1 ALT 303 : (2017) 2 AndhLD 274

Hon'ble Judges : Sri. Ramesh Ranganathan, ACJ. and Sri. A. Shankar Narayana, J.

Bench : Division Bench

Advocate : Sri C. Ramachandra Raju, Advocate, for the Petitioner/Appellant; Mr. T.S. Venkataramana, Standing Counsel for Railways, for the Respondents

Final Decision : Disposed Off

Judgement

Sri A. Shankar Narayana, J. - Aggrieved over that portion of the order of the learned Single Judge in W.P. No.8364 of 2014 and batch dated 17.09.2016 in directing him to file an application for renewal with an affidavit declaring that he does not have more than one stall as directed by the Hon''ble Supreme Court within a week from the date of receipt of a copy of the order giving further direction to the respondents to decide the request within one week thereafter, making it clear that the application shall be decided in terms of the observations in the judgment under challenge and the observations of the Hon''ble Supreme Court in Civil Appeal Nos.618-620 of 2016 dated 29.01.2016, the writ petitioner in W.P. No.8364 of 2014 invoked the jurisdiction of this Court under Clause 15 of the Letters Patent.

2. For the sake of convenience, the parties herein are hereinafter referred to as arrayed in the writ petition.

3. Invoking the jurisdiction under Article 226 of the Constitution of India, the petitioner sought mandamus to declare that he is entitled to renewal of his

licence of two Catering Stalls (Integrated Food Kiosks) at Vijayawada Railway Station in terms of the Catering Policy, 2010 and consequential direction to respondent No.3 - Senior Divisional Commercial Manager, Vijayawada Division, South Central Railways to consider his application dated 20.02.2014 for renewal of licence for two (2) catering stalls (IFKS) one at Platform No.10 and the other, between Platform Nos.2 and 3 of Vijayawada Railway Station in accordance with Catering Policy, 2010 and in accordance with the judgment of this Court dated 16.08.2013 passed in W.P. No.14577 of 2013 and batch of cases.

4. A similar request made by others in four (4) other writ petitions was taken up together by the learned Single Judge and disposed of by a common order dated 17.09.2016, by referring to the facts in W.P. No.28464 of 2016 for convenience sake.

5. Initially, we would like to indicate a few facts that are necessary for disposal of the present appeal.

(a) The South Central Railway, represented by respondent Nos.2 and 3, initially granted licence to the petitioner for running two (2) Integrated Food Kiosks, one is at Platform No.10 and the other between Platform Nos.2 and 3 in Vijayawada Railway Station for a period of three (3) years. Later, the licence was extended from time to time by renewal for every three (3) years on enhancement of licence fee.

(b) The petitioner refers to the order of this Court dated 16.08.2013 in W.P. No.14577 of 2013 and batch, wherein this Court held that existing licensees are entitled to renewal of their licence for every three years as per Clause 16.1.3, 16.2.1 and 18.3 of Catering Policy 2010 read with Circular Nos.37/2010 dated 09.08.2010 and 3/2012 dated 12/13.1.2012, issued by the Railways and allowed the writ petitions and the said order attained finality as the writ appeals preferred by the Railways were dismissed.

(c) When the petitioner made an application on 20.02.2014, requesting respondent No.3 to renew his licence, as per Catering Policy 2010, since respondent No.3 has not passed any orders, but alleged to have threatened to vacate him, he filed the writ petition seeking writ of mandamus to declare that he is entitled to renewal of his licence of both catering stalls (IFKS) in Vijayawada Railway Station and to direct respondent No.3 to consider his application for renewal of licence for the two (2) stalls in accordance with Catering Policy and in accordance with the judgment of this court in W.P. No.14577 of 2013 and batch dated 16.08.2013. He sought interim relief also not to evict him from the said two (2) catering stalls.

(d) The said request was resisted by the Railways stating that the petitioner's contract expired on 31.10.2015; it was under extension till 20.07.2016, in view of pendency of Special Leave Petition; the judgment of the Hon'ble Supreme Court has given any leverage of surrendering one unit and retention of another nor Railway Catering Policy, 2010 does have a provision of choice on the above

lines, and, thus, the licence of the petitioner could not be renewed. The Railways would state that on taking over stalls from IRCTC during 2010, Vijayawada and Guntakal Divisions, based on the circular dated 23.08.2011, processed the applications for renewals of stalls whose tenure expired on 20.07.2013, subject to the conditions stipulated in Clauses 16.1.3 and 16.2.1 of Policy 2010. Even prior to expiry of renewal period, respondent No.3 floated tender notice dated 26.04.2013 for GMUs at A & B category Railway Stations on BZA Division and a similar notification dated 03.05.2013 for SMUs at A1, A & B category stations. Challenging the said notice, tea stall and fruit juices stall contractors approached this Court in W.P. Nos.14577, 14888 and 15072 of 2013 and the said writ petitions were allowed on 16.08.2013, directing the Railways to consider renewal of licence and on appeal, it was upheld by the Division Bench of this Court. When the matter reached up to Supreme Court, the Hon''ble Supreme Court clarified in paragraph No.28 of the judgment, that only those licensees may be eligible for renewal of their licences who would declare on affidavit that they do not have licence for more than one shop/kiosk in their name or benami licence at any Railway Station with periodical reasonable increase of licence fee.

(e) Railways state that since the petitioner had more than one stall, he could not submit affidavit and, therefore, his licence was not renewed. Since the matter was sub judice before the Hon''ble Supreme Court, the respondent never assured renewal of licence to the petitioner and on receipt of judgment in S.L.P., respondents have taken steps to implement Railway Catering Policy, 2010.

(f) The learned Single Judge in the orders under appeal, referred to what has been observed by the learned Single Judge in W.P. No.14577 of 2013 in the order dated 16.08.2013, that the members of the petitioner's association shall make applications for renewal of their licence within one month; respondent No.3 shall consider each of such applications with reference to Clauses 16.1.3 and 16.2.1 and communicate its decision; in the event of rejection of the applications of any of the licensees for renewal shall record reasons therefor; till completion of said process, the members of the petitioner association shall be permitted to continue their respective GMUs and SMUs and that the petitioners had no occasion to file applications and so also for the Railways to decide the same. Thereafter, the learned single Judge referred to the decision of the Hon''ble Supreme Court in C.A. Nos.618-620 of 2016 preferred by the Railways challenging the judgment passed in writ appeals and extracted directions of the Hon''ble Supreme Court.

(g) The learned Single Judge then referred to the directions of the Hon''ble Supreme Court which are that the provisions of the Catering Policy, 2010 are applicable to the respondents therein; the action of the railways in not granting renewal of the licences to the members of the respondents was arbitrary, unreasonable, unfair and discriminatory and cannot be allowed to sustain in law and no interference was warranted and vacated the order dated 11.4.2014 granting stay of the impugned order. The learned Single Judge referred to the observation of the Hon''ble Supreme Court which is thus:

"We, however, make it clear that only those licensees may be eligible for renewal of their licenses who can declare on affidavit that they do not have the license of more than one shop or kiosk in their name or benami license at the railway stations with periodical reasonable increase of license fee."

(h) The learned Single Judge did not agree with the submissions of the learned counsel for the petitioner that the said observations made by the Hon''ble Supreme Court are obiter dicta and have no binding effect on the petitioners as it is not ratio decidendi as the judgment of this Court has been affirmed and has become final and binding on the railways.

(i) The learned Single Judge observed that the petitioners have not filed application for renewal of licence and no explanation was offered as to what prevented them from filing renewal applications. The learned Single Judge then referred to Clause 17 of Catering Policy, 2010 which refers to procedure for renewal of licence ever since that renewal will not be a matter of right and an application for renewal of licence must be made a minimum six (6) months in advance before expiry of the contract and extracted other conditions. Thereafter, observing that the petitioners were not parties either before this Court or before the Supreme Court in the batch of writ petitions and they were supposed to file applications minimum of six (6) months in advance before expiry of the period of licence, keeping in view, that the petitioners continued to enjoy possession of the stalls pursuant to the interim order, directed the petitioners to file an application for renewal with an affidavit declaring that they do not have more than one stall within a week from the date of receipt of a copy of the order with a further direction to the respondents to decide the matter within a week thereafter. While concluding, the learned single Judge made it clear that the applications shall be decided in terms of the judgment of this Court and the observations of the Hon''ble Supreme Court in C.A. Nos.618-620 of 2016 dated 29.01.2016.

(j) Aggrieved over directions of the learned Single Judge to file affidavit as directed by the Hon''ble Supreme Court and further direction to the Railways to decide the applications in terms of the judgment of this Court and the Hon''ble Supreme Court, the petitioner preferred the present appeal.

6. Heard Sri C. Ramachandra Raju, learned counsel for the petitioner (appellant), and the learned Standing Counsel for Railways.

7. Perused the order under challenge and the material made available on record.

8. Learned counsel for the petitioner would submit that the doctrine of merger is not applicable unless order of the learned Single Judge is modified or set aside. The learned counsel would submit that the observation made by the Hon''ble Supreme Court is a casual observation as none of the parties did advance the contention that only those licensees may be eligible for renewal of their licences who can declare on affidavit that they do not have licence for more than one shop or kiosk on their name or benami licence at the railway station. The learned counsel would submit that any observation of the Hon''ble Supreme Court

contrary to its judgment that too without any basis does not constitute any ratio and as such, it has no binding effect especially on the persons who are not parties to the judgment. He would also submit that the Catering Policy, 2010, does not speak anything of renewal for more than one stall and from obtaining licence for more than one stall; and, therefore, the said observation cannot be construed that a person who has got more than one stall is dis entitled to renewal of his licence.

9. Per contra, the learned standing counsel for railways would submit that the earlier writ petitions were filed by the Association, and, therefore, the order of the Hon''ble Supreme Court, merges the judgment of the Division Bench and also order of the learned Single Judge and binds the petitioner herein. He would further submit that the observation made by the Hon''ble Supreme Court cannot be viewed as obiter dicta or as a casual observation as the said observation was made while confirming the order of the learned Single Judge and the appellate Court.

10. Adverting to the rival submissions, we intend to address whether the doctrine of merger would attract the present case?

11. In the present context, we initially intend to express that the Hon''ble Supreme Court, granted leave having allowed the applications for intervention and rendered the judgment referred to by the learned Single Judge in South Central Railway Caterers.

12. We now intend to refer to the decision of a three-judge bench of the Hon''ble Supreme Court in Kunhayammed v. State of Kerala AIR 2000 SC 2587 rendered in the context of answering a question of frequent recurrence and some significance involving the legal implications and the impact of an order rejecting the petition seeking grant of special leave to appeal under Article 136 of the Constitution of India that has arisen for decision. Referring to the earlier rulings in Commissioner of Income-tax, Bombay v. Amrit Bhogilal and Co. ([1958] 34 ITR 130 (SC), Gojer Brothers Pvt. Ltd. v. Shri Ratanlal ([1975] 1 SCR 394), S.S. Rathor v. State of Madhya Pradesh [1989 (43) ELT 790 (SC)], Indian Oil Corporation Limited v. State of Bihar [(1987) 1 LLJ 17 SC], Rup Diamonds v. Union of India [1989 (40) ELT 226 (SC)], Wilson v. Colchester Justices [1985 (2) ALL ELR 97], Supreme Court Employees' Welfare Association v. Union of India [(1989) 2 LLJ 506 SC], V.M. Salgaocar & Bros. Pvt. Ltd. v. Commissioner of Income Tax {(2000) 243 ITR 383 (SC)}, Sree Narayana Dharmasanghom Trust v. Swami Prakasananda [(1997) 3 SCR 799], State of Maharashtra v. Prabhakar Bhikaji Ingle [(1996) 2 LLJ 430 SC], Penu Balakrishna Iyer v. Ariya M. Ramaswami Iyer [(1964) 7 SCR 49], Abbai Mallgal Partnership Firm v. K. Santhakumaran [AIR 1999 SC 1486], Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat [(1970) 1 SCR 322], Gopalbandhu Biswal v. Krishna Chandra Mohanty [(1988) 2 SCR 1108], Junior Telecom Officers Forum v. Union of India [(1993) 2 LLJ 856 SC] and Thungabhadra Industries Limited v. The Government of A.P. [(1964) 5 SCR 174], explained the meaning of the words "to

merge" in paragraph No.42 and summed up the conclusions in paragraph No.43. The conclusions made in paragraph No.43 are:

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 laws 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- 1068)

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 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. 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 special leave petition 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 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 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 C.P.C."

13. When examined the submissions made by the learned counsel for the petitioner, it is not his submission that order of the learned Single Judge in W.P. No.14577 of 2013 and batch dated 16.08.2013 is inapplicable to the present case. It is his strong submission that the entire order passed by the learned Single Judge affirmed by the appellate Court and further affirmed by the Hon''ble Supreme Court is applicable to the extent of affirming the order and judgment of the learned Single Judge and the appellate Court explaining the observation referred to herein above. Thus, the learned counsel insists on excluding the aforesaid observation made by the Hon''ble Supreme Court on the mere ground that it was a passing remark or a casual observation made unconnected with the stand taken by the rival parties respectively and consequently not binding on the petitioner. Though, it is his submission that the doctrine of merger would not apply, we are not in agreement with his submission for the reason that the conclusions of the Hon''ble Supreme Court in *Kunhayammed's Case* (Supra), extracted by us in the above, would negative that submission of the learned counsel, therefore, we find no merit in that submission.

14. In our view, the observation made by the Hon''ble Supreme Court is nothing but in the nature of clarification as the Hon''ble Supreme Court made it clear that only those licensees may be eligible for renewal of their licenses who can declare on affidavit that they do not have licence of more than one shop in their name or benami names at the railway stations with periodical increase of licence fee. The said observation was made in the context of assessing catering policy, circulars and the cases put-forth by rival parties respectively. Having answered the contentious issues, we are not in agreement with the learned counsel for the

petitioner's submission that the observation of the Hon'ble Supreme Court is a casual observation and has to be construed as an obiter dicta without having any binding effect on the right for renewal of licence of the petitioners.

15. Since we held herein above that observation of the Hon'ble Supreme Court has binding effect on the right for renewal of licence of the applicant, we are bound to act in aid of the orders of the Hon'ble Supreme Court, abiding by the constitutional mandate under Article 144 of the Constitution of India. In stating so, we rely on the rulings of the Hon'ble Supreme Court in *M.C. Mehta v. Union of India* AIR 2001 SC 1848, *Dayaram v. Sudhir Batham* (2012) 1 SCC 333, *State of West Bengal v. The Committee for Protection of Democratic Rights, West Bengal* AIR 2010 SC 1476 and *Court on its Own Motion v. Union of India* (UOI) 2012 (12) SCALE 307.

16. We, therefore, hold that the order of the learned Single Judge in directing the petitioner to file applications for renewal with an affidavit as directed by the Hon'ble Supreme Court declaring that the applicant does not have more than one stall and further direction to the respondents to decide renewal application of the petitioner in terms of the judgment of this Court in W.P. No.14577 of 2013 dated 16.08.2013 and the observation of the Hon'ble Supreme Court in C.A. Nos.618-620 of 2016 dated 29.01.2016, can neither be construed as patently perverse nor suffers from any legal infirmity warranting interference. Thus, we find no merit in the appeal.

17. The Writ Appeal is, therefore, dismissed. No order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the appeal stand disposed of.