

(2009) 08 CAL CK 0042

In the Calcutta High Court

Case No : R.V.W. No. 17 of 2008 in M.A.T. No. 739 of 2007 and M.A.T. No. 849 of 2007

West Bengal Dairy and Poultry Development Corporation Ltd.

APPELLANT

Vs

Senior Regional Manager, F.C.I.

RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Constitution of India, 1950 — Article 141

Citation : (2009) 08 CAL CK 0042

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Bimal Kumar Chatterjee and Chandan Misra, for the Appellant; Sakti Nath Mukherjee, Sankar Biswas and Aniket Mitra for the Appellant, Mr. Partha Sarathi Sengupta and Nizamuddin for the FCI, for the Appearing Parties

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This is an application for review of an order dated August 24, 2007 passed by a Division Bench of this Court in M.A.T. No.739 of 2007 heard analogously with M.A.T. No.849 of 2007 by which the said Division Bench allowed those two appeals by setting aside the order passed by the learned single Judge and dismissing the writ application filed by the respondent No.1.

2. It appears from record that being dissatisfied with the aforesaid order dated August 24, 2007 passed by the said Division Bench, the writ -petitioner preferred an application for special leave to appeal before the Supreme Court of India being Special Leave to Appeal (Civil) No.23769 of 2007 which was, however, dismissed by the Supreme Court on 4th January, 2008 by passing the following order:

UPON hearing counsel the Court made the following

ORDER

"Delay condoned.

We do not find any ground to interfere with the impugned order. The special leave petitions are, accordingly, dismissed.

3. After dismissal of the said application for special leave to appeal, the applicant before us filed the present application for review along with an application for condonation of delay. The said Division Bench of this Court, however, dismissed the application for condonation of delay.

4. Being dissatisfied, the present applicant for review filed another special leave application being SLP (Civil) No.9486 of 2009 and the Apex Court has set aside the said order rejecting the application for condonation of delay and has directed this Court to dispose of the review application in accordance with law.

5. Consequently, the application for review has come up for hearing before this Bench.

6. At the very outset, Mr. Partha Sarathi Sengupta, the learned advocate appearing on behalf of the Food Corporation of India, has taken a preliminary objection as regards the maintainability of the present application for review on the ground that in view of the fact that the applicant before us in the past filed an application for special leave to appeal before the Supreme Court and the Supreme Court after hearing the learned counsel for the parties decided "not to interfere with the order passed by this Court", the application for review of the selfsame order is not maintainable. In support of such contention Mr. Sengupta relies upon a decision of the three Judge-Bench of the Supreme Court in the case of *Abbai Maligai Partnership Firm v. K. Santhakumaran*, reported in AIR 1998 SCW 4061. Mr. Sengupta further submits that the view taken by the Supreme Court in the aforesaid case of *Abbai Maligai Partnership Firm* (supra) has been reaffirmed by a subsequent three-Judge-Bench of the Supreme Court in the case of *Kunhayammed and Others Vs. State of Kerala and Another*, as would appear from the last sentence of paragraph 27 of the judgment. Mr. Sengupta, therefore, prays for dismissal of the application for review on the aforesaid preliminary ground alone without entering into the merit.

7. Mr. Chatterjee, the learned senior advocate appearing on behalf of the writ-petitioner/applicant for review has, however, opposed the aforesaid contention of Mr. Sengupta and has contended that so long the special leave to appeal is not granted, the appeal preferred against the original judgment of the Division Bench was non est in the eye of law. According to Mr. Chatterjee, since in the previous occasion, the Supreme Court did not grant any special leave but dismissed the same without granting any leave, it should be presumed that his client had not preferred any appeal against the original judgment passed by the Division Bench and as such, his client's application for review is quite maintainable. Mr. Chatterjee points out that if the appeal is dismissed on merit, in that event only, an application for review is barred; otherwise, Mr. Chatterjee contends, there is no merger of the original decision of this Court with the order of the Supreme

Court dismissing the application for special leave. He therefore, submits that the present application for review is not at all barred. In support of his contention that mere rejection of an application for grant of special leave does not amount to merger. Mr. Chatterjee relied upon various decisions of the Supreme Court including the three Judge Bench decision in the case of Kunhayammed v. State of Kerala (supra) relied upon by Mr. Sengupta. He, therefore, prays for overruling the preliminary objection taken by Mr. Sengupta.

8. Therefore, the preliminary point that arises for consideration in this appeal is whether the present application for review is barred in view of dismissal of the special leave application against the original order.

9. At the very outset, we keep on record that we are quite conscious of the position of law that there is no merger of the original order with the order dismissing an application for grant of special leave unless leave is granted and the appeal is dismissed on merit. If there is no merger, in that case, there is no bar of filing an application for review in term of Order XLVII Rule 1 of the Code by invoking the doctrine of *res judicata*.

10. We are, however, called upon to decide whether in view of the decision of the Supreme Court in the case of Abbai Maligai Partnership Firm (supra), specifically laying down as a proposition of law that a High Court has no jurisdiction to entertain an application for review after the special leave application has been dismissed against the original order, we should entertain the present application for review.

11. In the said case of Abbai Maligai Partnership Firm (supra), against the original order passed by the High Court, an application for special leave to appeal was filed before the Supreme Court and the Supreme Court, after hearing the learned counsel for the parties, decided not to grant special leave to appeal and such fact is exactly the same in the present case. In the similar contest, the Supreme Court, however, made the following observation as regards the maintainability of the application for review:

The manner in which the learned single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this Court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned single Judge at that stage is subversive of judicial discipline. The High Court was aware that SLPs. against the orders dated 7.1.87 had already been dismissed by this Court. The High Court, therefore, had no power or jurisdiction to review the self same order, which was the subject matter of challenge in the SLPs. in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court. We

express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs. by this Court, abused the process of the Court and indulged in vexatious litigation. We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs. by this Court. The appeals deserve to succeed on that short ground. The appeals are, consequently, allowed and the impugned order dated 7.4.1994 passed in the review petitions is hereby set aside. The respondents shall pay Rs. 10,000/- as costs."

(Emphasis supplied by us).

12. In our view, even if the provision contained in Order XLVII Rule 1 of the CPC does not stand in the way of maintaining an application for review after dismissal of the special leave application against the original order for non-application of doctrine of merger, we cannot lose sight of the fact that a law specifically laid down by the Supreme Court by virtue of the power conferred under Article 141 of the Constitution of India is also the law of the land even if the same does find place in the Statute and, thus, in view of the aforesaid observations of the Supreme Court in the case of Abbai Maligai Partnership Firm (supra), this Bench is incompetent to entertain the application for review after the dismissal of the application for special leave to appeal against the selfsame order. We are quite alive to the fact that the Supreme Court, in the present case, while setting aside the order of rejection of the prayer for condonation of delay directed this Court to hear out the application for review but at the same time, the Apex Court made it clear that we should hear the application for review "in accordance with law". If the law stands in the way of" maintaining such application in view of the specific bar created by the decision of the Supreme Court as laid down in the case of Abbai Maligai Partnership Firm (supra), we are left with no other alternative but to dismiss this application on the ground of want of jurisdiction. The decision in the case of Abbai Maligai Partnership Firm (supra) was given by a bench consisting of three judges and we have not found any decision of the Apex Court by a bench of three judges or more, passed either earlier or subsequently, propounding a law specifically contrary to the one taken in the case of Abbai Maligai Partnership firm.

We, therefore, uphold the preliminary objection taken by Mr. Sengupta against maintainability of the present application for review. The application is, thus, dismissed as not maintainable.

In the facts and circumstances, there will be, however, no order as to costs.

Prasenjit Mandal, J.

13. I agree.