

S. Narahari vs S.R. Kumar on 5 July, 2023

Author: Krishna Murari

Bench: Sanjay Karol, Krishna Murari

REPORTABLE

IN THE SUPREME Court OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2023
SPECIAL LEAVE PETITION (CIVIL) NO. OF 2023
(DIARY NO. 23775 OF 2022)

S. NARAHARI & ORS.

... APPELLANT(S)

VERSUS

S.R. KUMAR & ORS.

... RESPONDENT(S)

JUDGMENT

KRISHNA MURARI, J.

Delay condoned.

2. Leave granted.

3. The present appeals are directed against the impugned order and judgment dated 20.12.2019 in RFA No. 392 of 2012 (DEC) and impugned judgment and order dated 15.07.2022 in Review Petition No. 365 of 2022 passed by the High Court of Karnataka at Bengaluru, (hereinafter referred to as “High Court”), whereby, both, the Appeal and the review preferred by the appellants herein were dismissed.

4. The relevant facts necessary for the adjudication of the present appeals, for the sake of convenience, are being mentioned herein.

5. One Late Arosji Rao was the original owner of the suit property and had two daughters. The said Late Arosji Rao, before his death, executed a Will dated 17.07.1945, bequeathing the suit property to both of his daughters in equal share. In the said Will, among other things, it was stated that both the legatees were to enjoy the suit property during their entire lifetime, and thereafter, the same was to be transferred to their respective male heirs. The said late Arosji Rao subsequently died on 30.09.1945, and the abovementioned Will was probated.

6. The two daughters of the original owner Lt. Arosji Rao, Smt. Kamala Bai and Smt. Anusuya Bai, as joint owners of the bequeathed suit property, executed a lease deed in favour of one M/s Rajatha Trust for a period of 45 years. During the tenure of the said lease, on 07.07.1988, Smt. Kamala Bai passed away, and as per the Will of the original suit owner, part of the suit property was to flow to the heirs of Smt. Kamala Bai.

7. After the death of Smt. Kamala bai, a dispute arose between her heirs and Smt. Ansuya Bai, on account of which, Smt. Ansuya Bai, filed a suit for partition and possession of her part of the bequeathed suit property. The matter was however settled by both the parties, and a compromise decree was passed. It was agreed upon by both the parties to divide the suit property in equal shares.

8. Subsequent to the compromise decree, the sons of Smt. Ansuya Bai, who are the respondent No.1 and respondent No.2 herein, filed a suit against their mother and the sons of Late Smt. Kamala Bai, seeking mandatory injunction.

9. During the said suit, Smt. Ansuya Bai leased the suit property to the appellants herein for a period of 51 years. The appellants then started construction of a commercial complex on the suit property, however, the respondents, as against the said construction, got a stay order in their favour.

10. In the aforesaid suit, the Trial Court, apart from framing other relevant issues, also framed five additional issues which are as under :-

I. Whether the plaintiffs prove that the defendant no. 1 has only life interest in the suit property?

II. Whether the plaintiffs prove that the defendant no. 1 has no right to deal with the suit property beyond her life time? III. Whether the plaintiffs further proves that any leases, etc., of the suit property by the defendant no. 1 for the period beyond her life time are void and not binding upon them?

IV. Whether the defendant no. 7 proves that he has lawfully entered into an agreement of sale with defendant no. 2 and 3 for their respective portion of property?

V. Whether the defendant no. 7 proves that there will be miscarriage of justice if this suit is decreed against the entire schedule property?

11. Vide order and judgment dated 11.04.2002, the Learned Trial Court dismissed the suit filed by the respondents herein, vacated the stay order, and held that the compromise decree entered into between the parties is binding on the respondents.

12. Aggrieved by the same, the respondents preferred an appeal in the High Court. During the pendency of the said appeal, Smt. Ansuya Bai passed away. Further, the respondents also filed an application under Order VI Rule 17 of CPC for amendment of plaint and sought for a relief of recovery of possession of property.

13. Vide order and judgment dated 10.08.2007, the High Court did not disturb the finding of the Trial Court regarding the compromise decree being binding on the respondents, however, in respect of the additional relief of possession of part of suit property, the matter was remanded to the Trial Court, for proper adjudication.

14. Aggrieved by the same, the appellant No.1 herein filed Special Leave Petition in this Court, and during the pendency of the said Special Leave Petition, the Trial Court proceeded with the matter remanded to its jurisdiction.

15. Vide order and judgment dated 29.10.2011, the Trial Court on the limited ground of possession of part of the suit property, decreed the suit in favour of the respondent no.1 and respondent no.2 herein.

16. Aggrieved by the aforesaid judgment and decree of the Trial Court, the petitioner(s) therein filed another appeal in the High Court. During the pendency of the said first appeal before the High Court, the Special Leave Petition filed in this Court by the petitioner(s)/appellant(s) was dismissed vide order dated 03.01.2013 on the ground that the relief prayed for in the Special Leave Petition had exhausted itself.

17. However, while dismissing the said Special Leave Petition, this Court held that since the first appeal filed against the judgment dated 29.10.2011 was still pending before the High Court and that there were issues raised in the Special Leave Petition qua the remand order, this Court gave liberty to the petitioner(s) therein to raise all such questions before the High Court in the pending appeal without being influenced by the remand order. Subsequently, the said first appeal also came to be dismissed vide judgment dated 20.12.2019.

18. Aggrieved by the dismissal of the first appeal, the petitioner(s)/appellant(s) filed another Special Leave Petition before this Court, however, the same was dismissed as withdrawn with liberty to approach the High Court by means of filing a review petition.

19. For the sake of clarity, in such a case where a multiplicity of proceedings exists, we find it crucial to clarify that as far as the present appeals are concerned, challenge is confined to two orders dated 20.12.2019 and 15.07.2022 passed by the High Court.

20. At the first instance, by way of an earlier Special Leave Petition, the original impugned order of the High Court dated 20.12.2019 was challenged. This Court had dismissed the same, however liberty was granted to the petitioner(s)/appellant(s) to approach the High Court by way of a review.

21. The said liberty was utilized by the appellant(s), and a review was filed in the High Court. The same however, was dismissed by the High Court vide impugned order and judgment dated 15.07.2022.

22. In the present appeals, both, the original impugned order by the High Court in appeal, as well as the order in review by the High Court, are being challenged.

ANALYSIS

23. The Ld. counsel appearing on behalf of both the parties were heard in great detail.

24. At the first instance, the Ld. Counsel appearing on behalf of the respondents has raised a preliminary objection as far as the maintainability of the present appeals are concerned.

25. We are of the considered opinion that only after the issue of maintainability is decided upon, can this Court enter into the merits of the case. The issue of maintainability of Special Leave Petition is akin to a rite of passage, and only after it is deemed that Special Leave Petition is maintainable, can an entry be taken into the merits of a dispute.

26. It is the contention of the respondents that as far as an appeal by way of Special leave against an order passed in review is concerned, the provisions of Order XLVII rule 7 make it amply clear that the same is not permissible, that is to say, no appeal by way of Special Leave Petition against an order passed in review is maintainable.

27. Further, it has also been contended by the respondents, that this Court, while dismissing the original Special Leave Petition filed by the petitioner(s) therein, while it granted liberty to the petitioners to approach the High Court in review, did not give the petitioners specific permission to file a subsequent Special Leave Petition before this Court. Such lack of explicit permission, as per the respondent, places a bar on the petitioners to approach this Court again. For this, the respondent has relied on the case of Sandhya Educational Society Vs. Union Of India¹

28. As far as first contention of the respondent is concerned, we concur with the same. Order XLVII rule 7 of the CPC makes it amply 1 (2014) 7 SCC 701 clear that no Special Leave Petition can be filed against an order passed in review, and as such, does not require our further consideration. For a ready reference, the same is being reproduced herein:

“Order of rejection not appealable. Objections to order granting application.

(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

29. The appellants however, to overcome such bar, in the present appeals, have not only impugned the order passed by the High Court in review, but has also impugned the original order passed by the High Court in appeal. The limited question, therefore, posed before us for our consideration, is whether liberty granted by this Court to approach the High Court in review, automatically places the said matter matter in the escalation matrix, and makes the remedy of Special Leave Petition available again.

30. In the case of Vinod Kapoor Vs. State Of Goa², the petitioner therein had filed a Writ in the High Court and the same was dismissed. As against this, the petitioner therein, filed a review in the High Court and also filed Special Leave Petition in the Supreme Court. When the Special Leave Petition came to be heard, the petitioner therein stated that he had already filed a review, and hence, sought liberty to withdraw the case, and on the same grounds, the Special Leave Petition was dismissed as withdrawn.

31. After the withdrawal of the Special Leave Petition, the review petition was heard by the High Court, however, the same was dismissed. Aggrieved by the said dismissal of the review, the petitioner therein, filed another Special Leave Petition in the Supreme Court.

32. While dealing with a similar fact circumstance as in the present case, wherein a consecutive Special Leave Petition was filed and the order in the original Special Leave Petition only gave an explicit 2 (2012) 7 SCC 701 liberty to approach the High Court, this Court held that the subsequent Special Leave Petition was not maintainable. The relevant paragraphs of the said judgment are being produced herein:

“There is nothing in the decisions cited by the appellant to show that this Court has taken a view different from the view taken in *Abhishek Malviya v. Additional Welfare Commissioner and Another* (supra) with regard to maintainability of an appeal by way of Special Leave under Article 136 of the Constitution against an order of the High Court after an earlier Special Leave Petition against the same order had been withdrawn without any liberty to file a fresh Special Leave Petition. Similarly, there is nothing in the decisions cited by the appellant to show that this Court has taken a view that against the order of the High Court rejecting an application for review, an appeal by way of Special Leave under Article 136 of the Constitution is maintainable. In the result, we hold that the Civil Appeals are not maintainable and we accordingly dismiss the same....”

33. Further, in the case of *Sandhya Education Society* (Supra), a two-Judge Bench of this Court, while accepting the principle laid down in the *Vinod Kapoor Judgment* (Supra), categorically held that once Special Leave Petition is dismissed as withdrawn, if no explicit liberty has been granted to approach the Supreme Court by way of a subsequent Special Leave Petition, the same cannot be allowed. For a ready

reference, the relevant extract of the said judgment is being placed hereunder:

“This Court in Vinod Kapoor v. State of Goa, has categorically observed that once the special leave petition is dismissed as withdrawn without obtaining appropriate permission to file a special leave petition once over again after exhausting the remedy of review petition before the High Court, the same is not maintainable.”

34. Per contra, the Ld. Counsel appearing on behalf of the appellants has relied upon the case of Khoday Distilleries Ltd. Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd³, wherein it has been observed that the doctrine of merger is not applicable in cases where the dismissal of Special Leave Petition is by way of a non-

speaking order. The relevant paragraphs of the said judgment, for the sake of convenience, are being reproduced herein:

“We reiterate the conclusions relevant for these cases as under:

(Kunhayammed case | Kunhayammed v. State of Kerala, (2000) 6 SCC359]. SCC p. 384) "(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.

3 (2019) 4 SCC 376

(vi) Once leave to appeal has been granted and appellate jurisdiction of the 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 the High Court to entertain a review

petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC”

35. While the law laid down by the two judgments relied upon by the appellants, and other judgments in line with the said two judgments explicitly state that specific liberty is a requirement for filing a subsequent Special Leave Petition after the withdrawal of the first Special Leave Petition, however, a crack seems to appear in the foundation of the said judgments when the judgment of *Khoday Distilleries (Supra)* is read into in detail.

36. In the case of *Khoday Distilleries (Supra)*, the question that was raised before this Court was different from the present case, however, the underlying logic of the said judgment, in our opinion, has bearing on the issue raised before us in the present case. In the said case, a three judge bench of this Court was tasked with answering the question of whether a review petition in the High Court is maintainable, once Special Leave Petition raising the same issue has been dismissed. This Court, while relying upon the case of *Kunhayammed Vs. State of Kerala*⁴, held that even after the dismissal of the Special Leave Petition, a review before the High Court is still maintainable.

37. While the conclusion of the said judgment is not relevant to the present case at hand, however, the reasoning behind coming to the said conclusion, in our opinion, has bearing on the present case. This Court, in the abovementioned case, while holding that a review is maintainable even after the dismissal of Special Leave Petition, observed that the dismissal of Special Leave Petition by way of a non- speaking order does not attract the doctrine of merger.

38. In simpler terms, this would essentially mean that even in cases where the Special Leave Petition was dismissed as withdrawn, where no reason was assigned by the Court while dismissing the matter and where leave was not granted in the said Special Leave Petition, the said dismissal would not be considered as laying down law within the ambit of Article 141 of the Constitution of India.

39. If a dismissal of Special Leave Petition by way of a non- speaking order is not considered law under Article 141 of the 4 (2000) 6 SCC 359 Constitution of India, the same also cannot be considered as *res judicata*, and therefore, in every such dismissal, even in cases where the dismissal is by way of a withdrawal, the remedy of filing a fresh Special Leave Petition would still persist. Further, if on the said reasoning, a remedy to file a review in the High Court is allowed, then the same reasoning cannot arbitrarily exclude the filing of a subsequent Special Leave Petition.

40. We are painfully aware of the fact that such an interpretation, if expanded beyond the specific scope of filing a review in the High Court is allowed, it would open the floodgates of litigation, and would essentially mean that every dismissal of Special Leave Petition must be accompanied with reasons declaring the same.

41. Therefore, in light of the abovementioned observations, we are of the opinion that to put a quietus to such an issue, it is necessary for the same to be adjudicated and deliberated upon by a larger bench of this Court. Further, since only after such a preliminary objection is decided, can the merits of the present case be entered into, the same is to be placed before an appropriate bench after the question of law is decided by the larger bench.

42. Accordingly, let the papers of the case be placed before the Hon'ble Chief Justice of India for constituting a larger bench.

.....,J (KRISHNA MURARI)J (SANJAY KAROL) NEW
DELHI;

05TH JULY, 2023