Kunhayammed & Ors vs State Of Kerala & Anr on 19 July, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2587, 2000 AIR SCW 2608, (2000) 9 JT 110 (SC), (2000) 113 TAXMAN 470, 2000 (2) UJ (SC) 1158, 2000 (7) SRJ 256, 2000 (5) SCALE 167, 2000 (3) LRI 502, 2000 (6) SCC 359, 2000 KERLJ(TAX) 388, 2000 (6) COM LJ 1 SC, 2000 (9) JT 110, 2000 UJ(SC) 2 1158, 2001 (2) BLJR 853, (2001) 129 ELT 11, (2000) 97 FJR 213, (2000) 245 ITR 360, (2000) 3 KER LT 354, (2000) 119 STC 505, (2000) 5 SUPREME 181, (2000) 3 RECCIVR 671, (2000) 5 SCALE 167, (2000) 162 CURTAXREP 97, (2000) 2 CURLJ(CCR) 626

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Bench: K.T. Thomas, D.P. Mohapatra, R C Lahoti

PETITIONER:
KUNHAYAMMED & ORS.

Vs.

RESPONDENT:
STATE OF KERALA & ANR.

DATE OF JUDGMENT: 19/07/2000

BENCH:
K.T. Thomas, D.P. Mohapatra., & R C Lahoti.

JUDGMENT:

R.C. Lahoti, J.

A question of frequent recurrence and of some significance involving the legal implications and the impact of an order rejecting a petition seeking grant of special leave to appeal under Article 136 of the Constitution of India has arisen for decision in this appeal.

Facts in brief :

> The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Act 26 of 1971), hereinafter referred to as the Act for short, was enacted by the State of Kerala to provide for the vesting in the Government of private forests in the State of Kerala and for the assignment thereof to agriculturists and agricultural labourers for cultivation.

> The Act and the assent of the President on the Act were both published in Kerala Government Gazette (Extraordinary) dated 23.8.1971. The Act was given a retrospective operation by declaring that it shall be deemed to have come into force on the 10th day of May, 1971. We are not concerned with the details of several provisions contained in the Act. For our purpose it would suffice to notice that the disputes - (i) whether any land is a private forest or not, or
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> (ii) whether any private forest or portion thereof is vested in the Government or not - may be entrusted for decision under Section 8 to a Tribunal constituted under Section 7 of the Act popularly known as Forest Tribunal. The Government or any person objecting to any decision of the Tribunal may within a period of 60 days from the date of that decision, appeal against such decision to the High Court under Section 8A of the Act.

There is a large family consisting of 71 members which raised a dispute before the Forest Tribunal, Kozhikode which was registered as OA 5 of 1981. Land to the tune of 1020 acres was the subject-matter of dispute. By order dated 11.8.1982 the Tribunal held that the land did not vest in the Government. An appeal was preferred by the State of Kerala before the High Court of Kerala which was dismissed on 17.12.1982 by an elaborate order. There was no statutory remedy of appeal, revision or review provided against the order of the High Court. The State of Kerala filed a petition for special leave to appeal under Article 136 of the Constitution registered as SLP(C) No.8098 of 1983. The petition was dismissed by an order dated 18.7.83. The order reads as under :- Special leave petition is dismissed on merits. By Amendment Act No.36 of 1986 published in Kerala Government Gazette (Extraordinary) dated 1.12.1986 Section 8C amongst others was enacted into the body of the Act giving it a retrospective effect from 19.11.1983. Sub-section (2) of Section 8C, with which we are concerned, reads as under:-

> 8C. Power of Government to file appeal or application for review in certain cases.
>
> (1) xxxx xxxx xxxxx
> xxxx xxxx xxxx
>
> (2) Notwithstanding anything containing in this Act, or in the Limitation Act, 1963 (Central Act 36 of 1963), or in any other law for the time being in force, or in any judgment, decree or order of any court or other authority, the Government, if they are satisfied that any order of the High Court in an appeal under Section 8A (including an order against which an appeal to the Supreme Court has not been admitted by that Court) has been passed on the basis of concessions made before the High Court without the authority in writing of the government or due to the failure to produce relevant data or other particulars before the High Court or that an appeal against such order could not be filed before the Supreme Court by reason of the delay in applying for and obtaining a certified copy of such order, may, during the period beginning with the commencement of the Kerala Private Forests (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March, 1987, make

an application to the High Court for review of such order.

xxx xxx xxx xxx

[emphasis supplied]

In January 1984 the State of Kerala filed an application for review registered as RP No.14 of 1984 before the High Court of Kerala seeking review of the order dated 17.12.1982 passed by the High Court. On behalf of the respondents before the High Court a preliminary objection was raised to the maintainability of the review petition which has been heard and disposed of by the order dated 14th December, 1995 which is put in issue in this appeal.

The High Court has overruled the preliminary objection as to the maintainability of the petition and directed the review petition to be posted for hearing on merits. Feeling aggrieved the petitioners have sought for leave to appeal to this Court which has been granted on 16.9.1996. On 14.3.2000 when this matter came up for hearing before a bench of two Judges they directed the matter to be referred to a bench of three Judges having regard to the importance of the question involved.

Shri T.L.V. Iyer, the learned senior counsel for the appellant has raised two contentions: Firstly, that the order of the High Court dated 17.12.1982 having merged into the order of this court dated 18.7.1983, the order of the High Court had ceased to exist in the eye of law and therefore an application seeking review of the order dated 17.12.1982 passed by the High Court and before the High Court is entirely misconceived; Secondly, the order dated 18.7.1983 passed by this Court amounts to affirmation of the order dated 17.12.1982 passed by the High Court and therefore the High Court cannot entertain a prayer for review of its order much less disturb the order in exercise of review jurisdiction.

The doctrine of merger :

The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

In Commissioner of Income-tax, Bombay Vs. M/s Amritlal Bhogilal and Co. AIR 1958 SC 868 this Court held :

There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that

it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement.

However, in the facts and circumstances of the case this Court refused to apply the doctrine of merger. There, an order of registration of a firm was made by the Income-tax Officer. The firm was then assessed as a registered firm. The order of assessment of the assessee was subjected to appeal before the Appellate Commissioner. Later on the order passed by the Income-tax Officer in respect of registration of the firm was sought to be revised by the Commissioner of Income-tax. Question arose whether the Commissioner of Income-tax could have exercised the power of revision. This Court held that though the order of assessment made by the ITO was appealed against before the Appellate Commissioner, the order of registration was not appeallable at all and therefore the order granting registration of the firm cannot be said to have been merged in the appellate order of the Appellate Commissioner. While doing so this Court analysed several provisions of the Income-tax Act so as to determine the nature and scope of relevant appellate and revisional powers and held if the subject matter of the two proceedings is not identical, there can be no merger. In State of Madras Vs. Madurai Mills Co.Ltd. AIR 1967 SC 681 this Court held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

In M/s Gojer Brothers Pvt.Ltd. Vs. Shri Ratanlal AIR 1974 SC 1380 this Court made it clear that so far as merger is concerned on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority; in all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision whether of reversal or modification or only confirmation. Their Lordships referred to an earlier decision of this court in U.J.S. Chopra Vs. State of Bombay AIR 1955 SC 633 wherein it was held.

A judgment pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgment of the lower court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by

the courts below.

In S.S. Rathor Vs. State of Madhya Pradesh AIR 1990- SC 10 a larger Bench of this Court (Seven-Judges) having reviewed the available decisions of the Supreme Court on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from doctrine of merger by referring to C.I.T. Vs. Amritlal Bhogilal & Co. (supra) and several other decisions of this Court.

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

Stage of SLP and post-leave stage The appellate jurisdiction exercised by the Supreme Court is conferred by Articles 132 to 136 of the Constitution. Articles 132, 133 and 134 provide when an appeal thereunder would lie and when not. Article 136 of the Constitution is a special jurisdiction conferred on the Supreme Court which is sweeping in its nature. It is a residuary power in the sense that it confers an appellate jurisdiction on the Supreme Court subject to the special leave being granted in such matters as may not be covered by the preceding articles. It is an overriding provision conferring a special jurisdiction providing for invoking of the appellate jurisdiction of Supreme Court not fettered by the sweep of preceding articles. Article 136 opens with a non- obstante clause and conveys a message that even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammeled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense or sense of justice of the Judges. No right of appeal is conferred upon any party; only a discretion is vested in Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.

The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps : (i) granting special leave to appeal; and (ii) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order XVI of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in form No.28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex-parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the S.L.P.. On hearing the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex-parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under :-

1. While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

2. If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

3. If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and the respondent may also be JJ called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the court may dismiss the appeal without noticing the respondent.

> 4. In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

Dismissal at stage of special leave - without reasons - no res judicata, no merger Having so analysed and defined the two stages of the jurisdiction conferred by Article 136, now we proceed to deal with a number of decisions cited at the Bar during the course of hearing and dealing with the legal tenor of an order of Supreme Court dismissing a special leave petition. In Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust and Another 1978 (3) SCC 119, a Three-Judges Bench of this Court has held that dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted. That may be due to various reasons. During the course of the judgement, their Lordships have observed that dismissal of a special leave petition under Article 136 against the order of a Tribunal did not necessarily bar the entertainment of a writ petition under Article 226 against the order of the Tribunal. The decision of Madras High Court in The Management of W. India Match Co. Ltd. Vs. Industrial Tribunal, AIR 1958 Mad 398, 403 was cited before their Lordships. The High Court had taken the view that the right to apply for leave to appeal to Supreme Court under Article 136, if it could be called a right at all, cannot be equated to a right to appeal and that a High Court could not refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move Supreme Court under Article 136 of the Constitution. Their Lordships observed that such a broad statement of law is not quite accurate, although substantially it is correct.

In Indian Oil Corporation Ltd. Vs. State of Bihar and Ors. - AIR 1986 SC 1780 there was a labour dispute adjudicated upon by an award made by the Labour Court. The employer moved the Supreme Court by filing special leave petition against the award which was dismissed by a non-speaking order in the following terms :-

> The special leave petition is dismissed. Thereafter the employer approached the High Court by preferring a petition under Article 226 of the Constitution seeking quashing of the award of the Labour Court. On behalf of the employee the principal contention raised was that in view of the order of the Supreme Court dismissing the special leave petition preferred against the award of the Labour Court it was not legally open to the employer to approach the High Court under Article 226 of the Constitution challenging the very same award. The plea prevailed with the High Court forming an opinion that the doctrine of election was applicable and the employer having chosen the remedy of approaching a superior court and having failed therein he could not thereafter resort to the alternative remedy of approaching the High Court. This decision of the High Court was put in issue before the Supreme Court. This Court

held that the view taken by the High Court was not right and that the High Court should have gone into the merits of the writ petition. Referring to two earlier decisions of this Court, it was further held :-

the effect of a non-speaking order of dismissal of a special leave petition, without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicity or even constructively while dismissing the special leave petition cannot, of course, be re- opened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment. The dismissal of a special leave petition in limine by a non-speaking order does not therefore justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by this Court. It may also be observed that having regard to the very heavy backlog of work in this Court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this Court to grant special leave in cases where the party cannot claim effective relief by approaching the concerned High Court under Article 226 of the Constitution. In such cases also the special leave petitions are quite often dismissed only by passing a non-speaking order especially in view of the rulings already given by this Court in the two decisions afore-cited, that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. In such cases it would work extreme hardship and injustice if the High Court were to close its doors to the petitioner and refuse him relief under Article 226 of the Constitution on the sole ground of dismissal of the special leave petition.

[emphasis supplied] In our opinion what has been stated by this Court applies also to a case where a special leave petition having been dismissed by a non- speaking order the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely guessing. We do not think it would be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non-speaking order.

In M/s. Rup Diamonds and others Vs. Union of India and others AIR 1989 SC 674, the law declared by this Court is that it cannot be said that the mere rejection of special leave petition could, by itself, be construed as the imprimatur of this Court on the correctness of the decision sought to be appealed against.

In Wilson Vs. Colchester Justices 1985 (2) All England Law Reports 97, the House of Lords stated;

There are a multitude of reasons why, in a particular case, leave to appeal may be refused by an Appeal Committee. I shall not attempt to embark on an exhaustive list for it would be impossible to do so. One reason may be that the particular case raises no question of general principle but turns on its own facts. Another may be that the facts of the particular case are not suitable as a foundation for determining some question of general principle. . Conversely the fact that leave to appeal is given is not of itself an indication that the judgments below are thought to be wrong. It may well be that leave is given in order that the relevant law may be authoritatively restated in clearer terms.

In Supreme Court Employees Welfare Association Vs. Union of India and Another 1989 (4) SCC 187, and Yogendra Narayan Chowdhury and Others Vs. Union of India and Others 1996 (7) SCC 1, both decisions by Two-Judges Benches, this Court has held that a non-speaking order of dismissal of a special leave petition cannot lead to assumption that it had necessarily decided by implication the correctness of the decision under challenge.

We may refer to a recent decision, by Two-Judges Bench, of this Court in V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax 2000 (3) Scale 240, holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non- speaking order. Here the doctrine of merger

> applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that anorder dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.

A few decisions which apparently take a view to the contrary may now be noticed. In Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others 1997 (6) SCC 78, it was held that a revisional order of the High Court against which a petition for special leave to appeal was dismissed in limine could not have been reviewed by the High Court subsequent to dismissal of S.L.P. by Supreme Court. This decision proceeds on the premises, as stated in para 6 of the order, that It is settled law that even the dismissal of special leave petition in limine operates as a final order between the parties. In our opinion, the order is final in the sense that once a special leave petition is dismissed, whether by a speaking or non- speaking order or whether in limine or on contest, second special leave petition would not lie. However, this statement cannot be stretched and applied to hold that such an order attracts applicability of doctrine of merger and excludes the jurisdiction of the Court or authority passing the order to review the same.

In State of Maharashtra and Anr. Vs. Prabhakar Bhikaji Ingle 1996 (3) SCC 463, the view taken by a Two-Judges Bench of this Court is that the dismissal of special leave petition without a speaking order does not constitute res judicata but the order dealt with in S.L.P., disposed of by a non-speaking order cannot be subjected to review by the Tribunal. In our opinion the law has been too broadly stated through the said observation. Learned Judges have been guided by the consideration of judicial discipline which, as we would shortly deal with, is a principle of great relevance and may be attracted in an appropriate case. But we find it difficult to subscribe to the view, as expressed in this decision, that dismissal of SLP without a speaking order amounts to confirmation by Supreme Court of the order against which leave was sought for and the order had stood merged in the order of Supreme Court.

Dismissal of SLP by speaking or reasoned order - no merger but Rule of discipline and Article 141 attracted. The efficacy of an order disposing of a special leave petition under Article 136 of the Constitution came up for the consideration of Constitution Bench in Penu Balakrishna Iyer and Ors. Vs. Ariya M. Ramaswami Iyer and Ors. - AIR 1965 SC 165 in the context of revocation of a special leave once granted. This Court held that in a given case if the respondent brings to the notice of the Supreme Court facts which would justify the Court in revoking the leave earlier granted by it, the Supreme Court would in the interest of justice not hesitate to adopt that course. It was therefore held that no general rules could be laid down governing the exercise of wide powers conferred on this Court under Article 136; whether the jurisdiction of this Court under Article 136 should be exercised or not and if used, on what terms and conditions, is a matter depending on the facts of each case. If at the stage when special leave is granted the respondent- caveator appears and resists the grant of special leave and the ground urged in support of resisting the grant of special leave is rejected on merits resulting in grant of special leave then it would not be open to the respondent to

raise the same point over again at the time of the final hearing of the appeal. However, if the respondent/caveator does not appear, or having appeared, does not raise a point, or even if he raised a point and the Court does not decide it before grant of special leave, the same point can be raised at the time of final hearing. There would be no technical bar of res judicata. The Constitution Bench thus makes it clear that the order disposing of a special leave petition has finality of a limited nature extending only to the points expressly decided by it.

The underlying logic attaching efficacy to an order of the Supreme Court dismissing S.L.P. after hearing counsel for the parties is discernible from a recent Three-Judges Bench decision of this Court in Abbai Maligai Partnership Firm & Anr. Vs. K. Santhakumaran & Ors. 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.

A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes

leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

Incidentally we may notice two other decisions of this Court which though not directly in point, the law laid down wherein would be of some assistance to us. In Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat AIR 1970 SC 1, this Court vide para 7 has emphasized three pre conditions attracting applicability of doctrine of merger. They are : i) the jurisdiction exercised should be appellate or revisional jurisdiction; ii) the jurisdiction should have been exercised after issue of notice; and, iii) after a full hearing in presence of both the parties. Then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. In Sushil Kumar Sen Vs. State of Bihar AIR 1975 SC 1185 the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one. The principle or logic flowing from the above-said decisions can usefully be utilised for resolving the issue at hand. Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardised as the pendency of appeal reopens the issues decided and this court is then scrutinising the correctness of the decision in exercise of its appellate jurisdiction.

In Gopalbandhu Biswal Vs. Krishna Chandra Mohanty & Ors. 1998 (4) SCC 447 there are observations vide para 8 and at a few other places that rejection of a special leave petition against the order of administrative tribunal makes the order of the Tribunal final and binding and the party cannot thereafter go back to the Tribunal to apply for review. However, paras 12 & 13 of the judgment go to show that (i) the applications for review before the Tribunal were not within the principle laid down under Order 47 Rule 1 of the C.P.C., (ii) did not comply with the relevant rules contained in Central Administrative Tribunal (Procedure) Rules, 1987, (iii) the review applicants were not in the category of persons aggrieved, and (iv) the review petitions were filed beyond the period of limitation prescribed and the delay was not explained. Thus the case proceeds on the peculiar facts of its own.

In Junior Telecom Officers Forum & Ors. Vs. Union of India & Ors. 1993 Supp.(4) SCC 693 also the view taken by a Two- Judges Bench of this Court is that the dismissal of the SLP, though in limine,

was on merits and the Court had declined to interfere with the impugned judgment of the High Court except to a limited extent as noticed therein whereafter the Tribunal could not have reopened the matter. The order passed earlier by the Supreme Court is quoted in para 5 of the report. It clearly states that on SLP itself the Court heard counsel of both the sides. While dismissing the special leave petition on merits, this Court had to some extent interfere with the order of the High Court which was put in issue before the Supreme Court. It is clear that the Supreme Court had exercised appellate jurisdiction vested in it under Article 136 of the Constitution and heard both the sides though the leave was not formally granted and the special leave petition was not formally converted into an appeal. Hence this decision rests on the special facts of that case.

In Supreme Court Employees Welfare Associations case (supra), this Court held :-

> When Supreme Court gives reasons while dismissing a special leave petition under Article 136 the decision becomes one which attracts Article 141. But when no reason is given and the special leave petition is summarily dismissed, the Court does not lay down any law under Article 141. The effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave petition should be granted.
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> Leave granted - dismissal without reasons - merger results It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal on such grounds as may have provided foundation for refusing the grant at the earlier stage. But that will be a dismissal of appeal. The decision of this Court would result in superseding the decision under appeal attracting doctrine of merger. But if the same reasons had prevailed with this Court for refusing leave to appeal, the order would not have been an appellate order but only an order refusing to grant leave to appeal.
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> Doctrine of merger and review :-
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> This question directly arises in the case before us.
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> The doctrine of merger and the right of review are concepts which are closely inter-linked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits - in a case where the High Courts order had not merged with an order passed

by this Court after grant of special leave - the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.

It will be useful to refer to Order 47 Rule 1 of the Code of Civil Procedure 1908. It reads as follows :

R.1. Application for review of judgment.

(1) Any person considering himself aggrieved, -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation. - The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.] For our purpose it is clause (a) sub-rule(1) which is relevant. It contemplates a situation where an appeal is allowed but no appeal has been preferred. The Rule came up for consideration of this Court in Thungabhadra Industries Ltd. Vs. The Govt. of A.P. (AIR 1964 SC 1372) in the context of Article 136 of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under Article 133 of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under Article 136. When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the

application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

Let us assume that the review is filed first and the delay in the SLP is condoned and the special leave petition 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.

The Review can be filed even after SLP is dismissed is clear from the language of Order 47 Rule 1 (a). Thus the words no appeal has been preferred in Order 47 Rule 1(a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Courts order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted. Conclusions :-

> 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-Judges 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.
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> A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected
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> (i) as barred by time, or (ii) being a defective presentation,
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> (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 petitioners 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 of the C.P.C. 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 of the C.P.C. 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 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.

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.

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. 1067-1068) 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 Supeme 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.
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> 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.
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> (iii) Doctrine of merger is not a doctrine of universal or unlimite 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.
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> 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 revew petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

Having thus made the law clear, the case at hand poses no problem for solution. The earlier order of the High Court was sought to be subjected to exercise of appellate jurisdiction of Supreme Court by the State of Kerala wherein it did not succeed. The prayer contained in the petition seeking leave to appeal to this Court was found devoid of any merits and hence dismissed. The order is a non-speaking and unreasoned order. All that can be spelled out is that the Court was not convinced of the need for exercising its appellate jurisdiction. The order of the High Court dated 17.12.1982 did not merge in the order dated 18.7.1983 passed by this Court. So it is available to be reviewed by the High Court. Moreover such a right of review is now statutorily conferred on the High Court by sub-section (2) of Section 8C of the Kerala Act. Legislature has taken care to confer the jurisdiction to review on the High Court as to such appellate orders also against which though an appeal was carried to the Supreme Court, the same was not admitted by it. An appeal would be said to have been admitted by the Supreme Court if leave to appeal was granted. The constitutional validity of sub-section (2) of Section 8C has not been challenged. Though, Shri T.L.V. Iyer, the learned senior counsel for the appellant made a feeble attempt at raising such a plea at the time of hearing but unsuccessfully, as such a plea has not so far been raised before the High Court also not in the petition filed before this Court.

No fault can be found with the approach of the High Court. The appeal is dismissed. No order as to the costs.