S. Shanmugavel Nadar vs State Of Tamil Nadu And Anr on 18 September, 2002

Equivalent citations: AIR 2002 SUPREME COURT 3484, 2002 (8) SCC 361, 2002 AIR SCW 4076, 2002 (6) SLT 127, (2003) 1 JCR 26 (SC), 2003 (1) ALL CJ 114, 2002 (7) SCALE 29, 2002 (4) LRI 54, 2002 (9) SRJ 489, 2002 SCFBRC 664, (2002) 7 JT 568 (SC), 2003 ALL CJ 1 214, (2002) 4 MAD LW 469, (2002) 4 SCT 1005, (2002) WRITLR 898, (2002) 2 RENCR 404, (2003) 263 ITR 658, (2003) 1 MAD LJ 1, (2003) 1 MAD LW 328, (2003) 1 RENTLR 4, (2002) 4 SCJ 386, (2003) 132 STC 284, (2002) 7 SUPREME 191, (2002) 4 RECCIVR 299, (2002) 7 SCALE 29, (2003) 1 WLC(SC)CVL 86, (2002) 6 ANDH LT 67, (2003) 185 CURTAXREP 593, (2003) 3 ESC 1229, (2003) 1 INDLD 107, (2004) 179 TAXATION 409

Bench: R.C. Lahoti, Bruesh Kumar

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           CASE NO.:
Appeal (civil)  2480 of 2001

PETITIONER:
S. SHANMUGAVEL NADAR

RESPONDENT:
STATE OF TAMIL NADU AND ANR.

DATE OF JUDGMENT: 18/09/2002

BENCH:
R.C. LAHOTI & BRUESH KUMAR

JUDGMENT:
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JUDGMENT 2002 Supp(2) SCR 498 The following Order the Court was delivered : Leave granted.

Looking at the nature of the controversy arising for decision and the view which we propose to take of the matter before us, a detailed statement of the facts is not called for. We will briefly notice bare essential facts. The Madras City Tenants Protection (Amendment) Act, 1994 (Tamil Nadu Act 2 of 1996) was enacted by the State Legislature and came into force w.e.f. l 1th January, 1996. The constitutional validity of this Act was put in issue by several writ petitions filed in the High Court. When the matter came up for hearing before the Division Bench reliance on behalf of the respondents in the High Court was placed on Division Bench decision of the High Court dated 25th January, 1972 reported as M. Vardaraja Pillai v. Salem Municipal Council, 85 Law Weekly 760.

Diverting a little in narration of facts it is necessary to note that at an earlier point of time the State Legislature had enacted the Madras City Tenants Protection (Amendment) Act, 1960 (Act No. 13 of

1960) whereby certain amendments were incorporated in the Madras City Tenants Protection Act, 1921. Constitutional validity of Act No. 13 of 1960 was challenged by filing several writ petitions which came up to be heard and disposed of by M. Vardaraja Pillai's (supra). The constitutional validity of Act No. 13 of 1960 was upheld.

Appeals by special leave were filed before this Court against the Division Bench decision in M. Vardaraja Pillai's case. This Court dismissed the appeals vide its order dated 10.9.1986. It was useful to extract and reproduce the brief order of this Court in its entirety for it will have a material bearing on the issue arising for decision before us in the presents appeals. This Court held :

> "The Constitutional validity of Act 13 of 1960 amending the Madras City Tenants' Protection Act, 1921 is under challenge in these appeals. The State of Tamil Nadu was not made a party before the Trial Court. However, the State was impleaded as a supplemental respondent in appeal as per orders of the High Court. When the appellants lost the appeal, they sought leave to appeals to this Court. The State of Tamil Nadu was not made a party in the said leave petition. In the S.L.P. before this Court also the State of Tamil Nadu was not made a party. A challenge to the constitutional validity of the Act cannot be considered or determined, in the absence of the concerned State. The learned counsel now prays for time to implead the State of Tamil Nadu. This appeal is of the year 1973. In our view it is neither necessary nor proper to allow this prayer at this distance of time. No other point survives in these appeals. Therefore, we dismiss these appeals, but without any order as to costs."

It is clear that this Court did not go into the question of constitutional validity of Act 13 of 1960 nor did this Court apply its mind to the correctness or otherwise of the view taken by the High Court in M. Vardaraja Pillai" case. This Court simply dismissed the appeals as not properly constituted, and hence incompetent, in view of the State of Tamil Nadu, a necessary party, having not been impleaded in the special leave petitions and the appeals. Thus briefly stated, the appeals were disposed of without any adjudication on merits.

Now, as stated in opening para of this judgment, when the matter as to the constitutional validity of Act 2 of 1996 came up for hearing before a Division Bench of the High Court, the decision in M. Varadaraja Pillai's case was cited as a precedent and reliance was placed on behalf of the respondents on the law laid down therein. The Division Bench entertained some doubt about the correctness of the view of the law taken by the earlier Division Bench in Varadaraja Pillai's case. However, consistently with the rules of judicial discipline and decoram, the Division Bench thought it fit to refer the matter to a Bench of three Judges (Full Bench) for reconsidering the decision of Madras High Court in Varadaraja Pillai's case, assigning the reasons in support of the opinion formed by it. The Division Bench in the operative part of its order concluded as under:

> "The aforesaid decision in S.M. Transport's Case*, of the Supreme Court, was heavily relied upon by this Court in deciding Varadaraja Pillai's case (68 L. W. 760). However, the aforesaid aspect of the case pointed out by the Supreme Court does not appear to nave been taken note of. For all these reasons, we are of the view that the

> decision in Varadaraja Pillai's case (85 L.W. 760) requires re-considerations. Therefore, we are of the opinion that it is just and appropriate to refer these cases to a larger Bench."

[*AIR 1963 SC 384] When the Full Bench took up the hearing of the case, the order of the Supreme Court dated 10.9.1986, referred to hereinabove, was brought to its notice. The Full Bench formed an opinion that in view of the appeals against the Division Bench decision in Varadaraja Pillai's case having been dismissed by the Supreme Court, though on technical ground, nevertheless the Division Bench decision of the Madras High Court stood merged into the decision of the Supreme Court according to the doctrine of merger and, therefore, it was . no more open for the Full Bench to examine and consider the correctness of the law laid down by the Division Bench in Varadaraja Pillai's case which, the Full Bench thought, would be deemed to have been affirmed by the Supreme Court in view of dismissal of the appeals there against.

Feeling aggrieved by the abovesaid decision of the Full Bench, these appeals have been filed by special leave.

Having heard the learned counsel for the parties, we are of the opinion that these appeals deserve to be allowed and the decision of the Full Bench dated 30.8.2000 deserves to be set aside as erroneous for the reasons more than one as stated hereinafter.

Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part, i.e. the mandate or decree issued by the Court which may have been expressed in positive or negative forum. For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum.

Secondly, the doctrine of merger has a limited application. In State of U.P. v. Mohammad Nooh. AIR (1958) SC 86 the Constitution Bench by its majority speaking through S.R. Das. CJ so expressed itself. "while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal there from or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree". A three-Judge Bench in State of Madras v. Madurai Mills Co. Ltd., AIR (1967) SC 681 held, "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 order 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. (emphasis supplied). Recently a three-Judge Bench of this Court had an occasion to deal with doctrine of merger in Kunhayammed and Ors. v. State of Kerala and Anr., [2000] 6 SCC 359 and this Court reiterated that the doctrine of merger 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, (emphasis supplied). In this view of the law, it cannot be said that the decision of this Court dated 10.9.1986 had the effect of resulting in merger into the order of this Court as regard the statement of law or the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into.

Thirdly, as we have already indicated, in the present round of litigation, the decision in Varadaraja Pillai 's case was cited only as a precedent and not as res judicata. The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141 speaks of declaration of law by the Supreme Court. For a declaration of law there should be a speech, i.e., a speaking order. In Krishen Kumar v. Union of India and Ors., [1990] 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In State of U.P. and Anr. v. Synthetics and Chemicals U.P. and Anr., [1991] 4 SCC 139, R.M. Sahai, J. (vide para

41) dealt with the issue in the light of the rule of sub-silentio. The question posed was: can the decision of an Appellate Court be treated as a binding decision of the Appellate Court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from B. Shama Rao v. The Union Territory of Pondicherry, [1967] 2 SCR 650 "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom -"restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

M/s. Rup Diamonds and Ors. v. Union of India and Ors., AIR (1989) SC 674 is an authority for the proposition that apart altogether from the merits of the grounds for rejection, the mere rejection by

a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In Supreme Court Employees Welfare Association v. Union of India and Ors.. AIR (1990) SC 334 this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. When no reason are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution. In Indian Oil Corporation Ltd. v. State of Bihar and Ors., AIR (1986) SC 1780 this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be re-opened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must nave been decided by this Court at least by implication.

It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution.

A situation, near similar to the one posed before us, has been dealt in Salmond' Jurisprudence (Twelfth Edition, at pp. 149-150) under the caption-

> "Circumstances destroying or weakening the binding force of precedent (perhaps) affirmation or reversal on a different ground". It sometimes happens that a decision is affirmed or reversed on appeal on a different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A. What, in such circumstances, is the authority of the decision on ground A in the Court of Appeal? is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases? The learned author notes the difficulty in the question being positively answered and then states; (i) the High Court may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity. It is certainly possible to find cases in the reports where judgments affirmed on a different point have been regarded as authoritative for what they decided; (ii) the true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had; but it remains an authority which may be followed by a court that thinks that particular point to have been rightly decided.
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> In the present case, the order dated 10.9.1986 passed by this Court can be said to be declaration of law limited only to two points - (i) that in a petition putting in issue the constitutional validity of any State Legislation the State is a necessary party and in its absence the issue cannot be gone into, and (ii) that a belated prayer for impleading a

necessary party may be declined by this Court exercising its jurisdiction under Article 136 of the Constitution if the granting of the prayer is considered by the Court neither necessary nor proper to allow at the given distance of time. By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division of the High Court in M. Varadaraja Pillai 's case had stood merged in the order of this court dated 10.9.1986 in such sense as to amount to declaration of law under Article 141 by this Court or that the order of this Court had affirmed the statement of law contained in the decision of High Court.

We are clearly of the opinion that in spite of the dismissal of the appeals on 10.9.1986 by this Court on the ground of non-joinder of necessary party, though the operative part of the order of the Division Bench stood merged in the decision of this Court, the remaining part of the order of Division Bench of the High Court cannot be said to have merged in the order of this Court dated 10.9.1986 nor did the order of this Court make any declaration of law within the meaning of Article 141 of the Constitution either expressly or by necessary implication. The statement of law as contained in the Division Bench decision of the High Court in M. Varadaraja Pillai's case would therefore continue to remain the decision of the High Court, binding as a precedent on subsequent benches of coordinate or lesser strength but open to reconsideration by any bench of the same High Court with a coram of judges more than two.

The Full Bench was not dealing with a prayer for review of the earlier decision of the Division Bench in M. Varadaraja Pillai's case and for setting it aside. Had it been so, a different question would have arisen, namely, whether another Division Bench or a Full Bench had jurisdiction or competence to review an earlier Division Bench decision of that particular Court and whether it could be treated as affirmed, for whatsoever reasons, by the Supreme Court on a plea that in view of the decision having been dealt with by the Supreme Court the decision of the High Court was no longer available to be reviewed. We need not here go into the question, whether it was a case of review, or whether the review application should have been filed in the High Court or Supreme Court. Such a question is not arising before us.

Under Article 141 of the Constitution, it is the law declared by the Supreme Court, which is binding on all Courts within the territory of India. Inasmuch as no law was declared by this Court, the Full Bench was not precluded from going into the question of law arising for decision before it and in that context entering into and examining the correctness or otherwise of the law stated by the Division Bench in M. Varadaraja Pillai's case and either affirming or overruling the view of law taken therein leaving the operative part untouched so as to remain binding on parties thereto.

Inasmuch as in the impugned judgment, the Full Bench has not adjudicated upon the issues for decision before it, we do not deem it proper to enter into the merits of the controversy for the first time in exercise of the jurisdiction of this Court under Article 136 of the Constitution. We must have the benefit of the opinion of the Full Bench of

the High Court as to the vires of the State legislation involved.

For the foregoing reason, the appeals are allowed. The impugned judgment of the High Court is set aside. All the appeals shall stand restored before the Full Bench of the High Court and shall be heard and decided in accordance with law. The Full Bench while doing so, shall not feel inhibited by the fact that the appeals against the decision in M. Varadaraja Pillai's case were dismissed by this Court which, as we have already stated, were dismissed only on the technical ground without any law being laid down by this Court. We also clarify that in view of the time that has already been lost, the Full Bench may proceed to hear and decide all the controversies arising for decision in the writ petitions in the High Court, that is, the Full Bench may obviate the need of sending the matter bade to the Division Bench for hearing on such other issues as are not decided by it Instead it may decide all the issues raised in the writ petitions fully and finally so far as the High Court is concerned. The hearing before the Full Bench shall be expedited as there are a number of writ petitions and a large number of cases are likely to be affected by the view that the Full Bench may ultimately take. In view of the writ petitions having been restored for hearing on the file of the High Court, we also clarify that all the interim orders, which were passed by the High Court shall also stand restored. Needless to say the High Court shall have the liberty of reconsidering the interim orders passed by it if any such occasion arises.