

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO. 149 OF 2014
IN
WRIT PETITION NO. 5552 OF 2013
with
CIVIL APPLICATION st. No. 30119 OF 2014
IN
REVIEW PETITION NO. 149 OF 2014
IN
WRIT PETITION NO. 5552 OF 2013

Sudha Hari Pophale and Others. ..Petitioners.

Versus

The Oriental Insurance Company Ltd
and Others. ..Respondents.

Mr. G. S. Godbole with Ms. Sneha Phene and Akshay Vora i/b
Little & Co., for the Petitioners.
Mr. V. Y. Sanglikar for Respondent No.1.

Coram : RANJIT MORE, J.
Order reserved on : **November 25, 2014.**
Order pronounced on : **January 15, 2015.**

P. C. :

1. Heard Mr. Godbole, learned Counsel for the
Petitioners and Mr. Sanglikar, learned Counsel for Respondent
No.1. By filing above review petition, the Petitioners are
seeking review of the judgment and order passed by the
learned Single Judge of this Court [*Coram* : Smt. Vasanti Naik,

J.] on 6th August 2013 in Writ Petition No.5552 of 2013. The above civil application is filed for condonation of delay, which occurred in filing the review petition. By the order dated 6th August 2013, this Court confirmed the order passed by the Estate Officer on 6th September 2009 as well as the order passed by the City Civil Court on 24th February 2012, and ultimately dismissed the writ petition.

2. Prior to the filing of this review petition, the Petitioners had filed Special Leave Petition (Civil) No.25694 of 2013 challenging the above-stated judgment and order of the learned Single Judge of this Court. The said Special Leave Petition was, however, dismissed as withdrawn on 10th November 2014. The review petition is mainly based on the proposition that tenants who come into occupation of the premises prior to the date of concerned premises belonging to a government corporation or a company and are covered under the protective provision of the State Rent Act, are excluded from the purview of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 [for short, “*the Public Premises Act*”]. The Petitioners in support of this proposition,

have heavily relied upon the decision of the Apex Court in Suhas H. Pophale v. Oriental Insurance Co., Ltd [(2014) 4 SCC 657].

3. Writ Petition No.5552 of 2013 was dismissed on 6th August 2013 relying upon the judgment of the Apex Court in Ashoka Marketing Ltd. v. Punjab National Bank [(1990) 4 SCC 406]. Subsequent thereto, i.e., on 11th April 2014 the decision of two Judges' bench of the Apex Court in *Suhas Pophale's (supra)* case has come, which supports the above referred proposition put forth by the Petitioners.

4. Mr. Godbole, learned Counsel appearing for the Petitioners made following submissions :

[i] The dismissal of a special leave petition without granting any leave to file an appeal does not have the effect of merger of the judgment or order of the high Court in that of the Supreme Court and therefore review petition is maintainable even before filing of SLP or after filing of SLP or before or after the withdrawal / dismissal of SLP. To support this submission, he relied upon two decisions of the Apex

Court, namely, Kunhayammed v. State of Kerala [(2000) 6 SCC 359] and Gangadhara Palo v. Revenue Divisional Officer [(2011) 4 SCC 602].

[ii] The issue of inherent lack of jurisdiction can be raised at any stage of the proceedings, including in review, execution or in any collateral proceedings, since the defect of inherent lack of jurisdiction strikes at the very authority of the Court or Tribunal. In support of this submission, he relied upon following three decisions of the Apex Court :

(a) *Jagmittar Sain Bhagat v. Health Services, Haryana [(2013) 10 SCC 138]*

(b) *Chiranjilal Shrilal Goenka v. Jasjit Singh [(1993) 2 SCC 507 and*

(c) *Kiran Singh v. Chaman Paswan [AIR 1954 SC 340]*.

[iii] Inherent lack of jurisdiction amounts to an error apparent on the face of record. To support this submission, he relied upon Budhia Swain v. Gopinath Deb [AIR 1999 SC 2089], Hira Lal Patni v. Kali Nath [AIR 1962 SC 199] and Erlapati Veera Lakshmi v. Guda Haritha Rani [2007(6)ALD 63].

[iv] Wherever the Bombay Rent Act or Maharashtra Rent Control Act is applicable, the jurisdiction of any other Court or Authority is ousted. To support this submission, Mr. Godbole relied upon following decisions :

- (a) *Unreported decision of this Court in Chamber Summons No. 1620 of 2010 in Suit No. 2688 of 2008 [Anjanabai Hanumantrao Sonawane v. Hindustan Construction Co., Ltd] decided on 5th September 2014.*
- (b) *Prabhudas Damodar Kotecha v. Manhabala Jeram Damodar [AIR 2013 SC 2959],*
- (c) *BPM Industries Ltd v. Samartha Development Corporation [2011(3) Bom. C.r. 443],*
- (d) *Central Warehousing v. Fortpoint Automotive Pvt. Ltd [2010(1) Bom.C.R.560],*
- (e) *Laxmidas Morarji v. Behrose Darab Madan [(2009) 10 SCC 425],*
- (f) *Manuskhlal dhanraj jain v. Eknath Vithal Ogale [(1995) 2 SCC 665] and*
- (g) *Natraj Studios (P) Ltd v. Navrang Studios & anr. [(1981) 1 SCC 523].*

[v] The law declared by any High Court or the Supreme Court is the law as it always was except in cases where (i) the High Court or the Supreme Court strikes down any statutory provisions either made by any local authority or the executive in exercise of powers of delegated legislation or executive legislation (ii) the High Court or the Supreme Court

declares any executive / administrative instrument / order to be illegal or unconstitutional and issues consequential writs, orders or directions.

[vi] A review petition may even be maintainable on account of misconception of law by the Court. For this proposition, he placed reliance on Board of Control for Cricket, India vs. Netaji Cricket Club [2005 SC 592].

5. Mr. Sanglikar, the learned Counsel appearing for Respondent no.1 very vehemently opposed the review petition and application for condonation of delay. He submitted that Supreme Court while disposing of the special leave petition filed by the Petitioners declined to interfere with the decision of this Court in writ petition. He also submitted that there is delay of 469 days in filing the review petition, however, the Petitioner has not given any explanation on the same and therefore delay cannot be condoned. Mr. Sanglikar challenged the maintainability of review petition. He placed reliance upon the provisions of Order-XLVII Rule-1 of the Code of Civil Procedure, 1908 and especially the Explanation thereto. He

submitted that the reliance of the Petitioners on the decision of the Apex Court in Kunhayammed (supra) is misconceived as the law laid down in the said decision has been subsequently clarified by the following decisions of the Apex Court :

- (i) Meghmala v. G. Narasimha Reddy [(2010) 8 SCC 383,
- (ii) Green View Tea and Industries v. Collector [(2004) 4 SCC 122],
- (iii) K. Rajamouli v. A.V.K.N. Swamy [(2001) 5 SCC 37],
- (iv) Kumaran Silks Trade (P) Ltd. v. Devendra [(2006) 8 SCC 555],
- (v) Nivruti v. State of Maharashtra [2007(5) Mh.L.J. 284].
- (vi) State of W.B. v. Kamal Sengupta [(2008) 8 SCC 612].

. Mr. Sanglikar also submitted that in the light of decision of the Apex Court in Shanti Devi v. State of Haryana. [(1999) 5 SCC 703], the provisions of Order-XLVII of the Code of Civil Procedure, 1908 are applicable to the review petition before this Court. He submitted that filing of the review petition is abuse of the process of law. He lastly prayed that review petition as well as civil application be dismissed with cost.

6. In the light of above submissions of the learned Counsel appearing for the respective parties, this Court is called upon to answer two questions :

- 1] Whether the review petition, as filed, is maintainable ?

- 2] And, if it is found to be maintainable, whether the Petitioner has made out a case for review of the order dated 6th August 2013 ?

7. At the outset, it would be appropriate to reproduce the order passed by the Apex Court in special leave petition filed by the Petitioner, namely, the order dated 10th November 2014 in SLP (C) No.25694 of 2013, which reads thus :

“After some arguments, learned Counsel appearing for the Petitioners sought permission to withdraw the special leave petition to move before the High Court to file review petition.

Mr. Vikas Singh, the learned Senior Counsel appearing for the Respondents opposed the prayer to grant liberty to move any review petition. It is submitted that judgment rendered in Suhas H. Pophale vs. Oriental Insurance Company Limited and its Estate Officer reported in (2014) 4 SCC 657, cannot be relied upon by the Petitioner in view of finding of this Court in Rupa Ashok Hurra v. Ashok Hurra & Anr reported in (2002) 4 SCC 388.

Having heard the learned counsel for the parties, while we are not inclined to interfere with the impugned judgment, we allow the Petitioners to withdraw the special leave petition for any remedy, if permissible under the law but without any liberty to challenge the same very impugned judgment before this Hon'ble Court.

The special leave petition is dismissed as withdrawn.”

11. The careful reading of the aforesaid order shows that :

- (1) The Apex Court refused to interfere with the order dated 6th August 2013 passed by the learned Single Judge of this Court [*Coram : Smt. Vasanti Naik, J.*] in Writ Petition No.5552 of 2013.
- (2) The Petitioners were allowed to pursue any remedy, if permissible under the law.
- (3) Liberty to the Petitioners to challenge the order dated 6th August 2013 before the supreme Court was refused.

12. Now, the moot question which deserves consideration in the present proceeding is whether in the light of above order of the Apex Court, whether the review petition is maintainable. And, secondly, in the light of various decisions cited by both the parties, whether sufficient explanation is given for condonation of delay.

13. Writ Petition No.5552 of 2013 was disposed of by this Court on 6th August 2013 and the review petition is filed on

15th November 2014. Interestingly, the Petitioner has not specified how many days delay has occurred in filing the review petition. However, if we take into consideration above dates, then, it would appear that there is delay of 469 days. In civil application for condonation of delay, the Petitioner has stated that immediately after the decision of this Court, SLP was filed in the Supreme Court which came to be disposed on 10th November 2014 and immediately thereafter present review petition is filed on 15th November 2014. Thus, the filing and pendency of SLP before the supreme Court is the only ground stated by the Petitioner for the condonation of delay. However, there is no explanation whatsoever forthcoming from the Petitioner as to what prevented them from filing the review petition immediately after the order dated 6th August 2013 passed by this Court, either prior to the filing of SLP or simultaneously with the SLP.

14. The filing of SLP could not have prevented the Petitioner from filing review petition. The Petitioner could have filed review petition immediately after the order dated 6th August 2013. The application filed by the Petitioner is totally

silent in this regard. In these circumstances, I am of the view that no reasons muchless the sufficient reasons are given by the Petitioner and therefore inordinate delay of 469 days cannot be condoned. Since I have come to the conclusion that delay in filing review petition is not sufficiently explained, I am not required to go into the maintainability of the review petition, however, since the learned Counsel appearing for the respective parties argued on this point extensively, I propose to deal with their arguments in short and give finding thereon.

15. Mr. Godbole, learned Counsel appearing for the Petitioners in support of the maintainability of review petition relied upon the decision of the Apex Court in Kunhayammed (supra) wherein the three Judges' bench of the Apex Court has laid down following principles :

“To sum up our conclusions are :-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court

being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.”

. The reading of above principles makes it clear that where matter has been decided by the Apex Court by a non speaking order *in limine*, the party may approach the high Court by filing the review petition.

16. At this stage, reference must be made to the decision of another bench of equal strength of the Apex Court in Abbai Maligai Partnership Firm v. K. Santhakumaran [(1998) 7 SCC 386]. In this case, the appellate authority set aside the

eviction order passed by the Rent Controller holding that there was a bona fide dispute with regard to title of the property which could be decided by civil Court. Revision petition filed against this order of the appellate authority was dismissed by the High Court. The SLP preferred by the Respondents against High Court's order also came to be dismissed after hearing the parties. Thereafter review petition came to be filed by the Respondents before the High Court after the delay of 221 days. The High Court condoned the delay and reversed the order made by it in revision and ordered eviction of the tenant Appellant. The Apex Court held that filing of the review petition after dismissal of the SLP by the Supreme Court against the selfsame revisional order amounted to abuse of process of the Court and entertainment of the review petition in the circumstances was an affront to the order of the Supreme Court. The observations made by the Supreme Court in paragraph 4 of the said decision read thus :

“The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the self-same order had been dismissed by this court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned single Judge at that stage is subversive of judicial

discipline. The High Court was aware that SLPs against the orders dated 7.1.87 had already been dismissed by this court. This High Court, therefore, had no power or jurisdiction to review the self same order, which was the subject matter of challenge in the SLPs in this court after the challenge had failed. By passing the impugned order on 7.4.1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case was an affront to the order of this Court, We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by the this court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this court. The appeals deserve to succeed on that short ground. The appeals are, consequently, allowed and the impugned order dated 7.4.1994 passed in the review petitions is hereby set aside. The respondents shall pay Rs. 10,000 as costs."

17. The two Judges' Bench of the Apex Court in K. Rajamouli (supra) considered above-stated both the decisions of the Apex Court in Kunhayammed and Abbai Maligai and held that dismissal of SLP against the main judgment of the High Court would not constitute *res-judicata* when the SLP is filed against the order passed in review petition provided the review

petition was filed prior to the filing of the SLP against the main judgment of the High Court. It was further held that position would be different where after dismissal of SLP against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of SLP. In such a situation the filing of review would be an abuse of the process of law. This two Judges' bench followed the decision in Abbai Maligai that if the high Court allows the review petition filed after SLP was dismissed after condoning the delay, it would be treated as an affront to the order of the Supreme Court.

18. Yet another two Judges' bench of the Apex Court in Green View Industries (supra) followed the decision in Abbai Maligai. The Bench of two Judges after quoting the observations in para 4 from Abbai Maligai, held as follows :

“13. The judgment squarely applies to the facts before us. The review petition in the instant case was filed on 29-7-1998, while the special leave petition against the main judgment of the High Court was itself filed on 16-10-1998. It was in these circumstances that this Court was persuaded to grant leave in the matter. We see no substance in the contention urged as to the non-maintainability of the appeal.”

19. Another two Judges' bench of the Apex Court in Meghmala (supra) considered earlier decisions of the Apex Court in K. Rajamouli, Abbai Maligai and Green View Tea Industries and held as follows in paragraph 25 :

“Thus, the law on the issue stands crystallised to the effect that in case a litigant files a review petition before filing the special leave petition before this Court and it remains pending till the special leave petition stands dismissed, the review petition deserves to be considered. In case it is filed subsequent to dismissal of the special leave petition, the process of filing review application amounts to abuse of process of the Court.”

20. Recently, another two Judges' bench of the Apex Court in Sunil Kumar v. State of Haryana [(2012) 5 SCC 398] considered Kunhayammed and Meghmala and made following observations in para 9 :

“The learned counsel for the Petitioner placed a very heavy reliance on the judgment of this Court in Kunhayammed v. State of Kerala wherein this Court has held that in case the special leave petition is dismissed by this Court in limine, the party aggrieved may file a review petition before the High Court. The said judgment has been explained in various subsequent judgments observing that in case the review petition has been filed before the High Court prior to the date the special leave petition is dismissed by this Court, the same may be entertained, However, a party cannot file a review petition before the High Court after approaching the Supreme Court as it would amount to abuse of process of the Court.”

21. The Apex Court in the judgments referred to

above, has relied upon Abbai Maligai which is three Judges' bench decision, which holds that filing of the review petition after the dismissal of SLP by the Supreme Court against the selfsame order amounts to abuse of process of the Court and entertainment of the review petition is held to be subversive of judicial discipline. At this stage, reference must be made to the decision of two Judges' bench of the Apex Court in Gangadhara Palo (supra) which is heavily relied upon by Mr. Godbole. It is true that the two Judges' bench of the Apex Court in this case held that the observation in K Rajamouli's case (supra) cannot be treated as a precedent at all. This decision was rendered on 8th March 2011. However, the earlier decisions of the benches of co-ordinate strength, namely, the decisions in Meghmala (supra) and Green View Tea and Industries (supra) were not brought to the notice of this bench which followed the decision of the three Judges' bench of the Apex Court in Abbai Maligai (supra) and K. Rajamouli (supra).

22. The decision of the Apex Court in Sunil Kumar (supra) is subsequent to the decision of the Apex Court in Gangadhar Palo (supra), which held that filing of the review

petition subsequent to the dismissal of SLP is abuse of the process of the Court. Be that as it may, it appears that provisions of Order-XLVII of the Code of Civil Procedure, 1908 were not brought to the notice of the Apex Court in Gangadhar Palo. The two Judges' bench of the Apex Court in Shanti Devi (supra) has already held that the provisions of Order-XLVII Rule-1 are applicable to the review petition by analogy. In this regard, the Explanation to Order-XLVII Rule-1 of the Code of Civil Procedure, 1908 is relevant, which reads thus :

“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.”

. The Petitioners in review petition itself has stated that the High Court order is based upon the judgment in Ashoka Marketing (supra) and the said judgment has been later on clarified by the Apex Court in Suhas Pophale's case (supra).

23. The perusal of the Apex Court order in SLP (C)

No.25694 of 2013 shows that the Petitioners relied upon the decision in Suhas Pophale's case (supra) in support of their submission, however, the Apex Court declined to interfere with the order of this Court and thereafter granted liberty to the Petitioners to withdraw the SLP for any remedy if permissible in law. The plain reading of the decision of the Apex Court in Kunhayammed's case (supra) would disclose that in cases where the S.L.P. is rejected by an order without assigning any reason as well as by assigning reason, it would nevertheless be an order in relation to the special leave to appeal and, therefore, would be before the entry of the appeal in the appellate arena and hence the doctrine of merger would not apply. However, mere non-application of the doctrine of merger would not entitle the Courts lower in hierarchy to ignore any opinion expressed by the Apex Court, either on the point of fact or law in the order rejecting the S.L.P. and to entertain review application in relation to the order which was the subject-matter of the special leave petition. It is so because though the order of the lower Court would not merge in the order rejecting the S.L.P., yet to express any opinion in conflict with or in departure from the view taken by the Apex

Court in relation to any fact or law would be subversive of judicial discipline and an affront to the order of the Apex Court. In above facts and circumstances, in my considered opinion, the review petition is not maintainable and same is accordingly dismissed.

[RANJIT MORE, J.]

At this stage, when the order was pronounced, learned Counsel appearing for the Petitioners submitted that this order may be stayed for the period of two weeks as the Petitioners would like to approach the higher Courts. Prayer was vehemently opposed. In the facts and circumstances of the case and in the interests of justice, parties are directed to maintain status quo for the period of two weeks from today only. It is made clear that in the absence of favourable order for the Petitioners from the higher Courts, Respondent No.1 is entitled to execute the order after the expiry of two weeks' status quo period.

[RANJIT MORE, J.]