

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

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Contempt Case No.1290 of 2015

Order: (*Per Hon'ble Sri Justice U.Durga Prasad Rao*)

The admissibility of Contempt Case before this Division Bench when the Writ Appeal is pending is the point that falls for our consideration.

2) The matrix of the case is thus:

The petitioner in Contempt Case filed W.P.No.18448 of 2013 seeking a writ of Mandamus to declare the action of the first respondent therein in rejecting petitioner's application for building permission in respect of Plot No.44, Block No.50 in T.S.No.1196/43(B) Waltair Ward, Visakhapatnam vide endorsement in Rc.No.15798/2012/ACP-III dated 10.05.2013 as illegal, arbitrary and unconstitutional and for a consequential direction to the first respondent to approve the building permission. The respondent authorities representing the Greater Visakhapatnam Municipal Corporation (for short "GVMC") contested the matter by filing the counter. The learned single Judge has allowed the writ petition in his order dated 30.12.2014.

3) Aggrieved, the respondents in writ petition preferred W.A.No.146 of 2015 before a Division Bench and along with the writ appeal the appellants filed W.A.M.P.No.405 of 2015 seeking suspension of the order in W.P.No.18448 of

2013. The Division Bench in its order dated 26.02.2015 declined to grant the interim relief sought for by giving cogent reasons.

The Writ Appeal is pending.

4) Be that it may, the writ petitioner has filed the instant Contempt Case submitting that in view of rejection of interim relief by the Division Bench, the GVMC is bound to issue building permission to the petitioner without raising any further objections. However, it has issued proceedings dated 13.06.2015 once again rejecting the building permission on two untenable grounds and the proceedings of the GVMC amount to wilful and deliberate contempt of Court and liable for punishment. Due to vindictive attitude of the appellants/respondents the petitioner is put to severe hardship. The petitioner thus sought to punish the appellants/respondents under the provisions of Contempt Courts Act, 1971. Citing the reason for filing the Contempt Case before the Division Bench, the petitioner submitted that the order of the learned single Judge has been merged with the order of the Division Bench and hence the Contempt Case could be filed here.

5) Notice before admission was ordered and the respondents appeared through their counsel and filed counter.

6) While hearing, we expressed a doubt about the maintainability of Contempt Case before Division Bench

when the main appeal is pending and not disposed yet. The argument of Sri Vedula Srinivas, learned counsel for the petitioner, we are constrained to hold, is unconvincing and bereft of legal force. He would argue that by its disinclination to grant interim relief and giving elaborate reasons thereof, the Division Bench virtually approved and upheld the order of the single Judge and thereby the order of single Judge merged with its order in WAMP No.405 of 2015 and therefore, he would emphasize, the petitioner is entitled to file Contempt Case before the Division Bench for respondents failed to honour the order of the single Judge. This Court reminded learned counsel of the pendency of Writ Appeal but his submission is that the refusal of interim relief by a speaking order is an indicative of Division Bench upholding the single Judge's order and as such, in spite of pendency of main appeal, the doctrine of merger would squarely apply and thus the order of single Judge merges with the order of Division Bench in WAMP No.405 of 2015.

7) The doctrine of merger though not a statutory doctrine but a common law doctrine founded on principle of propriety in the hierarchy of justice delivery system. The logic beneath this doctrine is that there cannot be more than one decree or operative order governing the same subject-matter at a given point of time. Precisely, the decree or order passed by an inferior Court, tribunal or authority if subjected to a remedy available under the law

before a superior forum then, once the superior Court has disposed of the *lis* before it either way—by setting aside or modifying or confirming the decree or order of the inferior Court, it is the decree or order of the superior Court which becomes final and binding and the order of the lower Court, tribunal or authority merges with the order of the superior Court. It is only the final order of the superior Court with which the decree or order of the inferior Court or tribunal merges but not with the interim order of the superior Court. The doctrine of merger is no more *res integra* but reiterated by Apex Court in a number of its decisions.

8) In ***Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat***^[1] (vide para-7) the Apex Court has emphasized three preconditions attracting applicability of doctrine of merger. They are:

- 1) *The jurisdiction exercised should be appellate or revisional jurisdiction.*
- 2) *The jurisdiction should have been exercised after issue of notice and*
- 3) *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. Thus, the undercurrent principle is that it is only the final decree or order of an appellate, revisional or review authority that absorbs the decree or order of the inferior Court or tribunal.

9) We have another important decision of Apex Court on the principle of merger.

10) In ***Kunhayammed v. State of Kerala***^[2] a Full Bench of Apex Court engaged with the question whether the order of High Court merged with the order of the Apex Court rejecting special leave to appeal under Article 136 of the Constitution of India. On facts, the Kerala Private Forests (Vesting and Assignment) Act, 1971 (for short “Forest Act”) was enacted by State of Kerala to provide for vesting in the Government, of private forests in the State of Kerala and for the assignment thereof to agriculturists and agricultural labourers for cultivation. Under Section 7 of the said Act a Forest Tribunal was constituted to decide whether a land or forest is a private land/forest or vested in Government. In O.A.No.5 of 1981 there was a dispute between a large family and Government about 1020 acres of the land before the Forest Tribunal and by order dated 11.08.1982 the Tribunal held the land did not vest in Government. The appeal preferred by the State of Kerala was dismissed by the High Court of Kerala on 17.12.1982. As per the Act there was no statutory remedy of appeal, revision or review and hence, State of Kerala filed a special leave to appeal under Article 136 of the Constitution of India before the Apex Court. The said petition was dismissed by the Apex Court on 18.07.1983 in its order which reads:

“Special leave petition is dismissed on merits”

11) While so, by an amendment to the Forest Act, Section 8(c) was introduced with retrospective effect creating a provision for review. Hence, State of Kerala filed Review Petition No.14 of 1984 before High Court of Kerala seeking review of its earlier order dated 17.12.1982. The Review Petition was opposed by the respondents as not maintainable. However, the High Court overruled the preliminary objection as to the maintainability of the petition and directed the Review Petition to be posted for hearing on merits. Aggrieved, the respondents sought for leave to appeal in Apex Court wherein the respondents, *inter alia*, contended that the order of the High Court dated 17.12.1982 merged with the order of Apex Court dated 18.07.1983 in SLP and therefore, the order of High Court is ceased to exist in the eye of law and in that view, the review was not maintainable.

12) In the above context, the Full Bench happened to verify several decisions including its earlier decision reported in ***Shankar Ramchandra Abhyankar's*** case (1 supra) while discussing doctrine of merger and summed up its conclusions under 7 points the relevant of which are thus:

“(i) xx xx xx

(ii) xx xx xx

(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) xx xx xx

(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) xx xx xx”

With these conclusions the Apex Court dismissed the SLP. Thus, in essence, the Apex Court held that the order of the High Court will not merge with the order in SLP be it may an ex-parte or on merit order and such merger takes place only with the final order of the Apex Court after hearing the appeal.

13) In the light of above precedential jurisprudence, the argument of Sri Vedula Srinivas, learned counsel for petitioner that the order of the single Judge merged with

the order of Division Bench in WAMP No.405 of 2015 cannot be accepted. The said order and the observations made therein confined to refusal of interim relief only. Since the main appeal is still pending, the question of merger of the order of single Judge does not arise at this stage. Consequently the Contempt Case is not maintainable before the Division Bench. We must hasten to say, we are not expressing anything on the merits except about the maintainability of the Contempt Case before us.

14) In the result, this Contempt Case is closed as not maintainable before the Division Bench.

SANJAY KUMAR, J

U.DURGA PRASAD RAO, J

Dt: 19.02.2016
Murthy

[\[1\]](#) (1970)1 SCR 322

[\[2\]](#) AIR 2000 SC 2587