

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SMT JUSTICE T.RAJANI**

Writ Appeal Nos.380, 420, 496, 499, 500, 503, 528, 540, 615 and 641 of 2017

COMMON JUDGMENT: (Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan)

These appeals are preferred against the order passed by the Learned Single Judge in a batch of writ petitions wherein a mandamus was sought to declare the action of the appellants herein, in not providing alternative employment like Record Tracer/ADC/Booking Clerk/Announcer to the respondent-writ petitioners, though they were found medically unfit, as contrary to the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the Act"); and in not paying them salary and emoluments from the date of their termination till alternative employment was provided to them.

By the order under appeal, the Learned Single Judge directed the appellants herein to examine each individual case and take necessary steps to implement the provisions of the Act, in the light of the order passed earlier, within a period of three months from the date of receipt of a copy of the order. After referring to a similar order, passed in W.A.No.1120 of 2015 and batch dated 29.01.2016, he allowed the writ petition.

The State Transport Corporation had earlier carried similar matters in appeal and, by order in Civil Appeal No.3529 of 2017 and batch dated 23.02.2017, the Supreme Court expressed its inability to subscribe to the view taken by the Madras High Court, which had been followed in the impugned order, and approved the view taken by the Delhi High Court in ***Hawa Singh vs. Delhi Transport Corporation***¹ and ***Airport Authority of India vs. Kumar Bharat Prasad Narain***

¹ Judgment in W.P.(C) No.7880 of 2011

Singh². The Supreme Court observed that, even though Section 2(i) of the Act may not cover every disability, the scheme of the Andhra Pradesh and Telangana Transport Corporations covered even those employees who were not covered by Section 2(i) of the Act; thus those who were disabled, within the meaning of Section 2(i), were not without any benefit whatsoever; and they were thus entitled to invoke such schemes, but not Section 47 of the Act. The appeals of the Corporation were allowed, and it was held that the benefit of Section 47 of the Act would be available only to those who were covered by Section 2(i) of the Act. The Supreme Court left it open to the appellant-Corporation to take a decision on the individual grievances of the employees, and granted liberty to the employees to avail their remedies in terms of the said judgment.

Section 47 of the Act reads thus:

47. Non-discrimination in Government employments:- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability.

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification exempt any establishment from the provisions of this section.

Under the first proviso to Section 47(1) of the Act if any employee, after acquiring disability, is not suitable for the post he was holding, he can be shifted to some other post with the same pay scale and service benefits.

The word “disability” is defined in Section 2(i) of the Act as under:

2(i) “disability” means-

- (i) blindness;
- (ii) low vision;
- (iii) leprosy-cured;
- (iv) hearing impairment;
- (v) locomotor disability;
- (vi) mental retardation;
- (vii) mental illness.

² Judgment in L.P.A.No.1601 of 2005 dated 14.12.2005

As held by the Supreme Court, the benefit under Section 47 of the Act is available only to those who suffer from such of the disabilities as are mentioned in Section 2(i) of the Act. The law declared by the Supreme Court in the aforesaid judgment, is binding on the High Court.

Learned counsel for the respondent-writ petitioners would, however, rely on an order of the Learned Single Judge in **Abdul Asad vs. The A.P. State Road Transport Corporation**³ which was affirmed in W.A.No.739 of 2013 dated 25.06.2013, and S.L.P(C.C).No.1438 of 2014 preferred thereagainst was dismissed by the Supreme Court on 07.02.2014.

In **Abdul Asad**³ the Learned Single Judge observed that the action of the APSRTC, in denying the petitioner salary and attendant benefits for the period he was kept out of service, and adjusting his leave in this regard, could not be countenanced; the petitioner therein was directed to be treated as on duty from 25.04.2011 to 04.05.2012 for all purposes, and was directed to be paid salary and attendant benefits for the said period; and the leave of the petitioner therein, which was adjusted by the APSRTC, was directed to be credited to his leave account.

In the appeal preferred thereagainst, in W.A.No.739 of 2013 dated 25.06.2013, the Division Bench observed that the object of the Act was that an employee, who acquired disability during his service, was sought to be protected under Section 47 of the Act specifically; such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer; Section 47(2) of the Act asserted that a disabled employee should not even be denied promotion merely on the ground of his disability; the petitioner therein would, therefore, be entitled to count his seniority in the service of the

³ Order in W.P.No.22269 of 2012 dated 25.09.2012

APSRTC from the initial date of his regular appointment as a Driver in its service, notwithstanding the fact that he was thereafter shifted to the post of a Record Tracer; a similar order in W.P.No.18756 of 2012 was affirmed in W.A.No.829 of 2013; and, for the same reasons, the Writ Appeal should also be dismissed.

When the APSRTC carried W.A.No.739 of 2013 dated 25.06.2013 by way of a Special Leave petition, the Supreme Court, while condoning the delay, found no ground to entertain the Special Leave Petition which was, accordingly, dismissed.

In **Union of India vs. West Coast Paper Mills Ltd.**⁴ a Division Bench of the Supreme Court doubted the correctness of another two-Judge Bench decision of the Supreme Court in **P.K. Kutty Anuja Raja v. State of Kerala**⁵, and referred the matter to a three-Judge Bench. Placing reliance on the judgment of the Supreme Court, in **Kunhayammed v. State of Kerala**⁶, it was contended, on behalf of the respondent, that, as the Supreme Court had granted special leave to appeal and had passed a limited interim order, the judgment of the Tribunal was in jeopardy; and, as the doctrine of merger applied, the period of limitation would begin to run from the date of passing of the appellate decree, and not from the date of passing of the original decree. In this context, the Supreme Court observed:

“.....Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. **Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.....**

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

⁴ 135 STC 265

⁵ (1996) 2 SCC 496

⁶ (2000) 6 SCC 359

The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.

In *Kunhayammed* ((2000) 119 STC 505 : (2000) 6 SCC 359), this

Court held:

"12. 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 an 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."

It was further observed (page 383 of 6 SCC and page 381 of 245 ITR):

"41. 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.

42."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- 68)"

(See also *Raja Mechanical Company Pvt. Ltd. Vs. Commissioner of Central Excise*, 2002 (4) AD (Delhi) 621)

It is beyond any cavil that in the event, the respondent was held to have been prosecuting its remedy bona fide before an appropriate forum, it would be entitled to get the period in question excluded from computation of the period of limitation.

Unfortunately in **P.K. Kutty (supra)** and **Mohinder Singh Jagdev (supra)** no argument was advanced as regard applicability of doctrine of merger. The ratio laid down by the Constitution Benches of this Court had also not been brought to the court's notice.

In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.

It has not been and could not be contended that even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, we are of the opinion that the decision of the Constitution Bench in **S.S. Rathore (supra)** was to be followed in the instant case.....”
(emphasis supplied).

The law laid down by the Supreme Court, in **West Coast Paper Mills Ltd⁴**, is that the logic, underlying the doctrine of merger, is that there should not be more than one decree or operative order, on the same subject matter, at a given point of time; once leave has been granted, the doors for the exercise of the appellate jurisdiction of the Supreme Court are open; the order impugned becomes an order appealed against; and any order, that would be passed thereafter, would be an appellate order and would attract the doctrine of merger. The Supreme Court followed its earlier decision in **Kunhayammed⁶** wherein it was held that when the order passed by the inferior court is subjected to a remedy available under law before a Superior forum, though the order under challenge is effective and binding, nevertheless its finality is put in jeopardy; on the Superior Court disposing of the lis before it, whether the order under appeal is set aside or modified or simply confirmed, it is the order of the Superior Court which is the final, binding and operative order wherein the order passed by the Court below merges; once a special leave petition has been granted, the doors for exercise of the appellate jurisdiction of the Supreme Court is let open; the order impugned before the Supreme Court becomes an order appealed against;

and any order passed thereafter would be an appellate order and would attract the doctrine of merger.

As held by the Supreme Court, on leave being granted by the Supreme Court and on a Civil Appeal being disposed of on merits, the order of the High Court merges with the order of the Supreme Court. Consequently, the order of the Supreme Court in the Civil Appeal would constitute a declaration of law and a precedent binding on the High Court. Unlike a Civil Appeal, where the doctrine of merger applies, dismissal of a Special Leave Petition, that too without reasons, does not attract the doctrine of Merger; and consequently the judgment of the High Court remains in force. Unlike the order in S.L.P(CC).No.1438 of 2014 dated 07.02.2014, whereby the SLP was dismissed without reasons, consequent upon which the order of the Division Bench in W.A.No.739 of 2013 dated 25.06.2017 continues to remain in force, the order of the Supreme Court, in Civil Appeal No.3529 of 2017 dated 23.02.2017, has resulted in the orders passed earlier by the Division Bench of this Court getting merged with the order of the Supreme Court; and the law declared, in Civil Appeal No.3529 of 2017 dated 23.02.2017, by the Supreme Court is binding on us.

Following the order of the Supreme Court, in Civil Appeal No.3529 of 2017 and batch dated 23.02.2017, these Writ Appeals are also disposed of holding that the benefit of Section 47 of the Act shall be available only to those who are covered by the disabilities specified in Section 2(i) of the Act; it is open to the appellant-Corporation to take a decision, on individual grievances of the respondent-writ petitioners, with utmost expedition preferably within three months from the date of receipt of a copy of the order; and the respondent-writ petitioners are at liberty thereafter to avail their remedies in terms of the judgment of the

Supreme Court. Miscellaneous Petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(T.RAJANI, J)

05th June, 2017
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Date: 05.06.2017

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