

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2019

CORAM

THE HON'BLE JUSTICE S.VAIDYANATHAN

Contempt Petition No.824 of 2018

M/s.Jamals
A Partnership Firm,
Rep. by its Partner
Mr.J.C.Shameem Cassim,
and Power of Attorney Holder
Mount Chambers, Ground Floor,
758, Anna Salai, Chennai-2.

... Petitioner/Writ Petitioner

-vs-

M/s.Vijaya Kumari,
The Commissioner,
Thiruverkadu Municipality,
Office of Thiruverkadu Municipality,
Chennai-600 077.

... Respondent/Contemnor/
3rd Respondent

Prayer: Petition filed under Section 11 of the Contempt of Courts Act, 1971 to initiate contempt proceeding against the respondent for committing wilful disobedience of the order passed by this Hon'ble Court in W.P.No.19675 of 2017 on 29.11.2017.

For Petitioner	:	M/s.S.Vaitheeswari
For Respondent	:	Mr.R.Mohandoss Standing Counsel

ORDER

This Contempt Petition is filed alleging willful disobedience of the order dated 29.11.2017 in W.P.No.19675 of 2017.

2. It is represented that against the order dated 29.11.2017 in W.P.No.19675 of 2017, Writ Appeal has been filed in W.A.No.2182 of 2018 and the same has been dismissed by the Hon'ble Division Bench of this Court vide order dated 29.10.2018. Applying the principle of Doctrine of Merger, the writ petitioner can file contempt proceedings only before the Hon'ble Division Bench of this Court and the Single Judge cannot deal with the Contempt Petition initiated by the petitioner.

3. At this juncture, it would be worth referring to the decision of the Apex Court in the case of **Kunhayammed & Others -vs- State of Kerala & Another, (2000 (6) SCC 359)**, wherein, the principle of Doctrine of Merger has been widely discussed. Relevant portion of the said decision is usefully extracted hereunder:

"32. 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.

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. 1067-1068) 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 Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

44. 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. The 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 the special leave petition is converted into an appeal.

(iii) The 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 the 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 the 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 CPC."

4. Learned counsel for the petitioner would contend that a Single Judge is entitled to proceed with a Contempt Petition. To substantiate his case, he has referred to a decision of the Apex Court in the case of **Dineshan, K.K. vs. R.K.Singh and another**, [(2014) 16 SCC 88], wherein, it has been held as under:

"9. We have carefully perused the decision of this Court. A reading of the judgment would certainly indicate that when the civil appeals and the special leave petitions are dismissed with reasons, the orders passed by the courts below would merge with the judgment and order passed by this Court. The said decision has been followed by this Court in a catena of subsequent judgments of this Court.

10. In view of what has been said by this Court in the aforesaid decision, we cannot hold that the judgment and order passed by the High Court has not merged with the judgment and order passed by this Court when the civil appeal filed by the petitioner complainant was dismissed.

12. We requested Shri K.K. Venugopal and Dr Rajeev Dhavan, learned Senior Counsel to assist us in the matter. Their view on the second question is that undoubtedly the order passed by this Court, while accepting the judgment and order passed by the courts below, would merge with the judgment and order passed by the courts below. ..."

5. With reference to the three-Judge ruling in

Kunhayammed case, a two-Judge Bench in the above case of **K.K.Dineshan**, in exercise of the powers under Articles 129,

136 and 142 of the Constitution of India, has directed the complainant therein to approach the High Court. But, this Court is not inclined to accept the contention of the counsel for the petitioner in view of the finding of the Apex Court in paragraph 14 of **K.K. Dineshan's case**, which would read thus:

"14. We are mindful of settled law that the orders passed by the High Court would merge with the order passed by this Court."

6. Once the order passed in a Writ Petition gets merged with the order of the Writ Appeal, the remedy available to the petitioner is to file a Contempt in the Writ Appeal and not in the Writ Petition, unless and until the Apex Court specifically directs the High Court to decide the issue. Thus, in view of the principle of Doctrine of Merger discussed above, **this Contempt Petition cannot be adjudicated and hence, it is closed.**

SD/-

ASSISTANT REGISTRAR (COMM.CASES)

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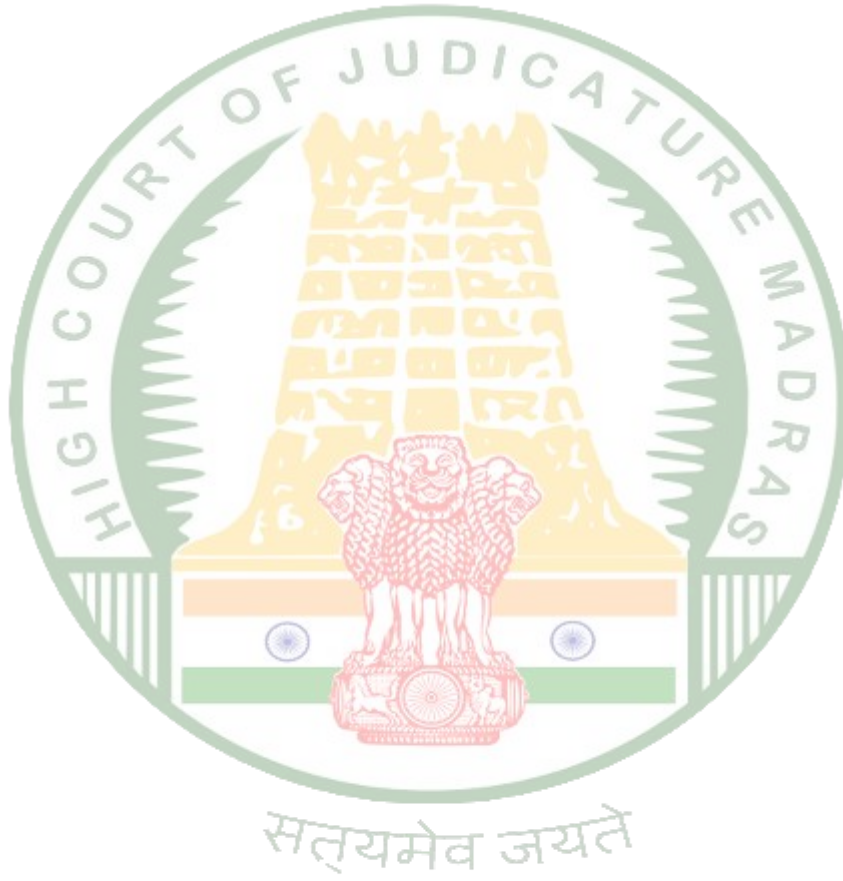
Dated at Madras this the day of 2019.

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