

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5165 of 2022

1. The Union of India through the Secretary, Ministry of Finance, Government of India, Department of Revenue, New Delhi- 110001.
2. The Chairman, Central Board of Direct Taxes, Ministry of Finance, Government of India, Department of Revenue, New - Delhi- 110001.
3. The Principal Chief Commissioner of Income Tax (Bihar and Jharkhand), CR Building, Bir Chand Patel Path, Patna - 800001.
4. The Commissioner of Income Tax (Admn and TPS), CR Building, Birchand Patel Path, Patna - 800001.

... .. Petitioners

Versus

Narendra Kumar Sinha Son of Late B.K.P. Sinha, Administrative Officer-III, Office of The Commissioner of Income Tax (Admn and TPS), CR Building, Birchand Patel Path, Patna - 800001 (Bihar).

... .. Respondent

Appearance :

For the Petitioner/s	:	Mr. Dr. K.N. Singh, ASG Mr. Tuhin Shankar, Advocate
For the Respondent/s	:	Mr. M.P. Dixit, Advocate Mr. S.K. Dixit, Advocate Mr. Sanjay Kumar Choubey, Advocate Mrs. Swastika, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAJIV ROY
ORAL ORDER

(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

2 20-06-2022 In the instant petition, the petitioners have assailed the order of the Tribunal dated 27.1.2021 passed in O.A. No. 050/00232/2020 passed by the Central Administrative Tribunal, Patna Bench, Patna (for short Patna Bench). The respondent, Narendra Kumar Sinha was appointed as a Data Entry Operator Grade 'A'. He was granted pay-scale of next grade namely Data Entry Operator Grade 'B'. It was a subject matter of litigation in



O.A. No. 961/2004 decided on 30th September, 2004 in favour of the respondent Narendra Kumar Sinha. Feeling aggrieved and dissatisfied with the order of Patna Bench, the petitioners/Union of India preferred C.W.J.C. No. 3153 of 2005 wherein department suffered an order dated 25.7.2006. Still aggrieved by the order of this Court dated 25.7.2006, the petitioners-department preferred SLP before the Apex Court in which they suffered an order dated 16.3.2009 (Annexure-3). Thus, grant of pay-scale under Data Entry Operator Grade 'B' has attained finality in so far as the respondent Narendra Kumar Sinha and the department is concerned.

2. Identical issue was a subject matter before the various Tribunals and it was taken up before the Apex Court in the case of T.V.L.N. Mallikarjuna Rao and others in the Civil Appeal No. 1086 of 2014 and it was decided on 9.12.2014 in favour of petitioners-department. In the light of T.V.L.N. Mallikarjuna Rao case, the petitioners-department proceeded to disturb the grant of Data Entry Operator Grade 'B' pay-scale and further order for recovery in so far as petitioner. It was a subject matter of litigation before the Patna Bench in O.A. No. 050/00232/2020 and it was in favour of the respondent Narendra Kumar Sinha. Thus, the petitioner-department



presented this petition, assailing the order of Patna Bench's order dated 27.1.2020 passed in O.A. No. 050/00232/2020.

3. The learned Senior Counsel Mr. N.K. Sinha submitted that the tribunal has committed error in interfering with the order dated 26.6.2020 whereby re-fixation of respondent's pay and order for recovery in the light of decision in the case of Secretary, Department of Personnel Public Grievances and Pension and another versus T.V.L.N. Mallikarjuna Rao and connected petition decided on 9.12.2014. The learned Senior Counsel vehemently contended that the department preferred SLP against the order dated 25.7.2006 passed in C.W.J.C. No. 3153 of 2005 and it was dismissed *in limine* in so far as petitioner and respondent, therefore, the department-petitioner is empowered to re-fixation of order and recovery in respect of respondent-Narendra Kumar Sinha in the light of T.V.L.N. Mallikarjuna Rao and connected cases (Annexure-4) (paragraph-28). Therefore, the impugned order of the Tribunal is liable to be set aside.

4. Per contra, the learned counsel for the respondent Narendra Kumar Sinha resisted the contention of the petitioners and submitted that the subject matter among inter-parties namely the petitioners and respondent Narendra Kumar Sinha



has attained finality before the Apex Court in SLP (Civil) No. 2911 dated 16.3.2009. Therefore, the petitioners-department have no right to interfere with the fixation of pay of the respondent-Narendra Kumar Sinha in the cadre of Data Entry Operator Grade 'B'. It is further submitted that T.V.L.N. Mallikarjuna Rao and others (supra) has no application to the respondent-Narendra Kumar Sinha for the reasons that inter-parties decision has already attained finality on 16.3.2009. It is further submitted that in the case of T.V.L.N. Mallickarjuna Rao and others, the petitioners-department have not apprised the decision in the case of respondent Narendra Kumar Sinha decided by the Apex Court on 16.3.2009. Dismissal of SLP *in limine* could have been taken note of and re-agitate the matter before the High Court in filing review petition in CWJC No. 3153 of 2005 decided on 25.07.2006 and not suo moto reopening fixation of pay of respondent, since the decision of the High Court which has attained finality before the Apex Court.

5. Heard learned counsel for the respective parties. Crux of the matter is whether the department-petitioners could review the decision of the Patna Bench, High Court and Supreme Court dated 30.9.2004, 20.5.2006 and 16.3.2009 in the



light of T.V.L.N. Mallikarjuna Rao decision dated 19th December, 2014 or not? Undisputedly, the re-fixation of pay of the petitioners in the cadre of Data Entry Operator Grade 'B' has attained finality before the Apex Court on 16.3.2009. Merely identical persons' grievances has attained finality in favour of the petitioners-department, in such circumstances, the department is not empowered to review the decision of the Apex Court in respect of respondent Narendra Kumar Sinha. Even though, dismissal of SLP filed by the petitioners-department *in limine* in respect of respondent Narendra Kumar Sinha's case is concerned, the department is not empowered to revisit in fixation of pay and recovery in so far as respondent Narendra Kumar Sinha in the absence of judicial pronouncement in disturbing the Supreme Court's decision dated 16.3.2009 or decision of this Court's order dated 25.07.2006 passed in CWJC No. 3153 of 2005 Apex Court in the case of **U.O.I. and others Vs. Saraswati Marble and Granite Industries Pvt. Ltd.** Reported in (2020) 20 SCC 810 held as under:

A neat submission which has been made by Mr. A.K. Sanghi, learned Senior Counsel appearing for the Union of India, is that no such writ petition to claim refund of the excise duty, penalty and interest was maintainable when the proceedings in respect of the respondents had attained finality and amount recovered.



Merely because this Court in some other judgment, at a subsequent date, took a different view and settled the position in law, is not a valid ground available to the respondents to approach the High Court under Article 226 of the Constitution of India and claim such a relief.

The aforesaid submission is valid and justified in law. Insofar as the respondents are concerned, the duty was paid by them after proper adjudication and a particular view was taken which was upheld by the Tribunal as well.

6. The Apex Court in the case of **Khoday Distilleries Ltd. Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.** wherein it is held as under:- [extract of 24 (44)]

(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.”

27. From a cumulative reading of the various judgments, we sum up the legal position as under:

- (a) The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.
- (b) We reiterate the conclusions relevant for these cases as under:

"(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.”

(c) Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of



Kunhayammed case.

7. In the light of above decisions of the Apex Court inter-parties decision cannot be reopened and petitioners-department have no power to unsettle the settled issue among the parties.

8. Therefore, the petitioners have not made out a case so as to interfere with the order of Tribunal dated 27.1.2021 passed in O.A. No. 050/00232/2020.

9. The petitioners should have resorted remedy before this Court in filing review petition or review petition before the Apex Court. That apart it is not appropriate to grant any liberty at this distance of time for the reasons that petitioners intends to review the order dated 25.07.2006 of this Court and Apex Court order dated 16.3.2009.

10. Accordingly, the petition stands dismissed.

(P. B. Bajanthri, J)

(Rajiv Roy, J)

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