

**IN THE HIGH COURT AT CALCUTTA**  
**CIVIL APPELLATE JURISDICTION**  
**APPELLATE SIDE**

**Present:**

**Hon'ble Justice Soumen Sen**

**Hon'ble Justice Saugata Bhattacharyya**

**RVW 245 of 2022**  
**With**  
**IA No. CAN 2 of 2022**

**West Bengal State Electricity Distribution Company Ltd.**  
**Vs.**  
**West Bengal State Electricity Board Engineer's Association**

**In**  
**MAT 502 of 2020**  
**With**  
**RVW 246 off 2022**  
**With CAN 2 of 2022**  
**West Bengal State Electricity Transmission Company Ltd. & Ors.**  
**Vs.**  
**West Bengal Electricity Board Engineers' Association & Ors.**  
**In**  
**MAT 501 of 2020**

For the Review Applicants : Mr. S.N. Mookherjee, Ld. Adv. Gen.,  
Mr. Biswaroop Bhattacharya, Adv.,  
Mr. Debanjan Mondal, Adv.,  
Mr. Chayan Gupta, Adv.,  
Mr. Sandip Dasgupta, Adv.,  
Mr. Saaqib Siddiqui, Adv.

For the respondents/  
Writ petitioners : Mr. Soumya Majumder, Adv.,  
Ms. Sanjukta Dutta, Adv.

Hearing Concluded on : 11<sup>th</sup> August, 2023

Judgment on : 30<sup>th</sup> August, 2023

**Soumen Sen, J:** Both the review applications are arising out of a judgment and order dated 17<sup>th</sup> September, 2021 passed in MAT 501 of 2020

and MAT 502 of 2020. Both the writ petitions were heard analogously and disposed of by a common judgment.

2. The order of the learned Single Judge that the employer is obliged to extend the Dearness Allowance to its employees at the central government rate on and from 1<sup>st</sup> January, 2009 as may be notified by the Central Government from time to time till the life of ROPA 2009 was affirmed by the Division Bench. The applicants prefer a Special Leave Petition being SLP(c) No. 2947 of 2022. The said special leave petition was dismissed on 4<sup>th</sup> March, 2022 with the following observation:

*“In the facts and circumstances of the case and, more particularly, considering the fact that even till January, 2016 respective employees were paid the Dearness Allowance at the Central Government rates, no interference of this Court is called for in exercise of powers under Article 136 of the Constitution of India. The special leave petitions stand dismissed. Pending applications stand disposed of.” (emphasis supplied)*

3. The review of the said order being Review Petition (C) D. No. 12240 of 2022 was also dismissed with the following observations:

*“Delay condoned. Having carefully gone through the review petitions, the order under challenge and the papers annexed therewith, we are satisfied that there is no error apparent on the face of the record, warranting reconsideration of the order impugned. The review petitions are, accordingly, dismissed. Pending applications stand disposed of.” (emphasis supplied)*

4. Thereafter this application for review has been filed with a prayer for condonation of delay.

5. We admit the review petition after condoning the delay.

6. The principal issue raised in this review application is after dismissal of the Special Leave Petition and review application arising out of the dismissal of Special Leave Petition by the Hon'ble Supreme Court this review application is maintainable.

7. Mr. S.N. Mookherjee, learned Senior Counsel appearing on behalf of the applicants have submitted that the dismissal of the special leave petition or the review application would not be a bar in reviewing the order under consideration. Mr. Mookherjee submits that SLP was dismissed in limine without considering the merits of the case. In the SLP it was not mentioned that ROPA 2020 had in the mean time come into operation and option has already been exercised by the members of the associations. It was also not stated that the direction passed by the learned Single Judge and the Division Bench is contrary to ROPA 2020. The right to get the order revisited is not restricted by the contours of Order 47 Rule 1 of the Code of Civil Procedure and to do substantial justice the Court can always review its order. The order passed in that SLP or in review dismissing the review petition filed against dismissal of SLP does not take away this statutory right of the applicants to exercise its statutory right under Order 47 of the Code of Civil Procedure.

8. The Hon'ble Supreme Court in exercise of power under Article 136 of the Constitution of India felt that it is not one of such cases which requires admission under Article 136 of the Constitution of India and in deciding whether there was an error apparent on the face of the record, the

reviewing court is only required to take such limited fact into consideration. From a reading of the judgment under review it would be clear that the Hon'ble Division bench did not intend to declare that the writ petitioners would be entitled to the benefits of ROPA 2020. It is submitted that few days before the Hon'ble Division Bench decided the writ petition West Bengal State Electricity Distribution Company Limited ROPA 2020 had come into operation. However, mistakenly the said fact was not brought to the notice of the Hon'ble Division Bench. The Division Bench had never intended to confer the said benefit to the writ petitioners of a subsequent ROPA 2020 which was neither the subject matter of the writ petition nor the appeal and if the order of the Hon'ble Division Bench is construed and/or intended to cover benefits at par with the Central Government it will result in a windfall gain or unjust enrichment. The fact that after promulgation of ROPA 2020 options have been invited from the employees of the review applicants in terms of Rule 16 of ROPA 2020 and that in terms of the office order dated 22<sup>nd</sup> February, 2020 the employees of the two Distribution Companies have exercised their options to opt for the benefit of revised pay scales. These facts mistakenly were not mentioned in the SLP. The said fact was also not brought to the attention of the Hon'ble Division Bench while deciding the appeal presumably on the ground that the validity of the ROPA 2020 with regard to the payment of the Dearness Allowances and other benefits were not the subject matter of challenge in the writ petition.

9. Mr. Mookerjee submits that the employees who have already exercised such options are bound by rule 8 and they, in fact, have accepted

Dearness Allowance in accordance with rule 8 of ROPA 2020 from 1<sup>st</sup> January, 2020 and thus if the review applicant is now made to pay at Central government rates as per the order dated 13<sup>th</sup> March, 2020 which was confirmed by the Hon'ble Division Bench on 17<sup>th</sup> September, 2021 not only employees of the two companies who are members of the writ petitions would be unjustly enriched but huge financial burden would be imposed on the review applicant which would make it unsustainable to function and discharge its duties as a public utility. The issue of exercise of options was also not included in the review petition filed before the Hon'ble Supreme Court.

10. Mr. Mookherjee has referred to paragraphs 10, 11, 12 and 13 of the writ petition and submits that the writ petitioners essentially questioned the rate at which the Dearness Allowance is required to be paid under ROPA Rules 2009 and the same would be discernible from the said paragraphs.

11. The reliefs were confined to payment of Dearness Allowance at the Central Government declared rate from July, 2016.

12. For proper appreciation the said paragraphs are stated below:

*“10. The non payment of Central Government rate of dearness allowance to the employees of the company is in violation of the ROPA 2009. It is stated that the respondent authorities have denied the Central Government rate of dearness allowance to the employees since July 2016, and had been unilaterally paying the State Government rate of dearness allowance in violation of ROPA 2009 implemented from 1st January, 2007.*

*11. Benefits under ROPA 2009 cannot be unilaterally curtailed or altered by the respondents in any manner whatsoever. It is also not intelligible to keep such payment of dearness allowance in arrears. The tariff order of West Bengal State Electricity Distribution Company Limited for the year 2017-2018 having considered a dearness allowance hike at the rate of 4% for 2017-2018 also supports the cause of the employees, and the said hike is in lying with the Central Government rate of dearness allowance since the tanff order takes into consideration the existing right of the employees to Central Government rate of dearness allowance.*

*12. The action of the respondent authorities have caused gross deprivation to the office employees of West Bengal State Electricity Distribution Company Limited and such unilateral withdrawal of existing benefits at the instance of the respondents harshly operates on the officers - employees and causes deprivation of fundamental r9ght guaranteed under Article 21 and the property right under Article 300A of the Constitution of India.*

*13. The Expert Body, while formulating ROPA 2009 for the employees of the West Bengal State Electricity Distribution Company Limited considered all parameters and thereafter came to a conclusion that the Central Government rate of dearness allowance should be applicable to the employees of the company, and as such by no administrative unilateral decision, the said payment can be stalled or curtailed.*  
(emphasis supplied)

13. Prayer (a) in the writ petition reads as follows:

*“a. A writ of and/or in the nature of Mandamus commanding the respondent authorities and each one of them their men, agents, assigns and subordinates to make payment of the*

*arrear dearness allowance to the employees-officers of West Bengal State Electricity Distribution Company Limited from July, 2016 upto date and to continue making payment thereof at the Central Government declared rate of dearness allowance." (emphasis supplied)*

14. It is submitted that in the first paragraph of the judgment and order dated 13<sup>th</sup> March, 2020 the learned Single Judge has framed the following question to be decided in the writ petition.

*"The question raised in the writ applications by employees of the WBSETCL and WBSEDCL in the writ petitions is whether an admitted term of contract indicating that D.A would be paid from the year 2009 at Central Government rate is vested right and whether the same can be reduced by the employer on the basis of any changed financial condition." (emphasis supplied)*

15. Mr. Mookherjee has referred to following excerpts from the judgment and order of the learned Single Judge to show that the learned Single Judge was deciding payment of arrears of Dearness Allowance from the year 2016 till the date of life of the order dated 16<sup>th</sup> February, 2009:

*"Since after formation of the two companies, their respective Boards adopted by Office Order dated February 16, 2009, a revision of pay and allowances (ROPA) for the two companies. The relevant part of the said ROPA that is the subject matter of the instant writ applications is Clause 9 which is set out herein below.*

*Clause 9. "Dearness allowance (DA)*

*The Dearness Allowance admissible to all categories of employees of the Company shall be payable on Basic pay + Grade Pay Non*

*practicing allowance (NPA), if any, from the dates mentioned below at the following rates:-*

| <i>Date from which payable</i> | <i>Rate of Dearness Allowance per month</i>      |
|--------------------------------|--------------------------------------------------|
| <i>From 1.1.2006</i>           | <i>No Dearness Allowance</i>                     |
| <i>From 1.7.2006</i>           | <i>2% of basic Pay+NPA, where applicable</i>     |
| <i>From 1.1.2007</i>           | <i>6% of the basic Pay+NPA, where applicable</i> |
| <i>From 1.7.2007</i>           | <i>9% of the basic Pay+NPA, where applicable</i> |

*Henceforth, Dearness Allowance will be applicable to the employees of the Company at such rate and from such date as may be notified by the Central Government from time to time."*

*Admittedly, the employees of the two companies received Dearness Allowance in terms of the said scheme of 2009, both arrears as well as current until the year 2016. To be must specific, the Central Government rate of D.A. were paid until 2016. Since after 2016, the company paid only 125% of the basic and post July, 2019, the employees were paid 135%. In both cases from 2016, Central Government rate of DA were not paid. The principal argument of the writ petitioners is that Dearness Allowance once agreed to be paid and subsequently paid at Central Government rates, cannot be reduced post 2016 for whatever be the reasons advanced by the companies or the State.*

*Having considered the cases cited by the respective parties, this Court finds that the order dated February 16, 2009 has been issued pursuant to a resolution of the terms the two*

*companies has not only been given effect to but also acted on from the year 2006 till the year 2016. The slabs rates prescribed retrospectively from 2006 to 2009, Central Government rate of D.A. were admittedly paid to the employees of WBSEDCL and WBSETCL*

*The same, therefore, cannot be denied to the writ petitioners even if the management of the two companies can demonstrate poor financial condition*

*The reasons for this is that the same has formed part of an irrevocable contract, undertaking agreement that the management has entered into and acted upon with the employees.*

*This Court on a plain reading of Clause 9 as a whole, is of the view that the expression "admissible must be treated as synonymous expression "applicable" and the employer cannot be allowed to resile from the said Clause, which has admittedly been acted upon the differences in language of the first and second paragraph of Clause 9, where the expression "employees of companies" applicable all categories of the Company shall be payable in the first and expression "will be applicable" cannot change the entitlement of the workmen. The expression "will be" in the second part of Clause 9, must, according to this Court, be read as" shall". At the risk of repetition, the use of the word "admissible" in the first part and applicable in the second part, cannot in any way defeat the claim of the employees from 2009 till 2016.*

*For the reasons stated above, this Court is inclined to direct the WBSEDCL and WBSETCL to pay all arrears of DA from the year 2016 till the date of life of the order dated February 16, 2019. The arrears from 2016 till date shall be paid in a phased manner in four instalments to each of the employees of the two*

companies spread over a period of six month." (emphasis supplied)

16. Mr. Mookherjee submits that, however, after allowing the reliefs the Hon'ble Single Bench proceeded to hold as follows:

*"..... The current Dearness Allowance would be payable at the Central Government rates from April 1, 2020."*

17. Mr. Mookherjee submits that the Hon'ble Division Bench while disposing of the appeal had called for affidavits from the applicants to satisfy whether both the applicants are financially capable and had the capacity to bear the additional expenses being the differential amount between Central Government rate and State Government rate and on a satisfaction being recorded that both the companies are financially sound to bear such additional expenditure dismissed the appeals.

18. Mr. Mookherjee has drawn our attention to the following observations of the Division Bench:

"The financial inability not being established we are of the view that the learned Single Judge was justified in allowing the writ petition. We reiterate that the appellants have not been able to establish its incapability or inability to pay DA at the Central Government rates. We, however, accept the submission on behalf of the learned Advocate General that in the event the companies are able to demonstrate poor financial condition the DA may not be payable at the Central Government rate. The observation of the learned Single Judge to the effect that the DA cannot be denied to the writ petitioners even if the management of two companies can demonstrate poor financial condition has to be read in the context of the observation made in the other

*paragraphs of the said judgment and not in isolation. However, if it means that irrespective of the financial condition the two companies were obliged to pay DA at the Central Government rate in terms of Clause 5(a) the same would be contrary to law as the DA cannot be equated to basic pay or basic wages. The phrase in Clause 5 that the terms and conditions of service of transfer shall not, in any way, be less favourable than those applicable to them immediately before the said effective date of transfer has to be assessed on the financial ability of the companies after the transfer.(emphasis supplied)*

19. Mr. Mookherjee submits that there was no occasion for the Division Bench to consider the aforesaid aspect of the matter during the implementation of the ROPA 2020 inasmuch as the writ petitioners have not filed any writ petition challenging the rates at which dearness allowance shall be paid to the writ petitioners under ROPA Rules 2020. The question of construing that the order of the Division Bench has mandated payment of Dearness allowance at the Central Government rate under ROPA Rules 2020 would be a perversion of the said order which the writ petitioners are intending to do on a deliberate misconstruction of the order of the Hon'ble Division Bench. Mr. Mookherjee submits that the Hon'ble Division Bench has clearly indicated in the first paragraph of the judgment that both the appeals have raised an identical issue regarding the enforceability of dearness Allowance under the ROPA Rules 2009 at the instance of the employees.

20. Mr. Mookherjee submits that the pleadings of the parties read with the judgment of both the courts would clearly show that it was restricted to ROPA 2009 and there was no scope of the learned Single Judge

or for the Division bench to examine the scope and ambit of ROPA 2020 and the said rule was not even referred to by any of the parties and rightly not taken into consideration in either of the judgments. It is specifically submitted that ROPA 2020 was not at issue before the Hon'ble Single Judge or the Hon'ble Division Bench or the Hon'ble Supreme Court.

21. Mr. Mookherjee submits that the courts have consistently held that a party should not suffer due to patently wrong steps taken by a litigant under legal advice as every court functions for the purpose of doing justice according to law. The court can even exercise its inherent power to undo a wrong and writ court being a court of equity, bestowed with extraordinary constitutional power, can exercise its inherent power *ex debito justitiae* in reviewing its order as held in ***Re: Mahamaya Banerjee*** reported at **AIR 1989 Cal 106** and ***Board of Control for Cricket, India & Ors. v. Netaji Cricket Club & Ors.***, reported at **2005 (4) SCC 741** paragraph 90. The aforesaid submission is made in the context of the mistake on the part of the learned Counsel representing the appellant in not bringing to the notice of the Hon'ble Division Bench that ROPA 2020 had come into operation with effect from January, 1, 2020 and duly notified on 22<sup>nd</sup> February 2020.

22. Mr. Mookherjee has submitted that the dismissal of the SLP is not a judgment on merits. The Hon'ble Supreme Court did not enter into the merits and the review applicant was shown the door at the threshold. Therefore dismissal of the SLP at the threshold would not stand in the way of deciding the present review application. Moreover, a relief that was not

even prayed for nor considered could not have been granted either by the writ court or by the Hon'ble Division bench.

23. Mr. Mookherjee, has submitted that it is trite law that mere dismissal of SLP without any reason in exercise of its power under Article 136 does not result in a merger as the merits of the dispute between the parties were not decided. The Hon'ble Supreme Court was only deciding whether leave should be granted or not and it is not a decision on merits and hence reviewable. This statutory right of review is not affected by the order of dismissal of SLP at the threshold or dismissal of review of the order of dismissal of SLP is recognised in ***Manohar & Ors. v. Jaipalsing & Ors.***, reported at **2008(1) SCC 520** and ***Kunhayammed & Ors. v. State of Kerala & Ors.***, reported at **2000 (6) SCC 359**.

24. Mr. Mookherjee has specifically referred to paragraph 34 in **Kunhayammed** (supra) case which states:

*“...But where the special leave petition is dismissed – there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it.” (emphasis supplied)*

25. Mr. Mookherjee submits that in paragraph 44 of **Kunhayammed** (supra), the Apex Court summed up the law and this was reiterated in ***Municipal Corporation of Delhi vs. Yashwant Singh Negi***, reported in **2020 (9) SCC 815** (paragraph 3) and for the present purpose enunciation of law in paragraph 44 (iv) and (v) of **Kunhayammed** are relevant as in the said clauses the effect and implication of a speaking or non-speaking order

refusing special leave petition to appeal on future litigation has been clearly stated. In either case it does not attract the doctrine of merger. This view was reiterated in ***Bakshi Dev Raj & Ors. v. Sudhir Kumar*** reported in **2011 (8) SCC 679** (paragraphs 33 to 38) and ***Khoday Distilleries Ltd. & Ors., v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.***, reported in **2019 (4) SCC 376** (paragraphs 2 and 26.2).

26. Mr. Mookherjee submits that in fact ***Khoday Distilleries Ltd.*** (*supra*) has affirmed and reiterated the law laid down in paragraph 44 of ***Kunhayammed*** (*supra*).

27. Mr. Mookherjee submits that in the review before the Hon'ble Supreme Court the fact that in terms of office order dated 22<sup>nd</sup> February, 2020, on 27<sup>th</sup> February, 2022 employees of the Review Applicant were invited to exercise their option in terms of Rule 16 of ROPA Rules, 2020 and that the employees of the review applicant exercised their option to opt for benefit of the revised pay scale and undertook to refund any excess payment including by adjustment against future payment was not considered. The Division Bench of this Court in FMA 442 of 2019 (***State of West Bengal and Ors. vs. Mala Sanyal***) in a review jurisdiction considered the effect of writ petitioner exercising option under ROPA 1999 and held:

*“There cannot any doubt that the memorandum of 21<sup>st</sup> July, 1990 is an important document which clearly excludes the respondent/writ petitioner and many others who have acquired qualification post dated 21<sup>st</sup> July, 1990 and before 26<sup>th</sup> July, 1994. We are referring to these particular memoranda because 26<sup>th</sup> July, 1994 puts an end to any claim that may be made by*

*respondent/writ petitioner or persons similarly placed who have acquired qualification post 26<sup>th</sup> July, 1994. In the meantime, ROPA 1999 had come into play by which it seems that the respondent authorities have tried to bring a pay parity amongst different classes of its employees with effect from 1<sup>st</sup> January, 1996. The respondent/writ petitioner exercised option under ROPA 1999 for receiving benefits with effect from 1<sup>st</sup> January, 1996 of higher scale of pay. This appears to be a conscious decision by the writ petitioners and it is an important factor to be taken into consideration at this stage because on that date it was possible for him to challenge the basis of the memorandum dated 21<sup>st</sup> July, 1990. It is clear case of waiver of right.....”(emphasis supplied)*

28. Mr. Mookherjee submits that in terms of the aforesaid judgment the employees having opted to come under ROPA 2020 have waived their rights to contend anything to the contrary. In all the options, the employees being the members of the writ petitioners undertook to refund excess payments made. Having exercised such option, the employees of the review applicant are bound by Rule 8 thereof and, in fact, have accepted Dearness Allowance in accordance with Rule 8 of ROPA 2020 from 1<sup>st</sup> January, 2020 which are being currently accepted by all of them.

29. Mr. Mookherjee submits that on a careful analogy of the same it can be argued that the dismissal of a review does not attract the doctrine of merger, in view of the judgment of the Hon’ble Supreme Court in **T.K. David v. Kuruppampady Service Co-Operative Bank Ltd. & Ors.**, reported in **2020 (9) SCC 92** (paragraphs 3 to 5 and 17) and **DSR Steel (P) Ltd. v. State of Rajasthan & Ors.**, reported at **2012(6) SCC 782**.

30. Per contra Mr. Soumya Majumdar learned Counsel representing the writ petitioner has submitted that the applicants have by conduct expressed exploration of the avenues of the litigation through the doctrine of election by filing the Special Leave Petition (SLP) and subsequently agitating all points taken in the review application arising out of the said SLP. The SLP was dismissed. The review application was also dismissed on consideration of all points raised in the review of order dismissing the SLP. The review application was dismissed with an observation that there was no error apparent on the face of the record. In this proceeding similar points that were raised and decided in the SLP and in the review application have been re-agitated.

31. Mr. Mazumdar has placed few grounds of the review application filed in the Supreme Court to show that the grounds in the said review application are identical and/or similar to the grounds raised in the review application filed before this court where liability to pay DA at the Central Government rate under the ROPA 2020 was raised. In fact, the review applicants have furnished upto date financial position as on the date of filing of the review petition before the Hon'ble Supreme Court.

32. The paragraphs on which Mr. Mazumdar has drawn attention of the Court are mentioned below:

“Direction to pay dearness allowance at the current Central Government rate from 01.04.2020 cannot be given effect to in light of the introduction of the revised ROPA, 2020:

1.1. The Ld. Single Judge of the Hon'ble High Court in its Judgement and Order dated 13.03.2020 in WP. No. 3292 (W) of 2019 had inter alia directed the Review Petitioner Company to pay "dearness allowance" to its employees at the current Central Government rate from 01.04.2020 onwards [at page 74].

1.2 The said direction of the Ld. Single Judge was upheld implicitly (without any actual consideration) by the Ld. Division Bench of the Hon'ble High Court in its Judgement and Order dated 17 09 2021 in MAT 502 of 2020. And was thereafter given finality by this Hon'ble Court vide the Order under Review dated 04.03.2022 in SLP(C) No. 3262/2022 [at page 54-55]

1.3 The aforesaid direction cannot be sustained in law on account of the fact that the erstwhile "West Bengal State Electricity Distribution Company (Revision of Pay and Allowance) Rules, 2009" ("ROPA, 2009"), was replaced on 22.02.2020 by the revised ROPA, 2020 [Rule 9 of erstwhile ROPA, 2009 at page 135-136]

1.4. The revised ROPA, 2020 was enunciated, prior to the decision of the Ld. Single Judge dated 13.03.2020, vide Office Order No. 1782 dated 22.02.2020 in pursuance of a Board of Directors meeting of the Review Petitioner Company held on 20.02.2020 and hence applied directly to this case.

1.5. Under Rule 8 of the revised ROPA 2020, it is clear beyond any doubt that the rate of dearness allowance payable to employees of the Review Petitioner Company lies within the exclusive discretion of the management of the Company [Rule 8 of ROPA, 2020 at page. 178]

1.6. As per Rule 8, there exists no mandate whatsoever on the company to pay dearness allowance at the current Central Government Rates. The relevant portion of Rule 8 of the revised ROPA, 2020 reads as under:

Henceforth, Dearness Allowance shall be admissible to the employees of the Company at such rate and from such date as may be decided by the Company keeping in view of the rates as would be admissible to employees of the State Government and Central Government from time to time."

1.7. In light of Rule 8 of the revised ROPA, 2020, the employees of the Review Petitioner Company have no legal right whatsoever to claim dearness allowance at Central Government rates from 01.04.2020

1.8. The findings of the Ld. Single Judge (at page. 73) & the Ld. Division Bench (at page. 104-105) of the Hon'ble High Court to the effect that the employees had a legal right to claim dearness allowance at Central Government rates was confined only to Rule 9 of the erstwhile ROPA, 2009 And therefore those findings do not apply to Rule 8 of the revised ROPA, 2020 dated 22.02.2020. In other words, the revised ROPA, 2020 and in particular Rule 8 thereof did not come up for consideration before the Hon'ble High Court & this Hon'ble Court.

1.9. By way of full and fair disclosure by the Review Petitioners herein, it is submitted that this factual aspect regarding revision of ROPA was inadvertently not brought to the notice of the Hon'ble High Court & to this Hon'ble Court. The same was a bona fide omission on the part of the Review Petitioners. It is prayed that this Hon'ble Court condones this oversight in the interest of justice and sets aside the said direction of the Ld. Single Judge (at page 74) which has been

given finality by virtue of Order under Review dated 04.03.2022 in SLP(C) No. 3262/2022, especially since the Review Petitioner Company is a State Level Public Sector Undertaking ("State PSU") and the case involves public monies.

1.10. It is submitted that a continuing obligation imposed on a State PSU (such as the Review Petitioner Company) to pay dearness allowance at Central Government rates is extremely onerous and will adversely affect its public duty of providing electricity to approximately 200 lakh consumers in the State of West Bengal.” (emphasis supplied)

33. It is submitted that the writ petitions were filed for claiming arrear DA at the Central Government rate in terms of ROPA 2009 and also seeking a direction that the Review applicants shall continue to make payment of DA at the Central Government Rate. ROPA 2020 was implemented on 22<sup>nd</sup> February, 2020 with effect from 1<sup>st</sup> January, 2020. The writ petition was disposed of on 13<sup>th</sup> March, 2020.

34. Applications were invited for exercising option under ROPA 2020 only with respect to the date of its taking effect and an employee was given the option either to remain under ROPA 2009 or opt for ROPA 2020.

35. Mr. Majumdar has submitted that during the pendency of the writ petition an interim order was passed on 27<sup>th</sup> November, 2019 in which the learned Single Judge directed the respondent authorities (appellants herein) to release the dearness allowance in favour of the writ petitioners @ 154% in accordance with the Central Government Rate under the 6<sup>th</sup> Pay Commission Scale (Pay Revised Scale). In an appeal from this

order being MAT 109 of 2020 an Order was passed by the Hon'ble Division Bench on 11<sup>th</sup> March, 2020 observing that in the event it is found that the writ petitioners are entitled to dearness allowance @ 154% the differential amount not paid would attract interest @ 10% per annum for the purpose under dispute.

36. In view of the aforesaid order the Corporation paid interest since 2016. Subsequently on 18<sup>th</sup> September, 2020 a direction was passed upon the review applicants to file affidavit in order to assess the financial position of the review applicants to bear the load of DA. In response an affidavit was filed on 28<sup>th</sup> September, 2020 showing payment of dearness allowances "at present". In the appeal before the Division Bench Corporation did not raise any point of non-payability of Central DA under ROPA 2020.

37. Mr. Majumder submits that by reason of not raising the said issue with regard to its obligation to pay DA at the Central Rate under ROPA 2020 it is barred by the principle of constructive res judicata.

38. Mr. Majumder submits that permitting to raise such an issue at the belated stage would lead to judicial chaos and uncertainty.

39. It is submitted that in view of the dismissal of the Special Leave Petition and the Review Application it would be improper and impermissible at the stage to consider the issues raised by the review applicants with regard to the payability of DA at the Central Rate under ROPA 2020. Moreover, the order passed by the Hon'ble Supreme Court in dismissing the Special Leave Petition is a recent order and any exercise of power to review

the order that has now attained finality by reason of dismissal of the SLP and by a recent order would be violating the provisions of Article 141 of the Constitution of India.

40. It is submitted that even in the contempt proceeding the review applicants have agreed to comply with the order passed by the learned Single Judge and prayed for payment in instalments.

41. Mr. Majumder submits that the review applicants in the review petition before the Hon'ble Supreme Court had stated that "issues had attained finality", and cannot now re-agitate the same under the garb of a fresh review before this court.

42. The applicants have understood the order passed by the Division Bench of this Court to include the benefits to the writ petitioners not limited to ROPA 2009 and to be continued even thereafter otherwise the applicants could not have stated clearly in the review application that "issues had attained finality". Moreover, the writ petition was not restricted to the claims made by the writ petitioners limited to ROPA 2009 as in the reliefs it has been categorically stated that the writ petitioners are entitled to receive such benefits of revision of pay following ROPA 2009.

43. Mr. Mazumder, however, admits that when the writ petition was filed ROPA 2009 was in vogue, however, at the time when the appeal was disposed of ROPA 2019 was introduced. It is submitted that apart from the statements made in the review petition the learned Senior Advocate representing the present petitioners have submitted before the learned

Single Judge on 20<sup>th</sup> May, 2022 on behalf of the alleged contemnors that the applicants are in the process of complying with the order in the contempt proceeding and would work out the mathematical calculation that would be necessary in ascertaining instalments and other matters. In fact, subsequently the alleged contemnors made a prayer on 17<sup>th</sup> June, 2022 to give them an opportunity to repay the dues towards dearness allowance with interest in 36 instalments.

44. Mr. Mazumder has submitted that in view of dismissal of the Special Leave Petition and review application the applicants cannot be allowed to argue that the understanding of the order under review was erroneous which is not the case here in view of the statements made in the review application. The application for clarification and/or review should have been filed before the dismissal of Special Leave Petition or the order dismissing the review arising thereof.

45. The order dismissing the SLP at the admission stage with reasons and the order in Review are binding on the parties and the matters involved therein are conclusive between the parties. Reliance is placed on ***Surinder Pal Soni v. Sohan Lal (D) thru L.Rs.*** reported in **2020(15) SCC 771**.

46. If at this stage this court takes a different view then the entire law “in relation to the precedents and ratio decidendi will have to be re-written” as observed in ***South Central Railway Employees Cooperative Credit Society Employees Union vs. B. Yashodabai and Ors.***; **2015(2) SCC 727**.

47. It is submitted that it is well settled that dismissal of SLP with some reasons however, short it might be would result in merger and the order of the Division Bench has clearly merged with the orders passed by the Hon'ble Supreme Court in dismissing the SLP and the review petitions arising therefrom.

48. Mr. Majumder in this regard, has relied upon the decision of the Hon'ble Supreme Court in ***Gangadhara Palo v. The Revenue Divisional Officer & Ors.***, reported in **2011 (4) SCC 602** (paragraphs 5, 7, 8).

49. Mr. Majumder has drawn our attention to paragraph 7 of the said decision which clearly states that if the SLP is dismissed with reasons however, meagre (it can be even of just one sentence) the doctrine of merger would apply. The judgment of the Division Bench merges into the order of the Hon'ble Supreme Court.

50. Mr. Majumder submits that in dismissing the review application the Hon'ble Supreme Court observed that there is no error apparent on the face of the record warranting reconsideration of the order impugned.

51. It is submitted that once the review applicants raised in the review petition that issues had attained finality reopening of the said issues are clearly impermissible and the review application filed before us is subversive of judicial discipline as held in ***Meghmala & Ors. v. G. Narasimha Reddy & Ors.***, reported in **2010 (8) SCC 383** (paragraphs 21, 25, 26) and ***Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors.***, reported in **1998 (7) SCC 386** (paragraph 4).

52. Mr. Majumder accordingly submits that review application is completely misconceived and should be dismissed with exemplary costs.

53. Mr. S.N. Mookherjee learned Senior Counsel in reply distinguished the aforesaid decisions. It is submitted that the principle of constructive res-judicata as enshrined in explanation iv, Section 11 of the Code of Civil Procedure has no manner of application in the instant case for the following reasons:-

i) For the principle of res judicata to apply there has to be more than one proceeding or a case of merger. This is evident from Section 11 of the Civil Procedure Code, which provides for “a formal suit” and a “subsequent suit” Further, the order of the Division Bench has not merged with any order of the Supreme Court.

ii) It does not apply to an application for review of an order which has not merged with an order passed by a higher forum. In the judgement of ***South Central Railway Employees Co-Operative Credit Society Employees Union*** (supra) relied on by the writ petitioners, there were two proceedings: (i) the first proceeding which culminated in a final adjudication by the Hon'ble Supreme Court in a decision in ***The South Central Railway Employees Co-operative Credit Society Employees Union, Secundrabad v. The Registrar of Co-operative Societies and Ors.*** reported in **(1998) 2 SCC 580** and (ii) a subsequent proceeding in which the decision relied on was rendered i.e the judgement of ***South Central Railways Employees*** (supra).

iii) The aforesaid decision is clearly distinguishable as the same is a decision where by way of an earlier decision of the Supreme Court regarding reservation policy of the employees

of South Central Railway Employees Credit Cooperative Society had already been taken by the Hon'ble Supreme Court. Such decision having already been arrived at by the Hon'ble Supreme Court, the Hon'ble Supreme Court felt that when a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court, unless it is distinguished or overruled or set aside. The ratio of the said decision will not apply to the facts of the instant case, as there has been no merger in the instant case. The Hon'ble Supreme Court was pleased to dismiss the SLP by recording that Dearness Allowance having been paid at Central Government rate until 2016, no interference by exercising powers under Article 136 was called for. Consequently it chose not to open its doors by granting Special Leave. The same did not attract the doctrine of merger in view of the decisions cited above. Subsequently, in the review, the points sought to be canvassed now might have been taken but once again the Hon'ble Supreme Court refused to entertain the review application, thereby not attracting the doctrine of merger. Accordingly, in view of the decision in **DSR Steel (Private) Ltd.** (supra) paragraph 25), the doctrine of merger on the basis of which the decision in **South Central Railways Employees** (supra) was rendered does not have any manner of application to the facts of the present case.

54. It is submitted that the proposition laid down in **Gangadhar Palo** (supra) is no more a good law in view of the decision in **Khoday Ltd.** (supra) in which Gangadhar Palo was impliedly overruled and the decision in **Kunhayammed** (supra) was affirmed and followed.

55. Moreover, the said decision would not apply as the order dismissing the said SLP in the instant case, clearly records that no

interference of the court is called for in exercise of its power under Article 136.

56. The Hon'ble Supreme Court factually recorded that respective employees were paid the Dearness Allowance at the Central Government rates till January, 2016 and merely on the aforesaid basis the SLP was not entertained. This is in reality a non-speaking order by reason of the decision ***Kunhayammed*** (*supra*).

57. Mr. Mookherjee has submitted that ***Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors.***, reported in **1998(7) SCC 386** and ***Meghmala & Ors.*** (*supra*) would also not apply in the facts and circumstances of this case.

58. In ***Abbai Maligai*** (*supra*) the Hon'ble Supreme Court did not take into consideration the issue of merger and has merely held that after dismissal of SLP if the review application is filed it is subversive of judicial discipline.

59. Mr. Mookherjee submits that the said view is hypothetical inasmuch as subsequent pronouncements has clearly diluted the said principle as is clearly discernible from the views expressed by the Hon'ble Supreme Court in ***Khoday Distilleries Ltd.***(*supra*).

60. It is submitted that ***Abbai Maligai*** (*supra*) was decided on peculiar facts with no discussion on any principle of law. However, ***Meghmala & Ors.*** (*supra*) was considered in ***Khoday Distilleries Ltd.***(*supra*) and has been impliedly overruled by a bench consisting of three

Hon'ble Judges affirming the earlier three judge bench decision in ***Kunhayammed*** (supra).

61. Mr. Mookherjee submits that applying the ratio of ***Kunhayammed*** (supra) it can be safely said that the dismissal of the SLP from the order of the Division Bench was a non-speaking order as neither did it declare any law nor seek to give any finding which would result in the entertaining of the SLP being an affront to the orders of the Hon'ble Supreme Court.

62. In the aforesaid background the maintainability of the review application has to be assessed.

63. The facts that emerge from the pleadings and submissions of the parties are stated below.

64. The writ petitioners have been enjoying the DA at the rate of Central government employees in terms of ROPA Rules, 2009.

65. Benefits under ROPA 2009 was curtailed from July, 2016.

66. Since then they were paid DA at a reduced rate and not at the Central Government rate.

67. This has caused unilateral alteration of service conditions.

68. Due to such deprivation and unilateral withdrawal of existing benefits at the instance of the review applicants the writ petitioners on 7<sup>th</sup> February, 2019 filed writ petitions against the review applicants praying, *inter alia*, for a direction upon their employers to pay arrear dearness

allowance upto date and to continue making payment at the Central Government declared rate of dearness allowance.

69. The writ petition was allowed on 13<sup>th</sup> March, 2020 by directing their respective employers, WBSEDCL and WBSETCL to pay all arrears of DA from the year 2016 till the date of life of the order dated 16<sup>th</sup> February, 2019. Thereafter, the learned Single Judge proceeded to hold that the current Dearness Allowance would be payable at the Central Government rates from 1<sup>st</sup> April, 2020.

70. The two companies preferred two separate appeals. The said two appeals were disposed of on 17<sup>th</sup> September, 2021.

71. The scope of enquiry in the appeal was entitlement of the employees to receive DA under ROPA Rules 2009 at the Central Government rate.

72. In the appeal the entitlement to receive DA under ROPA 2020 was never raised and hence not decided. The Division Bench was concerned with the payment of DA at the Central Government rate under ROPA 2009 only. Arguments were also restricted to ROPA 2009.

73. It would be clear from the opening paragraph of the judgment under review. It reads:

*“These two appeals raise an identical issue of enforceability of the dearness allowance under the Revision of Pay and Allowances Rules, 2009 at the instance of the employees.”*

74. Thereafter, the following observations of the Division Bench shall further make it clear:

*“The issues raised in these appeals turn on the interpretation of Rule 9 of the said Rules of 2009. If the said Rule truly means that the two companies are mandatorily required to pay dearness allowance at Central Government rates, then a right accrues in favour of the employees of the two companies and a writ of mandamus can be issued to ensure payment of dearness allowance at Central Government rates, for it is a proposition of law requiring no citation of authority that a writ may be issued to secure and enforce a legal right. However, if the nature of the said Rule is, properly speaking, permissive and does not depend on the terms of employment with regard to the payment of dearness allowance, then no right accrues and a writ of mandamus cannot be issued in favour of the petitioners, as held in State of M.P. v. C. Mandawar, reported in AIR 1954 SC 493 at paragraphs 5-6.*

*.....On the other hand, Mr. Majumdar adds weight to his preferred interpretation by stating that dearness allowance at Central Government rates was paid till January, 2016 and was contemplated to be so paid after the two companies were created under Clause 5(a) of the Transfer Scheme (see above), which stated that the terms and conditions of service of the employees of the two companies would not be any less favourable than they were immediately before the said Scheme was implemented. To Mr. Majumdar Rule 9 is the crystallisation of the earlier promise that the dearness allowance would be paid at Central Government rates, and therefore, the implication is that the general factors sought to be asserted by the learned Advocate General are irrelevant.*

*.....The record would unmistakably show that the employees of both the companies received dearness allowance in terms of*

the ROPA 2009 both arrears as well as current until January, 2016 at the Central Government rates. It cannot be disputed that the ROPA Rules applicable to the power companies have been framed in exercise of power conferred by Article 309 of the Constitution of India and it is statutory in nature. In fact, the rate of dearness allowance paid for the period of 1st April, 2007 till 1st July, 2008 was at the Central Government rates. The last sentence of the said clause, namely, "Henceforth, Dearness Allowance will be applicable to the employees of the company at such rate and from such date as may be notified by the Central Government from time to time" makes it clear that the rate of dearness allowance for the future period would be at such rate as may be notified by the Central Government from time to time. The reference of the Central Government in the aforesaid sentence makes it abundantly clear that the power companies would be obliged to pay the DA at the rate as may be notified by the Central Government from time to time. In fact, DA for the subsequent periods till 2016 was paid at the Central government rates only. However, there cannot be any doubt that in the event, the financial condition of the said companies deteriorate and the financial condition does not permit DA to be paid at the rate notified by the Central Government, the power companies can refuse to pay DA at such rate depending upon the various factors on which the DA can be reduced as the DA is distinguished from Basic Pay. At the same time, if all other parameters justify payment of DA at the rate at which the Central Government employees are being paid, the power companies cannot refuse payment of DA at such rate as may be notified by the Central Government from time to time. The word 'admissible' in clause 9 does not in any way dilutes the claim of the writ petitioners in claiming DA at the Central Government rate. The word 'admissible' in the context means 'applicable' and does not control the rates at which DA would be payable to

*the employer. It plainly states the components to be considered in computing DA for all categories of employees of the appellant companies. Once the power companies have accepted that its employees would be entitled to DA at rates that are applicable to the Central Government employees, it creates a legally enforceable right on its employees to get the DA. Moreover, we accept the point made by Mr. Majumdar that that dearness allowance at Central Government rates was paid till January, 2016 and that it was contemplated to be so paid after the two companies were created under Clause 5(a) of the Transfer Scheme. The said Clause 5(a) states that the terms and conditions of service of the employees of the two companies would not, at the effective date of transfer, be any less favourable than they were immediately before the said Scheme was implemented. Indeed, that does not preclude variation of the terms and conditions of service post transfer, but the fact that dearness allowance was paid till January 2016 under the said Rule 9 at Central Government rates indicates that the said Rule 9 did not present a departure from the pre-transfer status quo and that, manifestly, the said Rule was intended to be treated as (and has been treated as) mandatory post 25th February, 2009. Thus, the inexorable conclusion is that the said Rule 9 of the said Rules of 2009 confers a right on the petitioners to payment of dearness allowance at Central Government rates. A writ of mandamus can be issued for enforcement of rights created by statute. The respondents have prayed for enforcement of statutory rates. Dearness Allowance is a condition of service recognised by ROPA 2009.....*

*.....The affidavits filed by the power companies does not justify avoidance of the contractual terms towards payment of DA at the Central Government rates that were paid till January, 2016. When there has been a significant rise in the profit earned by the companies the financial inability to make*

*payment towards DA which is a benefit required to be extended to the respondents in terms of ROPA 2009 at the Central Government rate cannot be denied. The financial inability not being established we are of the view that the learned Single Judge was justified in allowing the writ petition. We reiterate that the appellants have not been able to establish its incapability or inability to pay DA at the Central Government rates. We, however, accept the submission on behalf of the learned Advocate General that in the event the companies are able to demonstrate poor financial condition the DA may not be payable at the Central Government rate. The observation of the learned Single Judge to the effect that the DA cannot be denied to the writ petitioners even if the management of two companies can demonstrate poor financial condition has to be read in the context of the observation made in the other paragraphs of the said judgment and not in isolation. However, if it means that irrespective of the financial condition the two companies were obliged to pay DA at the Central Government rate in terms of Clause 5(a) the same would be contrary to law as the DA cannot be equated to basic pay or basic wages. The phrase in Clause 5 that the terms and conditions of service of transfer shall not, in any way, be less favourable than those applicable to them immediately before the said effective date of transfer has to be assessed on the financial ability of the companies after the transfer. DA is a part of the larger component of salary. Salary is bifurcated into basic salary and other allowances of which DA is one to make good of the hardship caused due to rise in prices. DA is introduced to neutralise inflation and the percentage of DA is related to cost of living index or on any acceptable rational basis like AICPI and cannot be fixed arbitrarily by the employer. It must have a nexus to the deprivation of benefits in terms of money suffered due to rise in the cost of living. The appellants also did not say that DA is not*

*payable at all. In the facts and circumstances of these cases having regard to the materials on record we are of the view that the appellant companies are capable of paying DA to the writ petitioners at the Central Government rates under ROPA 2009.”*  
(emphasis supplied)

75. It was thus, stated in the judgment that in absence of financial hardship being established the said two companies cannot deny payment of DA under ROPA 2009 at the Central Government rate. The other relevant observations are already mentioned in paragraph 18 above which would show that the Division Bench did not decide any future entitlement and it was restricted to ROPA 2009 only. We have definite recollections that the learned Counsel for the parties addressed us on the obligation to pay DA under ROPA 2009 at the Central Government rate.

76. The order in the contempt proceedings are also with regard to payment of DA at the Central Government rate co-terminus with ROPA 2009.

77. In the SLP the review applicants have *inter alia*, stated:

*“9. The subject writ petition being W.P. 3292 (W) of 2019 was filed by the Respondents under Article 226 of the Constitution of India wherein it was prayed that a writ of mandamus be issued to the Petitioner Company directing it to make payment of arrears towards dearness allowance (arising from the difference between the Central Government and State Government rates) to the officers / employees of the Petitioner Company from July, 2016 till date and to continue to make payments towards dearness allowance at the Central Government declared rate of dearness allowance.*

10. Both the Ld. Single Judge vide its Order dated 13.03.2020 and the Ld. Division Bench vide the Impugned Order dated 17.09.2021 had arrived at the conclusion that the said Rule 9 of the ROPA Rules, 2009 created a legal right in favour of the employees of the Petitioner Company for claiming dearness allowance at central government rates.

11. It would be pertinent to mention that the Hon'ble High Court in the Impugned Order dated 17.09.2021 had agreed with the Petitioners contention that it would be contrary to law to direct the Petitioner Company to pay dearness allowance irrespective of its financial condition (a contention which the Ld. Single Judge had not countenanced in its Order dated 13.03.2020). However, while restating this correct legal position, the Hon'ble High Court as a corollary / consequential step ought to have relegated the parties to approach a Civil Court which would be competent to render a finding of fact inter alia based on expert evidence as to whether the Petitioner company was financially capable of paying dearness allowance at the Central Government rates or not. Alternatively, the Hon'ble High Court also did not deem it prudent to refer the question of whether the Petitioner Company was financially capable of making these payments to an expert body which would be better equipped and technically competent to make an assessment on the financial health of the Petitioner Company. Instead, the Ld. Division Bench in the Impugned Order dated 17.09.2021 arrived at finding of fact that the Petitioner Company was financially capable of paying dearness allowance to its employees at central government rates based on a bare reading of the company's annual accounts.

12. It is submitted that the financial implication of the Impugned Order dated 17.09.2021 on the Petitioner Company is to the tune of Rs. 177.18 crores being the arrears towards

*dearness allowance from July, 2016 to 31st December 2019 - which has been directed to be deposited by the Ld. Division Bench. In addition to this amount, the Petitioner Company has to make payment towards interest at 10 per cent (as directed in the Impugned Order) up to 17.09.2021 which comes to 55.31 crores. Therefore, the cumulative financial impact of the Impugned Order dated 17.09.2021 on the Petitioner Company is a total sum of Rs. 232.49 crores.” (emphasis supplied)*

78. Before the Hon’ble Supreme Court in the review application it was urged that payment of DA at the Central Government rate under ROPA 2020 was not actually considered by the Division Bench in its judgment and order dated 17<sup>th</sup> September, 2021 and it had therefore attained finality by the Hon’ble Supreme Court in dismissing the SLP on 4<sup>th</sup> March, 2022.

79. The basis of the review application has already been indicated in paragraph 31 above. The SLP was dismissed at the admission stage with brief reasons. The review application was dismissed since there was no error apparent on the face of the record. The order passed in the SLP was thus not interfered with in the review.

80. When the SLP is summarily dismissed at the admission stage without disclosing any reason for not interfering with the order of the Division Bench at the threshold, it does not constitute declaration of law under Article 141 of the Constitution. It simply negates and nips it at the bud. It does not affirm the order under challenged. All that it means is that the court was not inclined to exercise its discretion so as to allow the appeal being filed and thereby involving its appellate jurisdiction. In view of the fact that a mere refusal to grant SLP by a non-speaking order does not

constitute the affirmation of the order under challenge and it does not constitute a declaration of law under Article 141 of the Constitution either it does not attract the doctrine of merger as observed in **Kunhayammed** (*supra*).

81. The jurisdiction conferred by Article 136 of the Constitution is divisible in two stages. The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences as and when the leave is granted and the SLP is converted into an appeal. For the purpose of doctrine of merger to apply the superior jurisdiction should have the power to reverse, modify or affirm the order “put in issue before it.” Under Article 136 of the Constitution the Supreme Court may reverse, modify and affirm judgment, decree or order under appeal while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. Once the special leave to appeal is granted it crosses the threshold and entered into the appellate jurisdiction of the Hon’ble Supreme Court. An appeal is now born. It thus get transformed from the discretionary jurisdiction to appellate jurisdiction therefore the doctrine of merger would apply when the Hon’ble Supreme Court is exercising its appellate jurisdiction reverse, modify or affirm the judgment, decree or order under appeal.

82. The most crucial observation in **Kunhayammed** (*supra*) is with regard to the effect of speaking and non-speaking order in dismissing the SLP. The relevant observations are:

*"(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. (emphasis supplied)*

83. The conclusions rendered by three Judge Bench in **Kunhayammed** (supra) and summed up in paragraph 44 have been affirmed in **Khoday Distilleries Limited** (supra) in paragraphs 26.1 to 26.2. Thereafter, the Apex Court in paragraph 26.3:

*"Once we hold that the law laid down in **Kunhayammed** (supra) 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 paragraph 37 of **Kunhayammed** case."*

84. It thus, follows that summary dismissal of the SLP cannot be a bar to a remedy of review before the High Court. (See. ***Davesh Nagalya (dead) & Ors. v. Pradeep Kumar (Dead) through legal representatives & Ors.*** 2021(9) SCC 796 paragraph 11). The reason being that even a short reasoning in dismissing the SLP in exercise of discretionary jurisdiction is in effect not an affirmation of the order under appeal. It merely states the reason for not exercising the discretion. Thus the order dismissing the SLP with reasons for non interference does not result in merger of the orders. The doctrine of merger is founded on the rationale that there cannot be more than one operative decree at a given point of time. If an SLP is dismissed on the ground of delay or default at the admission stage and the judgment under challenge contained erroneous statement of law it would not result in merger of the order passed by the appellate court with the order of the Hon'ble Supreme Court. (See. ***Secretary, Government of India & Ors. v. Dharambir Singh*** reported in 2020 (14) SCC 582.)

85. There is a distinction between the dismissal of a special leave petition by a non speaking order where no reasons are recorded and the dismissal of a special leave petition by a speaking or reasoned order. In both the cases, the doctrine of merger would not apply. But in cases falling under the latter category, the reasons stated by the court would attract the applicability of Article 141 of the Constitution, if a point of law has been declared therein. If what is stated in the order of the Supreme Court (before the grant of leave) happens to be findings recorded by the Supreme Court not amounting to a declaration of law, the findings so recorded would bind

only the parties thereto (See. ***Kapico Kerala Resorts Pvt. Ltd. Vs. State of Kerala & Ors.*** reported in **2020 (3) SCC 18**).

86. In view of the clear enunciation of law by the Hon'ble Supreme Court in the instant case there is no merger of orders and our order is reviewable.

87. However, any wrong interpretation of an order or an erroneous understanding of an order cannot give rise to review of the order. The order under review has clearly stated that the Division Bench was considering the right of the employees of the two companies with regard to their entitlement to DA at the Central Government rate under ROPA 2009. The said judgment has not decided the right of the employees to similar relief under ROPA 2020.

88. Admittedly the parties never raised ROPA 2020 before the Division Bench and the Division Bench had no occasion to interpret the provision of ROPA 2020 or the financial ability or capability of the two companies to pay DA at the Central Government rate to its employees under ROPA 2020. The provision of ROPA 2020 had never come up for scrutiny or consideration before the learned Single Judge or the Division Bench.

89. The writ petition was also not amended to incorporate claims under ROPA 2020. The learned Single Judge also did not have the occasion to decide payment of DA under ROPA 2020 at the Central Government rate due to lack of pleadings. It was precisely for this reason no issue was raised

or argued with regard to enforcement of claim towards DA under ROPA 2020 at the Central Government rate in the appellate stage.

90. We reiterate that we had no occasion to decide the claim of the writ petitioners towards payment of DA at the Central Government rate under ROPA 2020 and our decision is restricted to the affirmation of the claim covered under Rule 9 of ROPA 2009 only. Our decision cannot be read and construed as an affirmation of payment of DA at the Central Government rate under ROPA 2020.

91. The review applications are accordingly disposed of. However, there shall be no order as to costs.

I agree

**(Soumen Sen, J.)**

**(Saugata Bhattacharyya, J.)**