

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

RVW 323 of 2024

With

IA No.: CAN 2 of 2024

The State of West Bengal

Vs.

Sri Goutam Bose & Ors.

For the appellant : Mr. Tapan Kumar Mukherjee, Ld. AGP
Mr. Pinaki Dhole, Advocate
Mr. Somnath Naskar, Advocate

For the respondent no.1 : Mr. Sahasrangshu Bhattacharjee, Advocate
Mr. Suchindram Bhattacharjee, Advocate

Heard & Judgment on : January 9, 2025

DEBANGSU BASAK, J.:-

1. Review is in respect of our order dated August 2, 2023 passed in
WP.ST 211 of 2016.

2. Review is at the behest of the State.

3. Learned Additional Government Pleader appears for the review applicant and submits that, attention of the Court was not drawn to two essential documents relating to the entitlement of the writ petitioner in WP.ST 211 of 2016. He submits that, the writ petitioner herein participated in a selection process without obtaining requisite leave from his earlier employer to participate in the selection process. Apart from the writ petitioner, another person participated in the selection process but such person obtained prior leave of the employer to participate in such selection process. Attention of the Court to this basic distinction of entrance into the cadre of the present employment by the writ petitioner and the other person was not drawn at the time of disposal of WP.ST 211 of 2016. He submits that mistakes of an Advocate in failing to draw the attention of the Court to essential facts of a case, is an error which can be looked into and considered, in review. Consequently, he seeks that the review should be allowed.

4. Learned Additional Government Pleader draws the attention of the Court to the order dated February 5, 2024 passed in Special Leave Petition (Civil) Diary No.50105/2023 and submits that, although the Special Leave Petition directed against the order dated August 2, 2023 passed in WP.ST 211 of 2016 was dismissed by the Hon'ble Supreme Court, nonetheless, a review of the order dated August 2, 2023 is maintainable. In support of such contention, he relies upon **(2019) 4**

Supreme Court Cases 376 (Khoday Distilleries Limited (Now

Known as Khoday India Limited) and Others vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal (Under Liquidation) Represented By The Liquidator), (2023) 7 Supreme Court Cases 740 (S. Narahari & Ors. Vs. S.R. Kumar & Ors.) and an order dated January 31, 2024 passed in ***Civil Appeal No(s). 4957-4958/2021 (The Dhanalakshmi Mills Ltd. vs. R. Krishnamurthy & Ors.)***

5. Writ petitioner is represented.
6. Our order dated August 2, 2023 passed in WP.ST 211 of 2016 disposing of the writ petition of the writ petitioner was assailed by the State in a Special Leave Petition being Special Leave Petition (Civil) Diary No.50105 of 2023 which was disposed of by an order dated February 5, 2024.
7. Relevant portion of such order is as follows:

“In the peculiar facts of the case, no interference is called for under Article 136 of the Constitution of India. The Special Leave Petition is accordingly dismissed.”

8. ***Khoday Distilleries Limited (Now Known as Khoday India Limited) and Others*** (supra) was doubted in ***S. Narahari & Ors.*** (supra) and a reference was made in respect thereof.
9. In ***The Dhanalakshmi Mills Ltd.*** (supra), the reference with regard to the ratio of ***Khoday Distilleries Limited (Now Known as Khoday***

India Limited) and Others (supra) was noted and the Civil Appeals were directed to be removed from the cause list.

10. Subsequent to **S. Narahari & Ors.** (supra) and the **The Dhanalakshmi Mills Ltd.** (supra), Hon'ble Supreme Court in **Virendra Bahadur Katheria and Others (supra)** considered **Khoday Distilleries Limited (Now Known as Khoday India Limited) and Others** (supra) amongst other authorities on the issue of doctrine of merger and the effect of a disposal of a Special Leave Petition. Hon'ble Supreme Court observed as follows:

“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. First stage is up to 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 special leave petition is converted into an appeal.**
- (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and**

the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

- (iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*
- (v) 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 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 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 of the CPC”

11. In the facts and circumstances of the present case, Hon’ble Supreme Court dismissed the Special Leave Petition directed against our order dated August 2, 2023 after noting that “*In the peculiar facts of the case, no interference is called for under Article 136 of the Constitution of India*”.

12. In our understanding, the present case falls within the ambit of paragraph 44(v) of ***Virendra Bahadur Katheria and Others (supra)***.

Therefore, although no proposition of law was laid down by the Hon'ble Supreme Court while dismissing the Special Leave Petition on February 5, 2024, nonetheless, such order of dismissal of the Special Leave Petition is a speaking order giving reasons for refusing the grant of the leave.

13. In terms of paragraph 44(v) of ***Virendra Bahadur Katheria and Others (supra)***, at least the second parameter therein comes into operation. The findings recorded in the order of the Hon'ble Supreme Court binds the parties. We cannot be invited to reopen the lis between the parties subsequent to such an order of the Hon'ble Supreme Court, ostensibly exercising our jurisdiction of review.
14. In such circumstances, we find no merit in the review.
15. **RVW 323 of 2024** and **IA No.: CAN 2 of 2024** are disposed of without any order as to costs.

(Debangsu Basak, J.)

16. I agree.

(Md. Shabbar Rashidi, J.)