

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-OCW-62-2020****WITH****LD-VC-OCW-63-2020****WITH****LD-VC-OCW-64-2020**

Ramendra Mayenkar & Ors. ... Applicants
Versus
State of Goa & Ors. ... Respondents

Mr. Shivraj Gaonkar, Advocate for the Applicants.

Mr. D. Pangam, Advocate General with Mr. P. Faldessai, Additional Government Advocate for Respondent Nos.1 to 3.

Mr. Omkar Kulkarni, Advocate for Respondent No.4.

**Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.**

Date:- 14th July, 2020

P.C.

Heard Mr. Gaonkar, learned counsel for the Applicants.

2. This petition seeks a review of our judgment and order dated 7th October, 2019 disposing of Writ Petition No.151 of 2019 by holding that the Petitioners have alternate and efficacious remedy available to them, which they may avail of.

3. As against our judgment and order dated 7th October, 2019, the Petitioners instituted a Special Leave Petition (Civil) No.1053 of 2020. This Special Leave Petition was disposed of by order dated 17th March, 2020 which is reproduced herein below for convenience of reference.

“1. By the order dated 29.02.2016, the Labour Court ordered Rs. 92,67,067/- (Rupees Ninety two lakhs sixty seven thousand and sixty seven only) with interest payable at the rate of 9% p.a. The amount totalling Rs.2,48,13,087/- (Rupees two crores forty eight lakhs thirteen thousand and eighty seven only) is stated to be payable to the petitioners. The Labour Commissioner issued a Recovery Certificate for recovery of the amount as arrears of land revenue under the Goa, Daman and Diu Land Revenue Code, 1968 by the Recovery Certificate dated 25.09.2018. When the petitioner approached Respondent No. 3 – Mamlatdar, the Mamlatdar informed that he himself taken steps against respondent no. 4 under the SARFAESI Act for the amount due and payable to the banks.

2. Being aggrieved by the order of the Mamlatdar, the petitioners approached the Bombay High Court by way of filing the writ petition. The writ petition was disposed of by giving liberty to the petitioners to proceed either under the Bankruptcy Code or through their Union and act in concert with respondent no. 6 – bank to ensure that the maximum returns are obtained or to proceed for civil arrest of the Director of respondent no. 4.

3. We have heard learned counsel appearing on behalf of the petitioners as well as learned counsel appearing on behalf of the respondents.

4. *Since under law other remedies are available to the petitioners, we are not inclined to interfere with the impugned order. The special leave petition is, accordingly, disposed of giving liberty to the petitioners to avail the remedy either before the NCLT or other remedies as observed by the High Court in para (7) of the impugned order.*

5. *Additionally, the petitioners are also at liberty to make representation to the banks who have taken action under the SARFAESI Act. In case, if the petitioners choose to approach the NCLT, four weeks' time is granted to the petitioners to approach the NCLT."*

4. Mr. Gaonkar, relying upon rulings of the Hon'ble Supreme Court in *Kunhayammed Vs State of Kerala*¹ and *Khoday Distilleries Limited Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal*² submits that the dismissal of Special Leave Petition in limine does not involve any merger and therefore, a review petition is maintainable where such review petition is instituted before filing of the Special Leave Petition or after. He submits that the Petitioners have no alternate and efficacious remedy available to them particularly under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the said Code) and therefore, the observations that the Petitioners have alternate and efficacious remedy amount to error apparent on the face of record.

5. Mr. Gaonkar relies in particular upon the observations in paragraph 26 of *Khoday Distilleries Limited* (supra) which we again

1 (2000) 6 SCC 359

2 (2019) 4 SCC 376

reproduce for convenience of reference.

“26) From a cumulative reading of the various judgments, we sum up the legal position as under:

26.1. The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.

26.2. We reiterate the conclusions relevant for these cases as under :(Kunhayammed case, SCC p. 384)

"(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 Order 47 Rule 1 CPC.”

26.3. 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.”

(Emphasis supplied)

6. On perusal of the Hon'ble Apex Court's order dated 17th March, 2020, we are not inclined to exercise our review jurisdiction in the peculiar facts of the present case. Even if we were to accept the Petitioners' contention that there is no merger and therefore, technically a review petition would be maintainable, we feel that the maintainability of the review petition is one thing and grant of relief therein is quite another.

7. In this case, it is obvious that the order dated 17th March, 2020 made by the Hon'ble Apex Court dismissing the Special Leave Petition is a speaking order. The Hon'ble Apex Court in paragraph 4 has held that “ *since under the law other remedies are available to the Petitioners, we are not inclined to interfere with the impugned order*”. In

terms of what is set out in paragraph 26.2 (v) of *Khoday Distilleries Limited* (supra), this observation, will amount to a declaration of law within the meaning of Article 141 of the Constitution. Secondly, even assuming that this is not declaration of law, whatever is stated in the order are the findings recorded by the Hon'ble Apex 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 Hon'ble Supreme Court being the Apex Court of the country. Thus, even apart from the issue of merger, we feel that no case has been made out for exercise of our review jurisdiction on merits.

8. For the aforesaid reasons, we dismiss this review petition.

9. In view of the aforesaid, the Misc. Civil Applications are also disposed of.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

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