

**M. Abln Suraj and Another Vs. Dr.M.V. Joseph and Others**

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**Court :** Kerala

**Decided On :** Jul-28-2011

**Judge :** Antony Dominic

**Appeal No. :** Con.Case(C).No. 653 of 2011(S)

**Appellant :** M. Abln Suraj and Another

**Respondent :** Dr.M.V. Joseph and Others

**Judgement :**

1. This petition under the Contempt of Courts Act has been filed on the allegation that the respondents herein have willfully disobeyed the directions of this Court in the judgment dated 17<sup>th</sup> of February 2011 in WP(C) No.37955/2010.

2. The petitioners herein, along with some of their colleagues, filed the aforesaid writ petition, in which, the University of Calicut, its officials and the Director of Medical Education of the Government of Kerala were the respondents. By judgment dated 17th of February, 2011, a copy of which is Annexure I, the writ petition was disposed of with the following directions:-

"For the aforesaid reasons, I direct that the University shall award grace marks as provided in the Regulations 1997 and the Academic Calendar 2005-2010 to the petitioners for practicals also and on that basis, their results shall be published afresh. This the University shall do as expeditiously as possible and at any rate within 4 weeks. It is made clear that, on such publication of their results, those

petitioners who are declared to have passed the final MBBS examination will be entitled to undergo internship".

3. Aggrieved by the judgment, the University and its officials, respondents 1 to 4 in the writ petition, filed WA 409/2011. In that writ appeal, apart from the petitioners in the writ petition, the Director of Medical Education was also impleaded as respondent No.25.

4. After hearing the appellants and the counsel for the writ petitioners, by Annexure 2 judgment dated 28th of March, 2011, the appeal was dismissed. The operative portion of the judgment reads as under:-

"From the practice of the University followed for five years prior to 2010 and the regulations of the MCI and the DME, we feel it will be unjust and inequitable to deny grace marks to the respondents in the practical examinations. We, therefore, decline to interfere with the judgment of the learned Single Judge and therefore, the writ appeal is dismissed. However the time for compliance of the judgment is extended by two weeks from receipt of this judgment".

5. In the purported compliance of the directions in the judgment, the University issued Annexure 5 notification and the students mentioned therein were required to submit their marklists for issuing revised marklists. It was thereupon that this petition was filed alleging that the directions in the judgment in WP(C) No.37955/10 have been willfully disobeyed, and that therefore, the respondents are liable to be proceeded against under the Contempt of Courts Act, 1971.

6. In my view, the petition filed is unsustainable for the reason that the judgment in the writ petition has merged in the writ appeal judgment rendered by the Division Bench, and therefore, if at all the petitioners want to initiate any proceedings, the same should be on the basis of the writ appeal judgment and not the judgment in the writ petition.

7. On this issue, extensive arguments were advanced by the learned senior counsel for the petitioners and also the learned standing counsel, who appeared for the respondents. According to the learned senior counsel for the petitioners,

the Division Bench dismissed the appeal at the admission stage without issuing notice to the respondents in the appeal. Therefore, according to him, the Division Bench did not exercise its appellate jurisdiction, and hence, the judgment in the writ petition has not merged in the writ appeal judgment. On this basis, it was argued that inspite of the writ appeal judgment, the judgment in the writ petition survives to be enforced. Therefore, it was contended that the petition is maintainable.

8. Per contra, learned standing counsel for the University contended that once an appeal has been filed and the Division Bench considered the matter on merits and decided the issue, irrespective of the nature of its disposal, the judgment in the writ petition will merge in the appellate judgment. Therefore, if at all the petitioners have an allegation that the judgment is disobeyed, such complaint can only be as against the judgment in the writ appeal. On this basis, it was argued that the petition is not sustainable and is liable to be dismissed at the threshold.

9. Both sides relied on the principles laid down in the Apex Court judgment in *Kunhayammed and others v. State of Kerala* {(2000) 6 SCC 359}.

10. The doctrine of merger is a common law doctrine adopted which has been firmly established as a principle of propriety in the hierarchy of justice delivery system. In *CIT v. Amritlal Bhogilal and Co* (AIR 1958 SC 868), the Supreme Court considered the doctrine of merger and opined thus:

"There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirm the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement".

11. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat* {(1969) 2 SCC 74}, the Supreme Court indicated three preconditions attracting the applicability of doctrine of merger. They are (i) the jurisdiction exercised should be appellate or revisional jurisdiction (ii) the jurisdiction should have been exercised after issue of notice; and (iii) after a full hearing in presence of both the parties. It was held that if the aforesaid three pre conditions are satisfied, then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. Subsequently, in *Sushil Kumar Sen v. State of Bihar* {(1975) 1 SCC 774}, the Apex Court held that the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction is applicable also to orders passed in exercise of review jurisdiction.

12. In *Kunhayammed and others v. State of Kerala* {(2000) 6 SCC 359}, the issue that was considered by the Apex Court was regarding the applicability of doctrine of merger in relation to a judgment of this Court, against which the SLP filed was dismissed at the admission stage itself. In this context, the Court held that, when a decree or order passed by an inferior Court, Tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way, by setting aside the decree or order under appeal or modify or simply confirm it, the decree or order of the superior court, which is the final, binding and operative decree or order wherein merges the decree or order passed by the court below. It was also held that in so far as the principle of merger is concerned, there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority and that in all the three cases, the order passed by the lower authority shall merge in the order passed by the appellate authority, whatever be its decision. However, the judgment pronounced by superior court in exercise of its appellate or revisional jurisdiction "after issuing of notice and full hearing in the presence of both parties" alone would replace the judgment of the lower court.

13. Finally, the plea of merger was rejected and the conclusions have been summed up in para 44 of the judgment in *Kunhayammed's* case (*supra*), which

reads as under:-

"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 sub-ordinate 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) 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 or 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 C.P.C".

14. In so far as the case in hand is concerned, Annexure I is the judgment in the writ petition. Aggrieved by the judgment, the respondents herein filed an appeal before the Division Bench. Before the Division Bench, the writ petitioners entered appearance at the admission stage itself and they were also heard. Although the Director of Medical Education, who was only a formal party was also in the writ petition and was represented by the learned Government Pleader, copy of the writ appeal judgment does not show that there was any appearance on his behalf when the writ appeal was heard. After considering the entire dispute, the Division Bench dismissed the writ appeal and the judgment in the writ petition was confirmed.

15. Therefore, this is a case where the appellate court entertained the appeal filed by the respondents herein, the writ petitioners who were the contesting respondents in the writ appeal entered appearance through their counsel, they argued their case in full, the Division Bench exercised its appellate jurisdiction, decided the lis and rendered its judgment on the merits of the controversy. The

fact that the writ appeal was not admitted or that notice was not issued in the appeal is inconsequential in a case where all the contesting parties entered appearance and were heard by this Court. In such a situation, if the principles laid down by the Apex Court in the judgments noticed above are applied, I am of the considered opinion that the judgment in the writ petition has merged in the appellate judgment, and the judgment, the enforcement of which can be sought or non compliance of which can be complained of, is the judgment in the writ appeal.

16. In so far as the judgment in the case of Kunhayammed is concerned, the issue that was considered by the Apex Court in that case was whether the doctrine of merger applies in a case where petition for special leave was rejected at the threshold itself. The Apex Court held that the dismissal of Special leave petition, even if it is on merits, will not result in the merger of the High Court judgment. Relying on this judgment, it was contended that since the writ appeal was dismissed at the admission stage, judgment in the writ petition has not merged in the writ appeal judgment. In my view, this conclusion of the Apex Court in its judgment in Kunhayammed's case (*supra*) cannot be applied in a writ appeal filed in terms of Section 5 of the Kerala High Court Act, which does not involve the grant of special leave unlike in the case of an application filed for special leave under Article 136 of the Constitution of India. Therefore, the aforesaid principle laid down in the judgment cannot be of any assistance to the petitioners.

For the aforesaid reasons, this petition filed alleging willful disobedience of the judgment in the writ petition is liable to be dismissed and I do so. However, this judgment will not in any manner affect the right of the petitioners to file a fresh petition, if they have a case that the judgment in the writ appeal has been wilfully disobeyed.

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