REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.4641-4642 OF 2009

Bakshi Dev Raj & Anr. .... Appellant(s)

Versus

Sudhir Kumar .... Respondent(s)

J U D G M E N T

P.Sathasivam,J.

1) These appeals are directed against the final judgment and orders dated 18.03.2008 and 08.09.2008 passed by the High Court of Jammu & Kashmir at Jammu in Civil Second Appeal No. 19 of 2005 and Review Petition (C) No. D-5 of 2008 respectively whereby the High Court dismissed the second appeal and the review petition filed by the appellants herein.

2) **Brief facts:**

(a) Shri Harbans Lal, father of the appellant No.1, purchased the land in dispute measuring 40 kanal 4 marlas bearing

Khasra No. 65 in Village Chak Gainda, Tehsil Kathua from one Gurdas by way of a registered sale deed dated 18.03.1959. The said land falls in Khasra No. 109/65 and the same was recorded in the name of the father of the appellant No.1 and after his father's death the name of appellant No.1 was recorded from Kharif 1987.

(b) The plot of Sudhir Kumar-the respondent herein is on the southern side of the land of the appellants. On 29.04.1991, the respondent herein filed a civil suit being No. 17/Civil/1991 in the Court of sub-Judge, Kathua seeking a declaratory decree to the effect that he is the owner and in possession of the suit land measuring and bounded by East Kathua Kalibari Road 90' West Police Line measuring 96', North Land of Bakshi Dev Raj (appellant No. 1 herein) and South, Lane 460' situated at Ward No.1 Village Chak Gainda, Tehsil Kathua and further sought decree for permanent injunction restraining the appellants herein in the suit land. On 06.04.1993, the appellants herein filed a joint written statement in the above civil suit. The trial Court, vide

judgment dated 25.04.2003, dismissed the suit filed by the respondent herein.

(c) Aggrieved by the said judgment, the respondent filed Civil First Appeal No.6 in the Court of District & Sessions Judge, Kathua. The first appellate Court, vide judgment and decree dated 09.06.2005, set aside the judgment and order dated 25.04.2003, passed by the trial Court and allowed the appeal in favour of the respondent.

(d) Challenging the same, the appellants filed Second Appeal No. 19 of 2005 before the High Court of Jammu & Kashmir at Jammu. Vide judgment dated 18.03.2008, the second appeal was disposed of by the High Court by modifying the decree with the consent of both the parties.

(e) Against the said order, a special leave petition bearing S.L.P. (C) No. 10939 of 2008 was filed by the appellants herein before this Court and the same was dismissed as withdrawn on 14.05.2008. On 21.05.2008, the appellants filed a review petition being Review Petition (C) No. D-5/2008 before the High Court for review of the order dated 18.03.2008 passed in Second Appeal. The learned single Judge of the High Court, by

order dated 08.09.2008, dismissed the review petition filed by the appellants.

(f) Aggrieved by the final orders dated 18.03.2008 passed by the High Court in Second Appeal and the order dated 08.09.2008 in the review petition, the appellants filed the present appeals before this Court by way of special leave petitions.

3) Heard Mr. Dinesh Kumar Garg, learned counsel for the appellants and Mr. Ranjit Kumar, learned senior counsel appearing for the respondent.

4) The questions which arise for consideration in these appeals are:

i) Whether Review Petition (C) No. D-5/2008 filed before the High Court against the judgment in Second Appeal No. 19 of 2005 is maintainable in view of dismissal of SLP (C) No. 10939 of 2008 dated 14.05.2008 by this Court filed against the said Second Appeal?

ii) Whether the statement of the counsel conveying that the parties have settled and modified the decree without a

written document or consent from the appellants is acceptable? and

iii) Whether dismissal of SLP as withdrawn without leave of the Court to challenge the impugned order therein before an appropriate court/forum is a bar for availing such remedy?

5) The present appellants filed Second Appeal No. 19 of 2005 before the High Court questioning the judgment and decree dated 09.06.2005 of the first appellate Court in First Appeal No.6. While admitting the above second appeal, the High Court framed two questions of law, one, as to whether the report of the Commissioner is admissible evidence without its formal proof and the other, whether the reliance can be placed on a site plan prepared by an Architect when the same record is available with the Revenue Authorities which has been withheld by the plaintiff. It is further seen from the order of the High Court that during the course of submissions, both the counsel agreed that without addressing the questions of law so formulated, the matter can be settled by modifying the decree impugned in appeal by incorporating the area of land

under Survey No. 110/65 with the boundary between the lands thereunder and Survey No. 109/65 belonging to other side being the Sheesham and Shreen trees currently existing on the spot. They further conceded that whatever of their respective land falling on either side would not be claimed by them and the Sheesham and Shreen trees would be respondent's property to be cut by him within a reasonable period of time. Based on the above submissions by both the counsel, the High Court modified the impugned decree in the following manner:

> "(a) The suit of respondent/plaintiff is decreed restraining other side from interfering or causing any interference or encroaching upon any portion of his land measuring 11 kanals 12 marlas under survey No 110/65 along with his other proprietary land whatever existing on spot.
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> (b) The sheesham and shreen trees existing on spot would be the boundary line between two parcels of land belonging to rival sides as aforementioned with the exact demarcating line running from centre of trees, which would be property of respondent/plaintiff to be cut by him at an appropriate time without undue delay.
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> (c) Whenever proprietary land of either parties falls on other side of the trees to form part of Opposite Party land stands conceded to each other by respective parties over which their claims would be deemed to have been abandoned.
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> (d) No costs."

6) By pointing out that the concession given by the counsel for the appellants before the High Court was not lawful and in violation of Section 23 of the Indian Contract Act, 1872 and that the second appeal was disposed of without hearing on substantial questions of law framed by the Court, the appellants filed Review Petition (C) No. No.D-5/2008. Even before the High Court, an objection was raised as to the maintainability of the review petition by pointing out the following objections:

> "(a) that once the petitioner had preferred an appeal before the Supreme Court, the review was barred under O. 47 Rule 1 Sub-Rule (1) of C.P.C.
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> (b) that application is time barred, period of limitation prescribed for filing review in terms of Rule 66 Sub Rule (3) of J&K High Court Rules is 30 days.
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> (c) that review application can be maintained only if some evidence or matter has been discovered and it was not within the knowledge of petitioner when the decree was passed or where there was a mistake or an error apparent on the fact of record."

7) In view of the above objections, the learned single Judge heard the review petition both on merits and its maintainability at length. A contention was raised with

reference to Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") and Order XLVII sub-rule (1) of Rule 1, ultimately, after finding that the question raised is not a question of law and not an error apparent on the face of the record, dismissed the review petition. In the present appeal, the appellants challenged not only the dismissal of the review petition but also final judgment in second appeal filed before the High Court. With these factual details, let us consider the questions posed in the earlier paragraphs. Inasmuch as Mr. Ranjit Kumar, learned senior counsel for the respondent raised an objection as to the maintainability of the present appeal, let us consider the same at the foremost and finally the merits of the impugned order of the High Court.

Compromise of Suit

8) Order XXIII of CPC deals with "Withdrawal and Adjustment of Suits". Rule 3 of Order XXIII speaks about "compromise of suit" which reads as under:

> "3. **Compromise of suit.-** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies

> the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit:
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> Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.
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> Explanation—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

9) The very same rule was considered by this Court in ***Gurpreet Singh*** vs. ***Chatur Bhuj Goel***, (1988) 1 SCC 270. In that case, the respondent therein Chatur Bhuj Goel, a practising advocate at Chandigarh first lodged a criminal complaint against Colonel Sukhdev Singh, father of the appellant, under Section 420 of the Indian Penal Code 1860 (hereinafter referred to as "the IPC"), after he had served the respondent with a notice dated 11.07.1979 forfeiting the amount of Rs.40,000/- paid by him by way of earnest money, alleging that he was in breach of the contract dated 04.06.1979 entered into between Colonel Sukhdev Singh,

acting as guardian of the appellant, then a minor, and the respondent, for the sale of residential house No. 1577, Sector-18-D, Chandigarh for a consideration of Rs,2,85,000/-. In terms of the agreement, the respondent was to pay a further sum of Rs.1,35,000/- to the appellant's father - Colonel Sukhdev Singh by 10.07.1979 when the said agreement of sale was to be registered and vacant possession of the house delivered to him, and the balance amount of Rs.1,10,000/- on or before 31.01.1980 when the deed of conveyance was to be executed. The dispute between the parties was that according to Colonel Sukhdev Singh, there was failure on the part of the respondent to pay the amount of Rs.1,35,000/- and get the agreement registered, while the respondent alleged that he had already purchased a bank draft in the name of the appellant for Rs.1,35,000/- on 07.07.1979 but the appellant's father did not turn up to receive the same. Although the Additional Chief Judicial Magistrate by order dated 31.10.1979 dismissed the complaint holding that the dispute was of a civil nature and no process could issue on the complaint, the learned Single Judge, by his order dated 11.02.1980 set aside the

order of the learned Additional Chief Judicial Magistrate holding that the facts brought out clearly warranted an inference of dishonest intention on the part of Colonel Sukhdev Singh and accordingly directed him to proceed with the trial according to law. Aggrieved Colonel Sukhdev Singh came up in appeal to this Court by way of special leave. While construing Order XXIII Rule 3 of CPC, this Court concluded thus:

> **"10.** Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing."

It is clear from this decision that during the course of hearing, namely, suit or appeal, when the parties enter into a compromise, the same should be reduced in writing in the form of an instrument and signed by the parties. The

substance of the said decision is that the Court must insist upon the parties to reduce the terms into writing.

10) In ***Pushpa Devi Bhagat (dead) through LR. Sadhna Rai (Smt.)*** vs. ***Rajinder Singh and Others***, (2006) 5 SCC 566, the term 'instrument' used in above-referred ***Gurpreet Singh's case*** (supra) refers to a writing a formal nature, this Court explained that when the hearing of letters patent appeal commenced before the High Court, the parties took time to explore the possibility of settlement and when the hearing was resumed, the appellant's father made an offer for settlement which was endorsed by the counsel for the appellant also. The respondent was also present there and made a statement accepting the offer. The said offer and acceptance were not treated as final as the appeal was not disposed of by recording those terms. On the other hand, the said proposals were recorded and the matter was adjourned for payment in terms of the offer. When the matter was taken up on the next date of hearing, the respondent stated that he is not agreeable. The High Court directed that the appeal would now be heard on merits as the respondent was not prepared to abide by the

proposed compromise. The said order was challenged before this Court by the appellant by contending that the matter was settled by a lawful compromise by recording the statement by appellant's counsel and the respondent's counsel and the respondent could not resile from such compromise and, therefore, the High Court ought to have disposed of the appeal in terms of the compromise. It is in this factual background, the question was considered with reference to ***Gurpreet Singh's case*** (supra). This was explained in ***Pushpadevi's case*** (supra) that the distinguishing feature in that case was that though the submissions made were recorded but that were not signed by the parties or their counsel, nor did the Court treat the submissions as a compromise. In ***Pushpadevi's*** case (supra), the Court not only recorded the terms of settlement but thereafter directed that the statements of the counsel be recorded. The statement of the counsel were also recorded on oath read over and accepted by the counsel to be correct and then signed by both counsel. In view of the same, in ***Pushpadevi's case*** (supra), it was concluded that there was a valid compromise in writing signed by the parties

(represented counsel).

11) In the earlier part of our order, we have already recorded that during the course of hearing of second appeal, both counsel agreed that without addressing the questions of law so formulated, the matter can be settled by modifying the decree impugned in appeal by incorporating the area of land under Survey No. 110/65 with the boundary between the lands thereunder and Survey No.109/65 belonging to the other side being the Sheesham and Shreen trees currently existing on the spot.

Role of the counsel

12) Now, we have to consider the role of the counsel reporting to the Court about the settlement arrived at. We have already noted that in terms of Order XXIII Rule 3 of CPC, agreement or compromise is to be in writing and signed by the parties. The impact of the above provision and the role of the counsel has been elaborately dealt with by this Court in ***Byram Pestonji Gariwala*** vs. ***Union Bank of India and Others***, (1992) 1 SCC 31 and observed that courts in India have consistently recognized the traditional role of lawyers and

the extent and nature of implied authority to act on behalf of their clients. Mr. Ranjit Kumar, has drawn our attention to the copy of Vakalatnama (Annexure-R3) and the contents therein. The terms appended in Vakalatnama enable the counsel to perform several acts on behalf of his client including withdraw or compromise suit or matter pending before the Court. The various clauses in the Vakalatnama undoubtedly gives power to the counsel to act with utmost interest which includes to enter into a compromise or settlement. The following observations and conclusions in paras 37, 38 and 39 are relevant:

> **"37.** We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.
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> **38.** Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise

> decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise.
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> **39.** To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

13) In ***Jineshwardas (D) by LRs and Others*** vs. ***Jagrani (Smt) and Another***, (2003) 11 SCC 372, this Court, by approving the decision taken in ***Byram Pestonji's*** case (supra), held that a judgment or decree passed as a result of consensus arrived at before Court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission.

14) In ***Jagtar Singh*** vs. ***Pargat Singh and Others***, (1996) 11 SCC 586, it was held that counsel for the appellant has

power to make a statement on instructions from the party to withdraw the appeal. In that case, respondent No.1 therein, elder brother of the petitioner filed a suit for declaration against the petitioner and three brothers that the decree dated 04.05.1990 was null and void which was decreed by subordinate Judge, Hoshiarpur on 29.09.1993. The petitioner therein filed an appeal in the Court of Additional Distruct Judge, Hoshiarpur. The counsel made a statement on 15.09.1995 that the petitioner did not intend to proceed with the appeal. On the basis thereof, the appeal was dismissed as withdrawn. The petitioner challenged the order of the appellate court in the revision. The High Court confirmed the same which necessitated filing of SLP before this Court. Learned counsel for the petitioner contended that the petitioner had not authorized the counsel to withdraw the appeal. It was further contended that the court after admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial Court and the conclusions either agreeing or disagreeing with it. Rejecting

the said contention, the Court held as under:

> **"3.** The learned counsel for the petitioner has contended that the petitioner had not authorised the counsel to withdraw the appeal. The Court after admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial court and the conclusions either agreeing or disagreeing with it. We find no force in the contention. Order III Rule 4 CPC empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. The question then is whether the court is required to pass a reasoned order on merits against the decree appealed from the decision of the Court of the Subordinate Judge? Order 23 Rules 1(1) and (4) give power to the party to abandon the claim filed in the suit wholly or in part. By operation of Section 107(2) of the CPC, it equally applies to the appeal and the appellate court has co-extensive power to permit the appellant to give up his appeal against the respondent either as a whole or part of the relief. As a consequence, though the appeal was admitted under Order 41 Rule 9, necessarily the Court has the power to dismiss the appeal as withdrawn without going into the merits of the matter and deciding it under Rule 11 thereof.
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> **4.** Accordingly, we hold that the action taken by the counsel is consistent with the power he had under Order III Rule 4 CPC. If really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere and the procedure adopted by the court below is consistent with the provisions of CPC. We do not find any illegality in the order passed by the Additional District Judge as confirmed by the High Court in the revision."

15) The analysis of the above decisions make it clear that the counsel who was duly authorized by a party to appear by executing Vakalatnama and in terms of Order III Rule 4,

empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere. Though learned counsel for the appellant vehemently submitted that the statement of the counsel before the High Court during the course of hearing of Second Appeal No. 19 of 2005 was not based on any instructions, there is no such material to substantiate the same. No doubt, Mr. Garg has placed reliance on the fact that the first appellant was bedridden and hospitalized, hence, he could not send any instruction. According to him, the statement made before the Court that too giving of certain rights cannot be sustained and beyond the power of the counsel. It is true that at the relevant time, namely, when the counsel made a statement during the course

of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the CPC as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in ***Byram Pestonji*** (supra), in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing.

Maintainability of Review Petition

16) Now, let us consider the maintainability of the review petition filed before the High Court after dismissal of SLP (C)

No. 10939 of 2008 before this Court. It is not in dispute that the High Court, by order dated 18.03.2008, based on the statement of both counsel disposed of Second Appeal No. 19 of 2005 by modifying the decree as stated therein. Against the said order of the High Court, the appellants preferred the above said SLP before this Court. By order dated 14.05.2008, this Court after hearing the counsel for the appellants passed the following order:

> "Learned counsel for the petitioner prays to withdraw the petition. Prayer made is accepted. The special leave petition is dismissed as withdrawn"

A reading of the above order makes it clear that based on the request of the counsel, the SLP came to be dismissed as withdrawn. It is also clear that there is no permission or reservation or liberty for taking further action. However, dismissal of SLP is not a bar for filing review before the same Court. This aspect was considered by a three-Judge Bench of this Court in ***Kunhayammed and Others*** vs. ***State of Kerala and Another***, (2000) 6 SCC 359. The above aspect was dealt with elaborately in paras 38, 40 and 44.

"38. The review can be filed even *after* SLP is dismissed is clear from the language of Order 47 Rule 1(*a*). Thus the words "no appeal" has been preferred in Order 47 Rule 1(*a*) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (*i*) as barred by time, or (*ii*) being a defective presentation, (*iii*) the petitioner having no locus standi to file the petition, (*iv*) the conduct of the petitioner disentitling him to any indulgence by the court, (*iv*) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises

discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution.

The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

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. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(*iii*) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The

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

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

(*v*) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

17) In view of the principle laid down above by this Court, even after dismissal of SLP, the aggrieved parties are entitled to move the court concerned by way of review. In the case on hand, though the appellants moved an SLP in this Court against the order of the High Court in Second Appeal, admittedly, the SLP was dismissed as withdrawn without the leave of the Court.

18) Similar question was considered by this Court in ***Sarguja Transport Service*** vs. ***State Transport Appellate Tribunal, M.P., Gwalior, and Others***, (1987) 1 SCC 5. In this decision it was held that where a petitioner withdraws a petition filed by him in the High Court under Article 226/227 without permission to institute a fresh petition, remedy under Article 226/227 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition and it would not be open to him to file a fresh petition in the High Court under the same article though other remedies like suit or writ petition before the this Court under Article 32 would remain open to him. It was further held that the principle underlying Rule 1 of Order XXIII of CPC should

be extended in the interests of administration of justice to cases of withdrawal of writ petition also. The main contention urged by the learned counsel for the petitioner in that case was that the High Court was in error in rejecting the writ petition on the ground that the petitioner had withdrawn the earlier writ petition in which he had questioned the order passed by the Tribunal on 04.10.1985 without the permission of the High Court to file a fresh petition. It was urged by the learned counsel that since the High Court had not decided the earlier petition on merits but only had permitted the petitioner to withdraw the petition, the withdrawal of the said earlier petition could not have been treated as a bar to the subsequent writ petition. While considering the said question, this Court considered sub-rule 3 of Rule 1 of Order 23 CPC and its applicability to writ petitions filed under Article 226/227 and held as under:

> **"9.** The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that article. On this point the decision in *Daryao case* is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of

> administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental rignt guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open."

19) In the light of the discussion in the earlier paragraphs even after dismissal of an SLP with or without reasons, the aggrieved party is entitled to file a review. In view of the language used in Order XLVII Rule 1(a) of CPC which relates to "Review", the present Review Petition (C) No. D-5/2008) cannot be dismissed on the ground of maintainability. Based on the above discussion and reasons, we hold that the review

petition filed by the appellants was maintainable but in view of Order III Rules 1 and 4, Chapter relating to the role of Pleaders, and in view of the conduct of the appellants in not raising any objection as to the act of their counsel except filing review petition, we are not inclined to accept the claim of the appellants.

20) Finally, Mr. Garg vehemently contended that by the concession of their counsel, appellants lost their property and they suffered huge loss in terms of money. On perusal of the modified decree as available in the order of the High Court in Second Appeal No. 19 of 2005 and the sketch produced about the existence of Sheesham and Shreen trees running as a demarcating line and whenever those trees fall on either side the parties having ownership of the land get right to use the same, we are unable to accept the said contention also.

21) In the light of the above discussion, we find no merit in both the appeals. Consequently, the same are dismissed. There shall be no order as to costs.

.....J.

(P. SATHASIVAM)

.....J.
(H.L. GOKHALE)

NEW DELHI;
4th AUGUST, 2011.