KHODAY DISTILLERIES LTD.
(NOW KNOWN AS KHODAY INDIA LIMITED)
AND OTHERS

v.

SRI MAHADESHWARA SAHAKARA SAKKARE
KARKHANE LTD., KOLLEGAL (UNDER LIQUIDATION)
REPRESENTED BY THE LIQUIDATOR

(Civil Appeal No. 2432 of 2019)

MARCH 01, 2019

[A. K. SIKRI, S. ABDUL NAZEER AND M. R. SHAH, JJ.]

Review:

Review of judgment against which Special Leave Petition was already dismissed by Supreme Court – Maintainability of – In view of conflicting views on the question in ****Abbai Maligai Partnership Firm*** *case and in* *****Kunhayammed*** *case, Division Bench of Supreme Court referred the matter to larger Bench – Held: There is no conflict of opinion in the two cases –* ****Abbai Maligai Partnership Firm*** *case was decided on its peculiar facts –* *****Kunhayammed*** *case lays down the correct law – Since the SLPs were dismissed in* limine *without giving any reasons, the review petitions filed in the present cases were maintainable – Constitution of India – Art. 136.*

Disposing of the appeals, the Court

HELD: 1. *Abbai Maligai Partnership Firm case is duly taken cognisance of and explained in the judgment in **Kunhayammed case. There is no conflict insofar as ratio of the two cases is concerned. Moreover, *Abbai Maligai Partnership Firm case was decided on its peculiar facts, with no discussion on any principle of law, whereas **Kunhayammed case is an elaborate discourse based on well accepted propositions of law which are applicable for such an issue. The detailed judgment in **Kunhayammed case lays down the correct law and there is no need to refer the cases to larger Bench. [Para 25] [432-D-E]

2. The conclusions rendered in **Kunhayammed case and summed up in paragraph 44 are affirmed and reiterated as under:

A **"(*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.**

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(*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.

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(*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.

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(*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." [Para 27] [433-D-H; 434-A-C]

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3. Once it is held that law laid down in *****Kunhayammed* **case is to be followed, it will not make any difference whether the

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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. [Para 27] [434-D-E]

4. Since Civil Appeal No. 2432 of 2019 was dismissed in *limine* without giving any reasons, the review petition filed by the appellant in the High Court would be maintainable and should have been decided on merits. Order dated November 12, 2008 passed by the High Court is accordingly set aside and matter is remanded back to the High Court for deciding the review petition on merits. [Para 28] [434-F]

5. Civil Appeal No. 2433 of 2019 was also, dismissed in *limine* and without any speaking order. After the dismissal of the special leave petition, the respondent in this appeal had approached the High Court with review petition. Said review petition is allowed by passing order dated December 12, 2012 on the ground of suppression of material facts by the appellant herein and commission of fraud on the Court. Such a review petition was maintainable. Therefore, the High Court was empowered to entertain the same on merits. Insofar as appeal of the appellant challenging the order dated December 12, 2012 on merits is concerned, the matter shall be placed before the regular Board to decide the same. [Para 28] [435-A-C]

*****Kunhayammed and Others* v. *State of Kerala and Another* (2000) 6 SCC 359 : [2000] 1 Suppl. SCR 538; *Palani Roman Catholic Mission* v. *S. Bagirathi Ammal* (2009) 16 SCC 657; *Bhakra Beas Management Board* v. *Krishna Kumar Vij and Another* (2010) 8 SCC 701 : [2010] 10 SCR 462 ; *Medical Council of India* v. *State of Kerala and Others* 2018 (11) SCALE 141 – relied on.**

***Abbai Maligai Partnership Firm and Another* v. *K. Santhakumaran and Others* (1998) 7 SCC 386 : [1998] 1 Suppl. SCR 535 – distinguished.**

Thungabhadra Industries Ltd. v. Govt. of A.P.* AIR 1964 SC 1372 : [1964] SCR 174 ; *Meghmala and Others* v. *G. Narasimha Reddy and Others* (2010) 8 SCC 383 :

[2010] 10 SCR 47; *Gangadhara Palo* v. *Revenue Divisional Officer and Another* **(2011) 4 SCC 602 : [2011] 3 SCR 74 ;** *Workmen v. Board of Trustees of the Cochin Port Trust* **(1978) 3 SCC 119 : [1978] 3 SCR 971 ;** *Western India Match Co. Ltd. v. Industrial Tribunal* **AIR 1958 Mad 398 ;** *Indian Oil Corpn. Ltd. v. State of Bihar* **(1986) 4 SCC 146 : [1986] 3 SCR 553;** *Rup Diamonds v. Union of India* **(1989) 2 SCC 356: [1989] 1 SCR 13 ;** *Supreme Court Employees' Welfare Assn. v. Union of India* **(1989) 4 SCC 187 : [1989] 3 SCR 488;** *Yogendra Narayan Chowdhury v. Union of India* **(1996) 7 SCC 1 : [1995] 6 Suppl. SCR 17 ;** *V.M. Salgaocar & Bros. (P) Ltd. v. CIT* **(2000) 5 SCC 373 : [2000] 2 SCR 1169 ;** *Sree Narayana Dharmasanghom Trust v. SwamiPrakasananda* **(1997) 6 SCC 78 : [1997] 3 SCR 799 ;** S*tate of Maharashtra v. Prabhakar Bhikaji Ingle* **(1996) 3 SCC 463 : [1996] 3 SCR 211 ;** *Penu Balakrishna Iyer v. Ariya M. Ramaswami Iyer* **AIR 1965 SC 195: [1964] 7 SCR 49 ;** *Abbai Maligai Partnership Firm v. K. Santhakumaran* **(1998) 7 SCC 386 : [1998] 1 Suppl. SCR 535 ;** *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat* **(1969) 2 SCC 74 : [1970] 1 SCR 322 ;** *Sushil Kumar Sen v. State of Bihar* **(1975) 1 SCC 774 : [1975] 3 SCR 942 ;** *Gopabandhu Biswal v. Krishna Chandra Mohanty* **(1998) 4 SCC 447: [1998] 2 SCR 1108 ;** *Junior Telecom Officers Forum v. Union of India* **(1993) 4 Suppl. SCC 693: [1992] 1 Suppl. SCR 764 – referred to.**

Wilson v. Colchester Justices **(1985) 2 All ER 97 (HL) – referred to.**

Case Law Reference

[1998] 1 Suppl. SCR 535	**distinguished**	**Para 11**
[2000] 1 Suppl. SCR 538	**relied on**	**Para 11**
[2010] 10 SCR 47	**referred to**	**Para 12**
[2011] 3 SCR 74	**referred to**	**Para 12**

(2009) 16 SCC 657	**relied on**	**Para 13**
[2010] 10 SCR 462	**relied on**	**Para 13**
2018 (11) SCALE 141	**relied on**	**Para 15**
[1978] 3 SCR 971	**referred to**	**Para 21**
AIR 1958 Mad 398	**referred to**	**Para 21**
[1986] 3 SCR 553	**referred to**	**Para 21**
[1989] 1 SCR 13	**referred to**	**Para 21**
[1989] 3 SCR 488	**referred to**	**Para 21**
[1995] 6 Suppl. SCR 17	**referred to**	**Para 21**
[2000] 2 SCR 1169	**referred to**	**Para 21**
[1997] 3 SCR 799	**referred to**	**Para 21**
[1996] 3 SCR 211	**referred to**	**Para 21**
[1964] 7 SCR 49	**referred to**	**Para 21**
[1998] 1 Suppl. SCR 535	**referred to**	**Para 21**
[1970] 1 SCR 322	**referred to**	**Para 21**
[1975] 3 SCR 942	**referred to**	**Para 21**
[1998] 2 SCR 1108	**referred to**	**Para 21**
[1992] 1 Suppl. SCR 764	**referred to**	**Para 21**
[1989] 3 SCR 488	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2432 of 2019

From the Judgment and Order dated 09.09.2011 of the High Court of Karnataka at Bangalore in Review Petition No. 96 of 2011

WITH

Civil Appeal No. 2433 of 2019.

Jaideep Gupta, Ravindra Raizada, Sr. Advs., Senthil Jagadeesan, Ms. Sonakshi Malhan, Ms. Suriti Chowdhary, Ms. Mrinal Kanwar, Partha

A Sil, Anirban Sen, Saurav Gupta, Tavish B. Prasad, Gaurav Jain, Ms. Abha Jain, Ranbir Singh Yadav, Puran Mal Saini, Ms. Anzu K. Varkey, Rajeev Kumar Dubey, Kamlendra Mishra, Bhakti Vardhan Singh, Anmol Tayal, S. Vinay Ratnakar, Ashok Panigrahi, Shanthkumar V. Mahale, Abdul Rahiman, Rajesh Mahale, Amith J., Ranbir Yadav, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Leave granted.

2. Question of law in both these appeals is identical. However, facts of the Civil appeal arising out of Special Leave Petition (Civil) No. C 490 of 2012 are noted for discussion, as in this case, order dated October 19, 2012 has been passed referring the question of law to a larger Bench.

3. Before we advert to the question of law, we deem it appropriate to take stock of seminal facts as the said factual background would D make it easier to understand the implication of the issue that arises for determination.

4. Respondent No.1 herein had filed original suit against the appellant on the file of the XXXI Additional City Civil Judge, Bangalore City. It was a money suit for recovery of Rs.1,00,76,630/- along with E interest. The City Civil Judge, after trial, dismissed the suit as barred by limitation vide his judgment and decree dated November 11, 2005, even after finding on merits that money was payable by the appellant to respondent No.1. Against this, respondent No.1 preferred first appeal under Section 96 of the Code of Civil Procedure, 1908. This appeal was F allowed by the High Court of Karnataka on November 12, 2008 by holding that the suit was filed within the period of limitation. Accordingly, it passed decree of the amount claimed along with interest @ 12% per annum from the date of demand, i.e. July 19, 1994, up to August 03, 1994 and the interest was granted @ 10% per annum from August 04, 1994 till the date of payment. Against this judgment of the High Court, G the appellant preferred the special leave petition. This special leave petition was dismissed by this Court on December 04, 2009 with the following order:

"Delay condoned.

Special Leave Petition is dismissed."

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After the dismissal of the special leave petition, respondent No.1 filed execution petition before the trial court.

5. It may be mentioned at this stage that after the High Court had decreed the suit of respondent No.1, the respondent filed application for rectification of the judgment, which was allowed on October 20, 2010 directing the appellant to pay the decretal amount with interest and costs. This is the subject matter of the execution proceedings.

6. The appellant herein, even after dismissal of the special leave petition, went back to the High Court in the form of review petition seeking review of the judgment dated November 12, 2008 passed by the High Court. It was filed on the premise that the High Court had granted relief which was not even sought for by respondent No.1 in the suit. We may reproduce the precise ground taken in this behalf in the review petition:

> "11. The above Review Petition is directed only with regard to the decree portion dated 12.11.2008 passed by this Hon'ble Court in RFA No. 427/2006 as corrected by the order dated 20.10.2010. It reads:
>
> "We direct the plaintiff to recover the amount as claimed at Rs.1,00,76,630/- with interest at the rate of 12% from the date of demand made namely 29.07.1994 till 03.08.1994 and at the rate of 10% from 04.08.1994 till the date of payment on the said sum with costs."
>
> A perusal of the prayer made in the suit O.S. No. 2808/1997 as extracted in para 2 above shows that the plaintiff has not claimed interest at any particular rate and he has also not prayed the interest from any particular date. He has also not claimed interest at different rates also. Thus the decree passed by this Hon'ble Court in RFA No. 427/2006 is not based on the prayer sought for by the plaintiff in O.S. No. 2808/1997. This mistake appears on the face of the record. Hence the impugned judgment and decree in RFA No. 427/2006 dated 12.11.2008 as corrected on 20.10.2010 is liable to be reviewed and modify the said judgment and decree in terms of the prayer made by the plaintiff in O.S. No. 2808/1997."

On that basis, it was pleaded that the award of interest from August 04, 1994 is also without jurisdiction since it was not claimed by respondent No.1 in the trial court.

A 7. This review petition has been dismissed by the High Court vide orders dated September 09, 2011, *inter alia*, with the following observations:

> "The judgment and decree passed by this Court in the above appeal was questioned by the petitioners before the Hon'ble Supreme
B Court in Special Leave Petition to Appeal (Civil) CC No. 18374/ 2009 and the petition came to be dismissed on 4.12.2009.
>
> According to us, when the judgment and decree passed by this Court has been confirmed by the Hon'ble Supreme Court, question of entertaining any review by us does not arise for consideration.
>
C Accordingly, review petition is dismissed."

8. As can be seen from the above order, the reason for dismissal of the review petition is that the Apex Court has already dismissed the special leave petition against the High Court's judgment dated November 12, 2008. Therefore, review of the said judgment by the High Court is
D not permissible. It is this order in review petition which is challenged in these proceedings inasmuch as case of the appellant is that when the special leave petition was dismissed *in limine* and not by speaking order, there was no reason not to entertain the review petition by the High Court, as dismissal of the special leave petition in *limine* by non-speaking
E order does not amount to merger of the High Court judgment with that of the Supreme Court.

9. The question of law which needs to be determined in the aforesaid circumstances is as to whether review petition is maintainable before the High Court seeking review of a judgment against which the
F special leave petition has already been dismissed by this Court.

10. The reason for referring the matter to a larger Bench is the conflicting views by different Benches of this Court which have been taken note of in the referral order. Those judgments will be discussed at the appropriate stage. At the same time, we would like to reproduce the
G following passages from the reference order:

> "12. We may also point out in this connection that Article 136 of the Constitution does not confer any right of appeal on any party but it confers a discretionary power on the Supreme Court to interfere in suitable cases. Clause (1) of Article 136 of the Constitution confers very wide and extensive powers on the
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Supreme Court. The article commences with a non obstante clause, the words are of overriding effect and clearly indicate the intention of the Framers of the Constitution that it is a special jurisdiction and residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. The jurisdiction under Article 136 of the Constitution, of course, cannot be barred by statute since it is extraordinary power under Article 136. Article 136 is an extraordinary power which cannot be taken away by legislation.

13. We also notice that several statutes confer on aggrieved parties right of appeal to the Supreme Court in contradistinction with the powers conferred on the Supreme Court under Article 136 of the Constitution, for instance, Section 15-Z of the Securities and Exchange Board of India (SEBI) Act, 1992 confers a right of appeal to any person aggrieved by any decision or order of the Securities Appellate Tribunal. So also various regulatory legislations provide for statutory right of appeal. To what extent the principle of res judicata and merger would apply in respect of a decision rendered by this Court while exercising its statutory power of appeal as well as the one rendered while entertaining an appeal invoking Article 136 is not seen considered by the larger Bench either in *Abbai Maligai* or *Kunhayammed* case, which is also, in our view, an issue to be considered by the larger Bench.

14. We notice that considerable arguments are being raised before this Court as well as before various High Courts in the country on the maintainability of review petitions after the disposal of the special leave petition without granting leave but with or without assigning reasons on which also conflicting views are being expressed by the two-Judge Benches of this Court. In order to resolve those conflicts and for proper guidance to the High Courts, we feel it would be appropriate that this matter be referred to a larger Bench for an authoritative pronouncement."

11. There are two judgments of this court, both of which are three Judge Bench decisions. First in line is ***Abbai Maligai Partnership Firm and Another*** v. ***K. Santhakumaran and Others***[1]. This judgment is relied upon by respondent No.1 with the plea that in that judgment this Court held that when the judgment and decree passed by the High Court

[1](1998) 7 SCC 386

A is affirmed by the Supreme Court with the dismissal of the special leave petition, there is no question of entertaining the review petition by the High Court, thereafter. Other judgment is in the case of ***Kunhayammed and Others*** v. ***State of Kerala and Another***[2]. In this judgment the Court laid down various ways in which special leave petitions can be disposed of and decided in which cases review would be permissible and where such a review is not entertainable, on the doctrine of merger and *res judicata*, etc. We may point out at this stage itself that various judgments which have been pronounced by this Court (which are the judgments rendered by two Judges' Bench) have taken different paths, on the interpretation of the aforesaid two cases, resulting in conflicting outcomes.

12. In ***Meghmala and Others*** v. ***G. Narasimha Reddy and Others***[3] and ***K. Rajamouli*** v. ***A.V.K.N. Swamy***, the view taken by this Court was that review petition is not maintainable. In ***Meghmala*** the Court, however, made one exception by holding that in case a litigant files a review petition before filing the special leave petition in the Supreme Court and it remains pending till the special leave petition is dismissed, the review petition still deserves to be considered. However, the review petition filed after the dismissal of the special leave petition would amount to abuse of the process of the Court. On the other hand, in ***Gangadhara Palo*** v. ***Revenue Divisional Officer Officer and Another***[4], this Court held that it will make no difference whether the review petition was filed in the High Court before the dismissal of the special leave petition or after the dismissal thereof. In either case, the doctrine of merger would apply, even when the special leave petition is dismissed *in limine*, which will bar the filing of the review petition before the High Court when the special leave petition is dismissed.

13. As against the aforesaid view, there is another line of cases holding that review petition is maintainable if no leave has been granted to file an appeal and there is dismissal of the special leave petition at the preliminary stage itself. These cases have taken a view that a preliminary stage does not constitute a binding precedent and, therefore, doctrine of merger would not apply. These cases are ***Palani Roman Catholic***

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[2](2000) 6 SCC 359
[3](2010) 8 SCC 383
[4](2011) 4 SC 602

Mission v. ***S. Bagirathi Ammal***[5], ***Bhakra Beas Management Board*** v. ***Krishna Kumar Vij and Another***[6]. A

14. After taking note of the aforesaid judgments, the reference order in the instant case makes a remark about the nature of conflict between them, which is noted in paragraph 11 of the judgment and is reproduced below: B

> "11. We notice that in *K. Rajamouli* this Court has followed *Kunhayammed* and distinguished *Abbai Maligai Partnership Firm* and in *Gangadhara Palo* the later Bench did not accept the view expressed in *K. Rajamouli*. To this extent, there is some conflict between the judgments in *Gangadhara Palo* and *K. Rajamouli* which calls for resolution by a larger Bench." C

15. It may be useful to add, in the line of the aforesaid cases, a recent judgment of this Court in ***Medical Council of India*** v. ***State of Kerala and Others***[7], which is again a two Judge Bench. Though in this case situation was not where review petition was filed after the dismissal of the special leave petition, at the same time, dismissal of the special leave petition *in limine* was explained to mean that it was still a decision on merits by this Court. D

16. Having stated the manner in which the issue is dealt with in various judgments noted above, it would be apposite to first discuss the law laid down in ***Abbai Maligai Partnership Firm*** as well as ***Kunhayammed's*** cases since both the judgments are rendered by three Judges' Bench. Therefore, it is to be seen, in the first instance, as to whether they project conflicting views. E

17. ***Abbai Maligai Partnership Firm*** was a case under the Rent Control Act and the appeal came from the High Court of Madras. In an eviction petition filed by respondent Nos. 1 and 2 in the said case, the Rent Controller had ordered eviction of the appellants therein on the ground of wilful default in payment of rent as well as on the ground of *bona fide* requirement of the premises by respondent Nos. 1 and 2 for their own business. In appeal, the order of the Rent Controller was set aside as it was found that there was a *bona fide* dispute with regard to the title of the property which could be decided by the Civil Court. The F G

[5] (2009) 16 SCC 657
[6] (2010) 8 SCC 701
[7] 2018 (11) Scale 141 H

A respondents preferred review petitions thereagainst, which were dismissed. They approached this Court by way of special leave petitions which were also dismissed. After the dismissal of these special leave petitions, the respondents therein filed review petition in the High Court with a delay of 221 days. The High Court condoned the delay and also
B entertained the review petition on merits and not only allowed those review petitions but even reversed the orders made earlier in the civil revision petitions by allowing those petitions and ordering eviction of the appellants/ tenants. In appeal against this order passed in review and revision petitions, this Court held that the jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. Entire
C discussion in this behalf is contained in one paragraph, which we reproduce below:

> "4. The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the selfsame order had been dismissed by this
D Court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned Single Judge at that stage is subversive of judicial discipline. The High Court was aware that the SLPs against the orders dated 7-1-1987 had already been dismissed by this Court. The High Court, therefore, had no power or jurisdiction to review the selfsame order, which was the
E subject-matter of challenge in the SLPs in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order.
F The very entertainment of the review petitions, in the facts and circumstances of the case, was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances,
G was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this Court, abused the process of the court and indulged in vexatious litigation. We strongly deprecate the matter in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this Court. The appeals deserve to succeed on that short ground.
H The appeals are, consequently, allowed and the impugned order

dated 7-4-1994 passed in the review petitions is hereby set aside. The respondents shall pay Rs 10,000 as costs."

18. In ***Kunhayammed's*** case, on the other hand, the Forest Tribunal had held that land in dispute did not vest in the Government under the provisions of the Kerala Private Forests (Vesting and Assignment) Act, 1971. Against this order the appeal of the State of Kerala was dismissed by the High Court on December 17, 1982. Thereagainst special leave petition was filed by the State, which was dismissed *in limine* stating - *'Special Leave Petition is dismissed on merits'*. Thereafter, the Estate filed an application in the High Court for review of its earlier order whereby appeal of the State had been dismissed upholding the order of the Forest Tribunal. It may be noted that during the pendency of this review petition, Section 8(c) was inserted in the Kerala Private Forests (Vesting and Assignment) Act, 1971 by amendment made in the year 1986 enabling the Government to file appeal or review in certain cases. This provision was introduced with retrospective effect, i.e. from November 19, 1983. Review petition was filed in January 1984. On these facts, the High Court passed orders dated December 14, 1995 overruling the objection to the maintainability of the review petition holding that review was maintainable and posted the case for hearing on merits. This order was challenged which became the subject matter of the appeal in the aforesaid cases. The contention of the petitioner before this Court was two fold: (a) the High Court's order dated December 17, 1982 was merged with order dated July 18, 1983 whereby the special leave petition was dismissed and, therefore, no review petition was maintainable; and (b) order of this Court in the special leave petition amounted to affirmation of the High Court's order and, therefore, could not be reviewed by the High Court. This Court rejected the contention of the petitioner holding that review was maintainable as the doctrine of merger was not applicable in the aforesaid circumstances. However, what is important is that the Court deliberated on the doctrine of merger and handed out well reasoned and lucid judgment explaining the situations where review would be maintainable as well as the situations where it would not be maintainable on the aforesaid doctrine.

19. Explaining the doctrine of merger, the Court held that logic behind this doctrine is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior Court, Tribunal or

A Authority is subjected to a remedy available under law before a superior forum, then, though the decree or order under challenge continues to be effective and binding, nevertheless, this finality is to put in jeopardy. Once the superior court disposes of the dispute before it in any manner, i.e. either by affirming the decree or order or by settings aside or by
B modifying the same, it is the decree of the superior Court, Tribunal or Authority which is the final binding and operative decree and the decree or order of the lower Court, Tribunal or authority gets merged into the order passed by the superior forum. The Court also clarified that this doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject
C matter of challenge laid or which could have been laid will have to be kept in view. The Court thereafter discussed the provision pertaining to the appellate jurisdiction that is exercised by the Supreme Court conferred upon it by Articles 132 to 136 of the Constitution of India. Insofar as jurisdiction under Article 136 is concerned, it explained that Article 136
D opens with a non-obstante clause and conveys a message that even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense or
E sense of justice of the Judges. No right of appeal is conferred upon any party; only a discretion is vested in the Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.

20. Exercise of jurisdiction under Article 136 and the manner in
F which it is dealt with is clarified as under:

> "14. The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (*i*) granting special leave to appeal; and (*ii*) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order 16 of the Supreme
G Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in Form No. 28. No separate application for interim relief need be filed, which can be incorporated in the

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petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing, the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under:

(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

A (3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

B (4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed

C against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge."

D 21. The Court thereafter analysed number of cases where orders of different nature were passed and dealt with these judgments by classifying them in the following categories:

(i) Dismissal at the stage of special leave petition - without reasons - no *res judicata*, no merger[8].

E (ii) Dismissal of the special leave petition by speaking or reasoned order - no merger, but rule of discipline and Article 141 attracted[9].

(iii) Leave granted - dismissal without reasons - merger results[10].

F [8] Proposition based on judgments in Workmen v. Board of Trustees of the Cochin Port Trust, (1978) 3 SCC 119; Western India Match Co. Ltd. v. Industrial Tribunal, AIR 1958 Mad 398; Indian Oil Corpn. Ltd. v. State of Bihar, (1986) 4 SCC 146; Rup Diamonds v. Union of India, (1989) 2 SCC 356; Wilson v. Colchester Justices, (1985) 2 All ER 97 (HL); Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187; Yogendra Narayan Chowdhury v. Union of India, (1996) 7 SCC 1; V.M. Salgaocar & Bros. (P) Ltd. v. CIT, (2000) 5 SCC 373; Sree Narayana Dharmasanghom Trust v. SwamiPrakasananda, (1997) 6 SCC 78 and State of Maharashtra v. Prabhakar Bhikaji Ingle, (1996) 3 SCC 463.

G [9] Penu Balakrishna Iyer v. Ariya M. Ramaswami Iyer, AIR 1965 SC 195; Abbai Maligai Partnership Firm v. K. Santhakumaran, (1998) 7 SCC 386; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, (1969) 2 SCC 74; Sushil Kumar Sen v. State of Bihar, (1975) 1 SCC 774; Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447; Junior Telecom Officers Forum v. Union of India, 1993 Supp (4) SCC 693 and Supreme Court Employees' Welfare Assn. Case, (1989) 4 SCC 187.

[10] Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372.

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22. It may be pertinent to mention here that while laying down the second principle mentioned above, the Court took note of the judgment in ***Abbai Maligai Partnership Firm*** and discussed it in the following manner:

> "26. The underlying logic attaching efficacy to an order of the Supreme Court dismissing SLP after hearing counsel for the parties is discernible from a recent three-Judge Bench decision of this Court in *Abbai Maligai Partnership Firm* v. *K. Santhakumaran* [(1998) 7 SCC 386] . In the matter of eviction proceeding initiated before the Rent Controller, the order passed therein was subjected to appeal and then revision before the High Court. Special leave petitions were preferred before the Supreme Court where the respondents were present on caveat. Both the sides were heard through the Senior Advocates representing them. The special leave petitions were dismissed. The High Court thereafter entertained review petitions which were highly belated and having condoned the delay reversed the orders made earlier in civil revision petitions. The orders in review were challenged by filing appeals under leave granted on special leave petitions. This Court observed that what was done by the learned Single Judge was "subversive of judicial discipline". The facts and circumstances of the case persuaded this Court to form an opinion that the tenants were indulging in vexatious litigations, abusing the process of the Court by approaching the High Court and the very entertainment of review petitions (after condoning a long delay of 221 days) and then reversing the earlier orders was an affront to the order of this Court. However the learned Judges deciding the case have nowhere in the course of their judgment relied on doctrine of merger for taking the view they have done. A careful reading of this decision brings out the correct statement of law and fortifies us in taking the view as under."

23. It may also be of interest to note that the Court dealt with the situation where the review is filed earlier in point of time and the special leave petition is filed thereafter, and dealt with the situation in the following manner:

> "37. Let us assume that the review is *filed first* and the delay in SLP is condoned and the special leave is ultimately granted and

A the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree — the one before review — becomes infructuous."

C 24. After elaborate discourse on almost all the aspects, the Court gave its conclusions and also summed up the legal position from paragraphs 39 to 44. We reproduce the same hereunder:

"39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point at issue. It is clear that as amongst the several two-Judge Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (*i*) Article 141 of the Constitution, (*ii*) doctrine of merger, (*iii*) res judicata, and (*iv*) rule of discipline flowing from this Court being the highest court of the land.

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

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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.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let

A open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

D 42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

G 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

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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

A 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
B 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
C 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."

25. Having noted the aforesaid two judgments and particularly the fact that the earlier judgment in the case of ***Abbai Maligai Partnership Firm*** is duly taken cognisance of and explained in the latter
D judgment, we are of the view that there is no conflict insofar as ratio of the two cases is concerned. Moreover, ***Abbai Maligai Partnership Firm*** was decided on its peculiar facts, with no discussion on any principle of law, whereas ***Kunhayammed*** is an elaborate discourse based on well accepted propositions of law which are applicable for such an issue.
E We are, therefore, of the view that detailed judgment in ***Kunhayammed*** lays down the correct law and there is no need to refer the cases to larger Bench, as was contended by the counsel for the appellant.

26. While taking this view, we may also point out that even in ***K. Rajamouli*** this Court took note of both these judgments and explained
F the principle of *res judicata* in the following manner:

"*4.* Following the decision in *Kunhayammed* [(2000) 6 SCC 359] we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order
G passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the High Court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the

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ground that the party was prosecuting remedy by way of special leave petition. In such a situation the filing of review would be an abuse of the process of the law. We are in agreement with the view taken in *Abbai Maligai Partnership Firm* [(1998) 7 SCC 386] that if the High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as an affront to the order of the Supreme Court. But this is not the case here. In the present case, the review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed the special leave petition against the main judgment of the High Court. We, therefore, overrule the preliminary objection of the counsel for the respondent and hold that this appeal arising out of special leave petition is maintainable."

27. From a cumulative reading of the various judgments, we sum up the legal position as under:

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

(b) We reiterate the conclusions relevant for these cases as under:

"(*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

A 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.

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(*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.

C (*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."

D (c) 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.

E 28. Applying the aforesaid principles, the outcome of these appeals would be as under:

Civil Appeal arising out of Special Leave Petition (Civil) No. 490 of 2012: In the instant case, since special leave petition was dismissed in *limine* without giving any reasons, the review petition filed by the appellant in the High Court would be maintainable and should have been decided on merits. Order dated November 12, 2008 passed by the High Court is accordingly set aside and matter is remanded back to the High Court for deciding the review petition on merits. Civil Appeal disposed of accordingly.

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G **Civil Appeal arising out of Special Leave Petition (Civil) No. 13792 of 2013:** In this case, we find that the special leave petition was dismissed with the following order passed on January 05, 2012:

"We find no ground to interfere with the impugned order. The special leave petition is dismissed."

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Here also, special leave petition was dismissed in *limine* and without any speaking order. After the dismissal of the special leave petition, the respondent in this appeal had approached the High Court with review petition. Said review petition is allowed by passing order dated December 12, 2012 on the ground of suppression of material facts by the appellant herein and commission of fraud on the Court. Such a review petition was maintainable. Therefore, the High Court was empowered to entertain the same on merits. Insofar as appeal of the appellant challenging the order dated December 12, 2012 on merits is concerned, the matter shall be placed before the regular Board to decide the same.

A B C

Kalpana K. Tripathy Appeals disposed of.