

A BUSSA OVERSEAS & PROPERTIES (P) LTD. & ANR.

v.

UNION OF INDIA & ANR.

(Civil Appeal No. 2687 of 2006)

JANUARY 22, 2016

B **[DIPAK MISRA AND SHIVA KIRTI SINGH, JJ]**

C *Review: Scope of – Refund claim – Custom duty – Department dismissed the claim on the ground that same was filed u/s.27 of Customs Act and the appellant had not complied with the formalities envisaged under the said provision – Writ petition – Dismissed by High Court – Review petition – Dismissal of – Special leave petition against order passed in review petition – Maintainability of – Held: Not maintainable – Code of Civil Procedure, 1908 – Or.47 r.7 – Constitution of India, 1950 – Article 136 – Customs Act, 1962 – s.27.*

D **Dismissing the appeal, the Court**

E **HELD:** When the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party. Though the decisions in *Shanker Motiram Nale*, the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and there is hardly any necessity not to be guided by the said precedent. [Para 26] [281-C-F]

H *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* (1994) 2 SCC 753; *State of Assam v. Ripa Sarma* 2013 (4) SCR 151 : (2013) 3 SCC 63 – relied on.

Durga Shankar Mehta v. Thakur Raghuraj Singh and others (1955) 1 SCR 267 : AIR 1954 SC 520 – held inapplicable. A

Thungabhadra Industries Ltd. v. Government of Andhra Pradesh (1964) 5 SCR 174 : AIR 1964 SC 1372 – Distinguished B

Collector of Central Excise v. India Tyre and Rubber Co. Ltd. 1997 (94) ELT 495 (Mad.); *Hindustan Metal Pressing Works v. Commissioner of Central Excise* 2003 (153) ELT 15 (S.C.); *Mafatalal Industries Ltd. v. Union of India* 89 ELT 247 (S.C.); *Union of India v. Jain Spinners Ltd.* 1992 (61) ELT 321 (S.C.); *Alcatel Modi Net Works Systems v. Commissioner of Customs* 2000 (117) ELT 522 (Tribunal); *Kunhyammed v. State of Kerala* 2001 (129) ELT 11 (S.C.); *Suseel Finance & Leasing Co. v. M. Lata and others* (2004) 13 SCC 675; C

M.N. Haider and others v. Kendriya Vidyalaya Sangathan and others (2004) 13 SCC 677; *Shiv Charan Singh v. State of Punjab and others* 2006 (9) Suppl. SCR 143 : (2007) 15 SCC 370; *Ravi alias Ravichandran v. State represented by Inspector of Police* 2007 (5) SCR 766 : (2007) 15 SCC 372; *Vinod Kapoor v. State of Goa and others* 2012 (8) SCR 1089 : (2012) 12 SCC 378; *Sandhya Educational Society and another v. Union of India and others* (2014) 7 SCC 701; *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy* 2004 (3) Suppl. SCR 931 : (2005) 1 SCC 481; D

Green View Tea & Industries v. Collector (2004) 4 SCC 122; *K. Rajamouli v. A.V.K.N. Swamy* 2001 (3) SCR 473 : (2001) 5 SCC 37; *Eastern Coalfields Limited v. Dugal Kumar* 2008 (11) SCR 369 : (2008) 14 SCC 295; *Krishena Kumar v. Union of India and others* 1990 (3) SCR 352 : (1990) 4 SCC 207; *Government of Andhra Pradesh and others v. A.P. Jaiswal and others* AIR 2001 SC 499 – referred to. E

Quinn v. Leathem (1901) AC 495; *Caledonian Railway Co. v. Walker's Trustees* (1882) 7 App Cas 259 : 46 LT 826 (HL) – referred to. F

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A	<u>Case Law Reference</u>		
	1997 (94) ELT 495 (Mad.)	referred to.	Para 4
	2003 (153) ELT 15 (S.C.)	referred to.	Para 4
	89 ELT 247 (S.C.)	referred to.	Para 7
B	1992 (61) ELT 321 (S.C.)	referred to.	Para 7
	2000 (117) ELT 522 (Tribunal)	referred to.	Para 7
	2001 (129) ELT 11 (S.C.)	referred to.	Para 7
	(1994) 2 SCC 753	relied on.	Para 8
C	(2004) 13 SCC 675	referred to.	Para 8
	(2004) 13 SCC 677	referred to.	Para 8
	2006 (9) Suppl. SCR 143	referred to.	Para 8
	2007 (5) SCR 766	referred to.	Para 8
D	2012 (8) SCR 1089	referred to.	Para 8
	2013 (4) SCR 151	relied on.	Para 8
	(2014) 7 SCC 701	referred to.	Para 8
	(1955) 1 SCR 267	held inapplicable.	Para 8
E	(1964) 5 SCR 174	Distinguished	Para 8
	2004 (3) Suppl. SCR 931	referred to.	Para 8
	(2004) 4 SCC 122	referred to.	Para 15
F	2001 (3) SCR 473	referred to.	Para 16
	2008 (11) SCR 369	referred to.	Para 19
	1990 (3) SCR 352	referred to.	Para 24
	AIR 2001 SC 499	referred to.	Para 26
G	CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2687 of 2006.		
	From the Judgment and Final Order dated 14-09-2004 by the High Court of Judicature at Bombay in Notice of Motion No. 62 of 2004 in Review Petition (LOD) No. 6 of 2004 in Writ Petition No. 71 of 1993.		
H	Kavin Gulati, Ruby Singh Ahuja, Utsav Trivedi, Manik Karanjawala,		

Anisha Mitra for the Appellants. A

Yashank Adhyaru, Tara Chandra Sharma, B.V. Niren, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal is directed against the judgment and order dated 14.09.2004 passed by the Division Bench of the High Court of Judicature at Bombay in Notice of Motion No. 62 of 2004 in Review Petition (Lod) No. 6 of 2004 in Writ Petition No. 71 of 1993 whereby the High Court while dealing with an application of review has declined to condone the delay of 129 days in preferring the application for review and also opined that the application for review was totally devoid of merit. The expression of the said view led to dismissal of the application for review. B C

2. The facts lie in a narrow compass. The appellants filed an application for refund of excess provisional customs duty amounting to Rs. 39,71,412/- which was claimed under Section 18(2) of the Customs Act, 1962 (for brevity, "the Act"). After the application was submitted, the 2nd respondent i.e., Assistant Collector of customs by letter dated 01.06.1992 communicated that the claim of the appellants was filed under the provisions of Section 27(2) of the Act and it was required to comply with the formalities envisaged under the said provision. The appellants reiterated their stand that Section 27(2) was not applicable and prayed for refund of the amount alongwith interest. However, as nothing effective ensued, the appellants, left with no option, filed a writ petition before the High Court of Bombay assailing the memo dated 23.12.1991 and letter dated 01.06.1992 which had required the appellants to apply for refund under Section 27(2) of the Act. During the pendency of the writ petition the 2nd respondent passed an *ex-parte* order dated 04.12.1992 dismissing the claim of the refund under Section 27 of the Act and opined that the claim was inadmissible. D E F

3. In the mean time, as the factual matrix would undrape, the Act was amended and Explanations were added to Section 27 of the Act. Placing reliance on the various aspects it was highlighted before the Division Bench of the High Court that the rejection of the application for refund was absolutely unsustainable. It was also urged that the refund was rightly claimed under Section 18(2)(a) of the Act inasmuch as Section 27 was remotely not applicable. G H

A 4. The main plank of submission before the High Court was that
 the assessment was provisional and hence, it remained provisional for
 all purposes and on finalisation of assessment under Section 18(2) of the
 Act if refund is due, then it was obligatory on the part of the customs
 authorities to refund the amount without applying the provisions contained
 B in Section 27 of the Act. To buttress the said submission, reliance was
 placed on *Collector of Central Excise v. India Tyre and Rubber Co.
 Ltd.*¹ and *Hindustan Metal Pressing Works v. Commissioner of
 Central Excise*².

C 5. The High Court appreciating the factual matrix and the legal
 submissions came to hold as follows:-

“... while exercising the Writ jurisdiction, if the Writ Court finds
 that any direction to refund results in unjust enrichment to the
 Petitioners, then it is open to the Writ Court to decline to exercise
 its Writ jurisdiction, even though the Petitioner has a right to obtain
 D refund. This reasoning of ours is supported by the Full Bench
 decision of this Court in the case of *New India Industries vs.
 Union of India* reported in 1990 (1) B.C.R. 315, as well as the
 decision of the Apex Court in the case of *Mafatlal Industries Ltd.*
 (supra at para 95). In the present case, admittedly, the Petitioners
 E have passed on the incidence of duty to the customers and have
 recovered the amount due to them. In this view of the matter, we
 decline to issue Writ in favour of the Petitioners.”

Being of the aforesaid view, the High Court dismissed the writ
 petition. An application for review was filed which met with its Waterloo
 being barred by limitation and also being devoid of substance.

F 6. Mr. Yashank Adhyaru, learned senior counsel for the respondents
 has raised a preliminary objection that the main order, that is, the order
 passed in the writ petition having not been assailed, the challenge only to
 the order passed in review is not tenable; and, therefore, the appeal
 deserves to be dismissed as not maintainable.

G 7. It is also contented by him that Section 27 of the Act refers to
 refund of duty paid pursuant to an order of assessment and the term
 “assessment” is defined under Section 2(2) of the Act to include
 provisional assessment and, therefore, the application required to be made
 under Section 27 for refund including the refund of duty paid under the

H ¹ 1997 (94) ELT 495 (Mad.)

² 2003 (153) ELT 15 (S.C.)

provisional assessment. On that basis it is canvassed that the authorities were justified in insisting upon the appellants to apply for refund under Section 27 of the Act. On behalf of the revenue reliance has been placed on the decisions in *Mafatlal Industries Ltd. v. Union of India*³, *Union of India v. Jain Spinners Ltd.*⁴, *Alcatel Modi Net WSorks Systems v. Commissioner of Customs*⁵ and *Kunhyammed v. State of Kerala*⁶.

8. Mr. Kavin Gulati, learned senior counsel appearing for the appellants would submit that in view of the trend of recent decisions, namely, *Shanker Motiram Nale v. Shirolalsing Gannusing Rajput*⁷, *Suseel Finance & Leasing Co. v. M. Lata and others*⁸, *M.N. Haider and others v. Kendriya Vidyalaya Sangathan and others*⁹, *Shiv Charan Singh v. State of Punjab and others*¹⁰, *Ravi alias Ravichandran v. State represented by Inspector of Police*¹¹, *Vinod Kapoor v. State of Goa and others*¹², *State of Assam v. Ripa Sarma*¹³, and *Sandhya Educational Society and another v. Union of India and others*¹⁴, the stance set forth by the respondents may deserve acceptance, but the aforesaid authorities have ignored the earlier larger Bench decisions rendered in *Durga Shankar Mehta v. Thakur Raghuraj Singh and others*¹⁵ and *Thungabhadra Industries Ltd. v. Government of Andhra Pradesh*¹⁶ and hence, they are not binding precedents. Learned senior counsel has also drawn inspiration from *Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy*¹⁷ to bolster the stand that the power under Article 136 of the Constitution of India being relatable to plenary jurisdiction conferred under the Constitution cannot be curtailed by the ordinary legislation. It is the submission of Mr. Gulati that the subsequent decisions have been guided by the provisions contained in the Code of Civil Procedure though the stipulations therein cannot control the exercise of the jurisdiction under Article 136 of the Constitution.

³ 89 ELT 247 (S.C.) 11 (2007) 15 SCC 372

⁴ 1992 (61) ELT 321 (S.C.) 12 (2012) 12 SCC 378

⁵ 2000 (117) ELT 522 (Tribunal) 13 (2013) 3 SCC 63

⁶ 2001 (129) ELT 11 (S.C.) 14 (2014) 7 SCC 701

⁷ (1994) 2 SCC 753 15 (1955) 1 SCR 267 = AIR 1954 SC 520

⁸ (2004) 13 SCC 675 16 (1964) 5 SCR 174 = AIR 1964 SC 1372

⁹ (2004) 13 SCC 677 17 (2005) 1 SCC 481

¹⁰ (2007) 15 SCC 370

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A 9. First we shall deal with the preliminary objection, for if we accept the same, the appeal would fail on the ground of maintainability and there will be no necessity to advert to the controversy on merits.

B 10. In *Durga Shankar Mehta* (supra), the Constitution Bench was dealing with a legal acceptability of the order passed by the Election
 C Tribunal under Section 100(1)(c) of the Representation of the People Act, 1951. A preliminary objection was raised challenging the competency of the appeal. It was contended by the learned counsel for the respondent therein that Article 329(b) of the Constitution ousts the jurisdiction of all the ordinary courts in election disputes and provides expressly that no election to either House of Parliament or to either House of the Legislature
 D of a State shall be called in question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature, and therefore, there can be no challenge to the validity of an election except by way of an election petition. It was further urged that the jurisdiction that was created in the Election Tribunal was a special jurisdiction which could be invoked by an aggrieved party only by means of an election petition and the decision of the Tribunal was final and conclusive, and, therefore, this Court could not interfere with the said final decision by exercising power under Article 136 of the Constitution. Thus, emphasis was placed on the finality of the decision rendered by the Election Tribunal. Dealing with
 E the said preliminary objection, the Constitution Bench opined thus:-

F “... The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a court or tribunal in any cause or matter and the powers could be exercised in spite
 G of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way. Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for
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any further appeal but that cannot in any way cut down or affect the overriding powers which this Court can exercise in the matter of granting special leave under Article 136 of the Constitution.” A

Elaborating further, the larger Bench proceeded to state that there was no prohibition of the exercise of powers by the Supreme Court in proper cases under Article 136 of the Constitution against the decision or determination of an Election Tribunal which like all other Judicial Tribunals comes within the purview of the said article. B

11. The aforesaid decision, as is evident, deals with the ambit and sweep of the power exercised by this Court under Article 136 of the Constitution. The larger Bench has expressed the view that it is a plenary jurisdiction and it cannot be taken away or abridged by the Representation of the People Act, 1951. The preliminary objection raised therein has to be carefully appreciated. The submission was that the Supreme Court did not have jurisdiction to hear an appeal against the order of an Election Tribunal. In our considered opinion, the said authority does not lend any assistance to the principle which is sought to be canvassed by the learned counsel for the appellants, for there is discussion with regard to the plenary jurisdiction of this Court and ouster of jurisdiction by ordinary law. That apart, it has to be kept in mind that the subsequent decisions have opined that the special leave petition under Section 136 is not maintainable and they have not ignored the fundamental facet plenary jurisdiction of this Court. We will be dwelling upon the said aspect at a later stage while we will be adverting to the principle stated in the subsequent authorities. C D E

12. In *Thungabhadra Industries Ltd.* (supra), the question arose whether the common order passed by the High Court of Andhra Pradesh rejecting the applications to review an earlier order by that court was correct on the facts of the case. The three-Judge Bench stated the facts, adverted to the concept of review jurisdiction as envisaged under Order 47 Rule 1 of the Civil Procedure Code and thereafter took note of the objection raised by the learned counsel for the respondent therein urging that leave granted by this Court should be revoked. The Court did not permit the respondent to raise the preliminary objection primarily on two reasons, namely, the special leave was granted after notice to the respondent and therefore after hearing the respondent as to any objection to the maintainability of the appeal or to the granting of special leave. It was further observed that the statement of the case filed on behalf of F G H

A the respondent did not disclose any ground upon which the leave granted should be revoked. The three-Judge Bench in that context observed thus:-

“... any ground in relation to these matters should have been urged at that stage and except possibly in some extraordinary cases where the ground urged happens to arise subsequent to the grant of the special leave or where it could not be ascertained by the respondent at that date notwithstanding the exercise of due care; except in such circumstances this Court will not permit the respondent to urge any argument regarding the correctness of the order of the Court granting special leave. Indeed, the very object of issuing notice to the respondent before the grant of leave is to ensure that the latter is afforded an opportunity to bring to the notice of the Court any grounds upon which leave should be refused and the purpose of the rule would be frustrated if the respondent were permitted to urge at a later stage — at the stage of the hearing of the appeal and long after the appellant has incurred all the costs — that the leave granted after notice to him should be revoked on a ground which was available to him when the application for special leave was heard. This apart, even the statement of the case filed on behalf of the respondent does not disclose any ground upon which the leave granted should be revoked; nor, of course, does it make any prayer seeking such relief. ...”

13. Relying on the aforesaid passage, it is submitted by Mr. Gulati that stage for raising the issue as to maintainability is over. Before we analyse the ratio of the said decision, it is desirable to take note of judgments that have come into existence in the meantime.

14. In *Shanker Motiram Nale* (supra), a two-Judge Bench has opined that an appeal against the order rejecting the application for review of a judgment and decree passed by the learned Single Judge is not appealable as appeal is not against the basic judgment. To arrive at the said conclusion, the Court has referred to Order XLVII Rule 7 of the Code of Civil Procedure, 1908 that bars an appeal against the order of the court rejecting the review.

15. In *Suseel Finance & Leasing Co.* (supra), while dealing with the special leave petition preferred against the rejection of review petition without assailing the main judgment, the Court referred to the decision in

Shanker Motiram Nale (supra) and concurred with the said view. In that context, the two-Judge Bench referred to the decisions in *Green View Tea & Industries v. Collector*¹⁸ and *K. Rajamouli v. A.V.K.N. Swamy*¹⁹ and opined that:-

“We find that in these two cases the question whether a special leave petition was maintainable against an order rejecting a review petition, was not considered at all. In these cases, the question was whether special leave petition was barred by principles of res judicata. It was held that special leave petition was not barred by principles of res judicata. In neither of these cases has reference been made to the abovementioned judgment of this Court in *Shanker Motiram Nale case*. In both those cases it has been held that a special leave petition is maintainable only in the context of it not being barred on principles of res judicata. In both these cases the question whether a special leave petition is against an order disposing of a review petition was not considered at all. These cases therefore have no relevance at all.”

16. In *M.N. Haider* (supra), relying on earlier decisions, it has been held that once the special leave petition is not maintainable no orders/judgments can be passed thereon except to dismiss the same.

17. In *Shiv Charan Singh* (supra), a two-Judge Bench was dealing with an appeal challenging an order of review. Relying on the decision in *Shanker Motiram Nale* (supra), this Court dismissed the appeal.

18. In *Vinod Kapoor* (supra), it has been held thus:-

“11. Moreover, on the High Court rejecting the application for review of the appellant, the order rejecting the application for review is not appealable by virtue of the principle in Order 47 Rule 7 CPC. In *Shanker Motiram Nale v. Shiotalising Gannusing Rajput, Suseel Finance & Leasing Co. v. M. Lata and M.N. Haider v. Kendriya Vidyalaya Sangathan* cited by the learned counsel for Respondent 8, this Court has consistently held that an appeal by way of special leave petition under Article 136 of the Constitution is not maintainable against the order rejecting an application for review in view of the provisions of Order 47 Rule 7 CPC.

¹⁸ (2004) 4 SCC 122

¹⁹ (2001) 5 SCC 37

A 12. There is nothing in the decisions cited by the appellant to show that this Court has taken a view different from the view taken in *Abhishek Malviya v. Welfare Commr*²⁰ with regard to maintainability of an appeal by way of special leave under Article 136 of the Constitution against an order of the High Court after an earlier special leave petition against the same order had been withdrawn without any liberty to file a fresh special leave petition.

B Similarly, there is nothing in the decisions cited by the appellant to show that this Court has taken a view that against the order of the High Court rejecting an application for review, an appeal by way of special leave under Article 136 of the Constitution is maintainable.”

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19. In *Ripa Sarma* (supra), the main judgment and order was not challenged before this Court. The challenge was to the order passed in the review petition. On behalf of the respondent, a preliminary objection was raised with regard to maintainability of the special leave petition.

D On behalf of the petitioner, reliance was placed on *Eastern Coalfields Limited v. Dugal Kumar*²¹ wherein it has been observed:-

“It was submitted by the learned counsel for the appellant that when the review petition was dismissed, the order passed by the Division Bench in intra-court appeal got merged in the order of review petition. But even otherwise, when the order passed in the review petition is challenged, it would not be proper to dismiss this appeal particularly when leave was granted in SLP after hearing the parties. We, therefore, reject the objection raised by the writ petitioner.”

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F 20. The two-Judge Bench in *Ripa Sarma* (supra), while dealing with the said observations, opined that the decisions of this Court in *Shanker Motiram Nale* (supra), *Suseel Finance & Leasing Co.* (supra) and *M.N. Haider* (supra) were not brought to the notice of the Court and, on that foundation proceeded to state as follows:-

G “... This apart, the submission with regard to the merger of the main order with the order in review has been merely noticed, and not accepted. The preliminary objection seems to have been rejected on the ground that since leave has been granted in the

²⁰ (2008) 3 SCC 108

H ²¹ (2008) 14 SCC 295

special leave petition, it would not be proper to dismiss the same without hearing the parties.” A

And again:-

“In the present case, the preliminary objection has been raised at the threshold. In addition, it is an inescapable fact that the judgment rendered in *Eastern Coalfields Ltd.* has been rendered in ignorance of the earlier judgments of the Benches of co-equal strength, rendering the same per incuriam. Therefore, it cannot be elevated to the status of precedent. ...” B

21. Recently in *Sandhya Educational Society and another* (supra), the Court referred to the decision in *Vinod Kapoor* (supra) and opined thus:- C

“This Court in *Vinod Kapoor v. State of Goa* has categorically observed that once the special leave petition is dismissed as withdrawn without obtaining appropriate permission to file a special leave petition once over again after exhausting the remedy of review petition before the High Court, the same is not maintainable.” D

22. Having noticed the aforesaid pronouncements, we may now advert to the authority in *Thungabhadra Industries Ltd.* (supra). The reasons ascribed therein are two-fold, namely, no objection had been taken at the initial stage as a consequence of which cost had been incurred by the appellant; and further no stand had been taken in the statement of the case. In our view, the decision has to be read in entirety to appreciate why the three-Judge Bench expressed the said view. The Court itself had made it clear that it might add that the matter mentioned by the learned counsel for the respondent in the said respect, even if urged at the hearing of the special leave petition would not have materially assisted him in resisting the grant of special leave. To appreciate the said observation in proper perspective, we may reproduce the factual backdrop and the analysis made therein:- E

“... The point he desired to urge was that in the petition for special leave the appellant had averred that the decision of this Court reversing the judgment of the High Court in TRC 120 of 1953 had been brought to the notice of the High Court, but that this statement must be erroneous or untrue for two reasons: (1) This is not referred to in the order now under appeal, and (2) the decision of F G H

A this Court was not reported in any of the law reports — official or
 unofficial — till long after January 1961 when the petition for
 review was heard. It is manifest that neither of the two
 B circumstances would by itself prove the untruth of the averment
 in the special leave petition. The learned Judges might well have
 thought that the decision had no material bearing on the only point
 that arose for consideration before them viz. whether their order
 of September 1959 was or was not vitiated by error of the sort
 which brought it within Order 47. Rule 1 of Civil Procedure Code.
 C It is obvious that so viewed, it would not have any relevance. As
 regards the other point, the appellant did not have need to wait for
 a report of the case in the Law Reports but might very well have
 produced a copy of the judgment of this Court — and being a
 party to the proceeding here it is improbable that it had not a copy,
 so that its statement that it drew the attention of the Court to the
 decision is not proved to be false by the decision not being reported
 D till long after January 1961. The oral application for revoking the
 leave granted is therefore rejected as entirely devoid of substance.”

23. The aforesaid decision when properly appreciated clearly reveals
 that it pertains to the stage when objection is to be taken. It does not lay
 down that a special leave petition against a review petition is maintainable
 or not. The focus on the stage of taking objection is fact-centric but not
 E principle-oriented. To elaborate, the said decision does not lay down as
 a principle that the Court is bereft of power to hear on maintainability. If
 we understand the view expressed therein, it can be said that the Court
 has been guided by the concept of propriety. In this regard, we may
 reproduce the statement of law made by Lord Halsbury in the case of
 F *Quinn v. Leatham*²²:-

“...there are two observations of a general character which I wish
 to make, and one is to repeat what I have very often said before,
 that every judgment must be read as applicable to the particular
 facts proved, or assumed to be proved, since the generality of the
 G expressions which may be found there are not intended to be
 expositions of the whole law, but governed and qualified by the
 particular facts of the case in which such expressions are to be
 found. The other is that a case is only an authority for what it
 actually decides. I entirely deny that it can be quoted for a

H ²² (1901) AC 495

proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.” A

24. In *Krishena Kumar v. Union of India and others*²³ the Constitution Bench, while appreciating the concept of *ratio decidendi*, adverted to the principles stated in *Caledonian Railway Co. v. Walker's Trustees*²⁴ and *Quinn* (supra) and observations made by Sir Frederick Pollock and thereafter laid down thus:- B

“The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573) “The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal’s duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.” C
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Viewed in the backdrop of the factual score in entirety, we are of the considered opinion that decision in *Thungabhadra Industries Ltd.* (supra) has to be confined to the facts of the said case. G

25. Earlier we have stated that we will refer to the principles stated in *Durga Shankar Mehta*’s case (supra). The said authority deals with width of power conferred under Article 136. It is submitted by Mr.

²³ (1990) 4 SCC 207

²⁴ (1882) 7 App Cas 259 : 46 LT 826 (HL)

A Gulati that the said power is of great magnitude and cannot be controlled by any stature. It has been held in *Durga Shankar Mehta* (supra) that it is a plenary jurisdiction. In *Mahendra Saree Emporium (II)* (supra), a three-Judge Bench, in the context of power under Article 136, has held thus:-

B “The jurisdiction conferred on this Court by Article 136 of the
 C Constitution is a plenary jurisdiction in the matter of entertaining
 and hearing appeals by granting special leave against any kind of
 judgment or order made by court or tribunal in any case or matter
 and the jurisdiction can be exercised in spite of other specific
 D provisions for appeal contained in the Constitution or other laws.
 This article confers on the Supreme Court special or residuary
 powers which are exercisable outside the purview of the ordinary
 laws in cases where the needs of justice demand interference by
 the Supreme Court [see Constitution Bench decisions in *Durga
 E Shankar Mehta v. Thakur Raghuraj Singh* and *Union Carbide
 Corpn. v. Union of India*²⁵. In *Durga Shankar Mehta* case the
 Constitution Bench held that Section 105 of the Representation of
 the People Act, 1951 which gives finality to the decision of the
 Election Tribunal has the effect of giving finality so far as that Act
 is concerned and the fact that it does not provide for any further
 appeal cannot cut down, or have an overriding effect on, the
 powers which the Supreme Court can exercise by virtue of Article
 136 of the Constitution. The constitutional jurisdiction conferred
 by Article 136 cannot be limited or taken away by any legislation
 subordinate to the Constitution. This view finds support from the
 F Constitution Bench decision of this Court in *S.P. Sampath Kumar
 v. Union of India*²⁶ and the recent decision of this Court in *Surya
 Dev Rai v. Ram Chander Rai*²⁷. In *Surya Dev Rai* case this
 Court has on a review of several authorities held that any legislation
 subordinate to the Constitution cannot whittle down, much less
 take away, the jurisdiction and powers conferred on the
 G constitutional courts of the country.”

26. The aforequoted passage has to be appositely understood. The three-Judge Bench has held that any legislation subordinate to the

²⁵ (1991) 4 SCC 584 (SCC para 58)

²⁶ (1987) 1 SCC 124

H ²⁷ (2003) 6 SCC 675

Constitution cannot whittle down or take away the jurisdiction and powers conferred on the constitutional courts of the country. The decisions which we have referred to earlier deal about the maintainability of the challenge to the order of review when the main order is not assailed. The real test is even if the order passed in review is set aside, the order that is not challenged cannot be set aside. The decision in *Eastern Coalfields Limited* (supra) has been rightly opined in *Ripa Sarma*'s case, has been rendered in ignorance of the earlier judgments of co-equal strength. That apart, we are inclined to agree with the view in *Ripa Sarma* (supra) wherein it has been observed that the submission with regard to the merger of the main order with the order in review has been merely noticed in *Eastern Coalfields Limited* (supra) and not accepted. Needless to state that when the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party. The decisions pertaining to maintainability of special leave petition or for that matter appeal have to be seemly understood. Though the decisions in *Shanker Motiram Nale* (supra) the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent. In this context, we may profitably reproduce a passage from *Government of Andhra Pradesh and others v. A.P. Jaiswal and others*²⁸ wherein a three-Judge Bench has observed thus:-

“Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial

²⁸ AIR 2001 SC 499

A pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principle are based on public policy...”

B 27. In view of the aforesaid analysis, the submission of Mr. Gulati that all the subsequent judgments are *per incuriam* as they have not taken into consideration the decision rendered in ***Thungabhadra Industries Ltd.*** (supra) is not correct. Consequently, the appeal, being not maintainable, stands dismissed. There shall be no order as to costs.

Devika Gujral

Appeal dismissed.