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AN ANALYSIS OF APPEAL AND SPECIAL LEAVE PETITION BEFORE SUPREME COURT

AND THE DOCTRINE OF MERGER

1. INTRODUCTION:

Under the Income tax Act, an appeal against the order of the High Court is filed before the Hon'ble Supreme Court under section 261 of the Income tax Act. Equivalent to section 261, under the Constitution of India, Article 132 to 134A provides the appellate jurisdiction of the Supreme Court for entertaining appeals for the orders of High Court.

Generally what has been observed that against an order of the High Court, a Special Leave Petition (herein after referred as 'SLP') is filed under Article 136 of the Constitution of India instead of an appeal under section 261 of the Income tax Act r.w. Article 133 of the Constitution of India. A SLP under Article 136 is required to be filed where there are cases, where justice might require the interference of the Hon'ble Supreme Court for deciding the orders of any court or tribunal within the territory of India. Such residuary powers outside the ordinary law are provided to the Hon'ble Supreme Court under Article 136 of the Constitution of India.

2. RELEVANT PROVISIONS FOR APPEAL BEFORE HIGH COURT AND APPEAL OR SPECIAL LEAVE PETITION BEFORE SUPREME COURT UNDER INCOME TAX ACT, CIVIL PROCEDURE CODE and CONSTITUTION OF INDIA

A. PROVISIONS UNDER INCOME TAX ACT:

The relevant provisions of Income tax relating to filing an appeal against the order of the tribunal before High Court as well as High Court and Supreme Court are given in section 260A, 261 and 262 of the Income tax Act which read as under: -

Before High Court – Section 260A of the Income tax Act

260A. Appeal to High Court

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or
(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

Before Supreme Court - Section 261 of the Income tax Act

"261. Appeal to Supreme Court:

An appeal shall lie to the Supreme Court from any judgment of the High Court delivered before the establishment of the National Tax Tribunal on a reference made under section 256 against an order made under section 254 before the 1st day of October, 1998 or an appeal made to High Court in respect of an order passed under section 254 on or after that date in any case which the High Court certifies to be a fit one for appeal to the Supreme Court."

The hearing before the Hon'ble Supreme Court will be as per **section 262** of the Act which reads as under:

> ***262. Hearing before Supreme Court:***
>
> *(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 261 as they apply in the case of appeals from decrees of a High Court:*
>
> *Provided that nothing in this section shall be deemed to affect the provisions of sub-section (1) of Section 260 or section 265.*
>
> *(2) The costs of the appeal shall be in the discretion of the Supreme Court.*
>
> *(3) Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 260 in the case of a judgment of the High Court.*

B. Provisions under the Code of Civil Procedure, 1908

The Code of Civil Procedure, 1908 (Act No. 5 of 1908) is an act to consolidate and amend the laws relating to the procedure of the Courts of the Civil Judicature. Part VII of the Act from Section 96 to 112, the provisions relating to the appeals have been given. The relevant sections 100 and 109 of Civil Procedure Code in respect of disposal of appeal u/s 260A and 262 of the Income tax Act are reproduced as under: -

Section 100. Second appeal —

> *(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force,* ***an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law****.*
>
> *(2) An appeal may lie under this section from an appellate decree passed ex parte.*
>
> *(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.*
>
> *(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.*
>
> *(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:*
>
> *Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.*

This section 100 is practically similar to the provisions made under section 260A of the Income tax Act relating to the appeal before High Court. Therefore, the decisions given under section 100 of the Civil Procedure Code, 1908 will equally be applicable to the interpretation of the provisions of section 260A of the Income tax Act.

Section 109. When appeal lie to the Supreme Court

Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, **an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies** -

(i) that **the case involves a substantial question of law** of general importance; and

(ii) that **in the opinion of the High Court the said question needs to be decided by the Supreme Court**.

C. <u>Provisions under the Constitution of India</u>

Under the Constitution of India Article 132 to 134A and 136 are relating to the appeal and SLP before the Hon'ble Supreme Court. Although the provision given in section 109 are parallel to section 261 of the Income tax Act, but section 261 only required for filing appeal from the judgment of the High Court if High Court certifies it to be a fit case for appeal to the Supreme Court. However, the wording as given under section 261 of the Income tax Act do not state that the High Court should certify that the case involved a substantial question of law. For this we have to look into the relevant provisions of the Constitution of India given under Article 132 to 136 of the Constitution. The said articles are reproduced as under for ready reference:

Article 132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

(3) Where such a certificate is given any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Explanation – For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Article 133. Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under Article 134A

(a) that the case involves a substantial question of law of general importance; and
(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court

(2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Article 134. Appellate jurisdiction of Supreme Court in regard to criminal matters

(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court –

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies under Article 134A that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Article 134A. Certificate for appeal to the Supreme Court

Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of Article 132 or clause (1) of Article 133, or clause (1) of Article 134 –

(a) may, if it deems fit so to do, on its own motion; and

(b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of Article 132, or clause (1) of Article 133 or, as the case may be, sub clause (c) of clause (1) of Article 134, may be given in respect of that case.

Article 136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

3. FOR AN APPEAL BEFORE HIGH COURT AND SUPREME COURT THERE SHOULD BE A SUBSTANTIAL QUESTION OF LAW

3.1. Under section 260A of the Income tax Act, the appeal before the High Court lies against the order of the Income tax Appellate Tribunal if the High Court is satisfied that the case involves a substantial question of law. Section 261 of the Income tax Act provides that an appeal lies to the Supreme Court against the judgment of the High Court in a case which the High Court certifies to be a fit one for appeal to the Supreme Court.

3.2. Section 100 of the CPC provides that in case the appeal is to be filed before High Court, there should be a substantial question of law. While under section 109 of the CPC, an appeal before the Supreme Court lies if the High Court certifies that the case involves a substantial question of law of general importance and in the opinion of the High Court the said question needs to be decided by the Supreme Court.

3.3. Under Article 132 of the Constitution of India, an appeal shall lie to the Supreme Court in a civil, criminal or other proceedings, if the High Court certifies under article 134A that the case involves **a substantial question of law as to the interpretation of this Constitution**. Under Article 133, an appeal shall lie in a civil proceeding if the High Court certifies under Article 134A that the case involves **a substantial question of law of general importance and in the opinion of the High Court the said question needs to be decided by the Supreme Court**. Under Article 132, the matters relating to the constitutional validity are covered and under Article 133, the civil matters relating to the substantial question of law of general importance are covered. Further Article 134A requires that High Court can if it deems fit certify at its own motion and shall also certify if an oral request is made on behalf of the aggrieved party immediately after the pronouncement of the order as the case may be issue a certificate as required under Article 132(1), Article 133(1) or Article 134(1)(c) of the Constitution.

3.4. For issuing the certificate by the High Court whether it is a fit case for appeal to the High Court it is necessary that there is a substantial question of the law which need to be decided by the Supreme Court. If the question involved that of a fact, High Court need not to refer to the Supreme Court. In the case of **Bhagat Construction Co. (P) Ltd. Vs. Commissioner of Income tax [2000] 250 ITR 291 (Delhi)**, the Hon'ble Delhi High Court considering the judgments of the Hon'ble Supreme Court in the case of **Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd. 1962 AIR 1314 and Sree Meenakshi Mills Ltd. Vs. CIT [1957] 31 ITR 28**, has laid down the following tests to determine whether the question involved is one of fact or law:

> *(1) As the Tribunal is a final fact-finding authority, if it has reached certain findings upon examination of all relevant evidence and materials before it, the existence or otherwise of certain facts at issue is a question of fact.*
>
> *(2) Any inference from certain facts is also a question of fact. If a finding of fact is arrived at by the Tribunal after improperly rejecting evidence, a question of law arises.*
>
> *(3) Where a court of fact acts on materials partly relevant and partly irrelevant and it is impossible to say to what extent the mind of the adjudicating forum was affected by the irrelevant material used by it in arriving at the finding gives rise to a question of law. Such a finding is vitiated because of the use of inadmissible material.*

(4) When any finding is based on no evidence or material, it involves a question of law. In other words, if the Tribunal acts on irrelevant materials and evidence, a question of law is involved.

3.5. Usually five tests are used to determine whether a substantial question of law is involved. They are as follows:

(1) whether, directly or indirectly, it affects substantial rights of the parties, or
(2) the question is of general public importance, or
(3) whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or
(4) the issue is not free from difficulty, and
(5) it calls for a discussion for alternative view.

3.6. In the case of **Mahavir Woollen Mills Vs. CIT [2000] 245 ITR 297 (Delhi), the Hon'ble Justice Arijit Pasayat, Chief Justice of Delhi High Court** held that,

"Section 260A is analogous to the provisions of Section 100 of the Civil Procedure Code, 1908 (in short, "the Code"). Under Section 100 of the Code, a second appeal can be entertained only when a substantial question of law is involved. Such substantial question of law is required to be formulated in the memorandum of appeal. If the High Court is satisfied that a substantial question of law is involved in the case, then the court is also required to formulate that question. The appeal is required to be heard only on the question so formulated."

3.7. Recently in the case of **Pr. CIT Vs. A.A. Estate (P) Ltd. [2019] 413 ITR 438**, the **Hon'ble Apex Court** observed that in the said case, the High Court did not formulate any substantial question of law as is required to be framed under section 260A of the Act. *"The questions which are proposed by the appellant, fall under section 260A(2)(c) whereas the questions framed by the High Court fall under section 260A(3). The appeal is heard on merits only on the questions framed by the High Court under sub-section (3) of section 260-A as provided under section 260-A(4). In other words, the appeal is heard only on the questions framed by the Court. If the High Court was of the view that the appeal did not involve any substantial question of law, it should have recorded a categorical finding to that effect saying that the questions proposed by the appellant either do not arise in the case or/and are not substantial questions of law so as to attract the rigor of section 260-A for its admission and accordingly should have dismissed the appeal in limine. … It was, however, not done and instead the High Court without admitting the appeal and framing any question of law issued notice of appeal to the assessee, heard both the parties on the questions urged by the appellant and dismissed it. The respondent had a right to argue 'at the time of hearing' of the appeal that the questions framed were not involved in the appeal and this the respondent could urge by taking recourse to sub-section (5) of section 260-A. But this stage in this case did not arise because as mentioned above, the High Court neither admitted the appeal nor framed any question as required under sub-section (3) of section 260-A. The expression 'such question' referred to in sub-section (5) of section 260-A means the questions which are framed by the High Court under sub-section (3) of section 260-A at the time of admission of the appeal and not the one proposed in section 260-A(2)(c) by the appellant."* Thus, the Hon'ble Supreme Court remanded the case to the High Court for deciding the appeal afresh to answer the questions framed in accordance with the law.

3.8. In the case **Sheel Chand Vs. Prakash Chand [1998] 6 SCC 683**, the Hon'ble Supreme Court relied on the judgment of the Hon'ble Apex Court in the case of **Kahitish Chandra Purakait Vs. Santosh Kumar Purkaji and Others [1997] 5 SCC 438**, wherein it was held that

> *"(a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; and (b) that in (exceptional) cases, at a later point of time, when the Court exercises its jurisdiction under the proviso to sub-section(5) of Section 100 CPC in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 CPC should always be borne in mind."*

3.9. Similar view is taken by the Hon'ble Supreme Court in the case of **Wyawahare & Sons and Others Vs. Madhukar Raghunath Bhave [2007] 2007 (9) SCC 614** that under section 100 of CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. Reference is also made to the judgment of the Hon'ble Supreme Court in the case of **Raghavendra Swamy Mutt vs Uttaradi Mutt [2016] 11 SCC 235**.

3.10. In the case of **CIT Vs. Rashtradoot (HUF) [2019] 412 ITR 17**, the Hon'ble Supreme Court held that,

> *"The High Court also has the jurisdiction to dismiss the appeal by answering the question(s) framed on merits or by dismissing the appeal on the ground that the question(s) though framed but such question(s) does/do not arise in the appeal. The High Court, though may not have framed any particular question at the time of admitting the appeal along with other question, yet it has the jurisdiction to frame additional question at a later stage before final hearing of the appeal by assigning reasons as provided in proviso to section 260A(4) and section 260A(5) of the Act and lastly, the High Court has jurisdiction to allow the appeal but this the High Court can do only after framing the substantial question(s) of law and hearing the respondent by answering the question(s) framed in appellant's favour.*
>
> *However, in this case, the High Court did not dismiss the appeal in limine but has dismissed it after hearing both the parties, in such a situation,* ***the High Court should have framed the question(s) and answered them by assigning the reasons accordingly one way or the other by exercising powers under sub-sections (4) and (5) of section 260A of the Act."***

3.11. In view of the aforesaid decisions, it is apparent that formulation of a substantial question of law is essential by the Hon'ble High Court before deciding the appeal. Without deciding the substantial question of law, no appeal can be heard by the Hon'ble High Court as well as by the Hon'ble Supreme Court. Thus, before any appeal to be considered as lies before the High Court and Supreme Court, it is necessary that there should be a substantial question of law which has to be decided by the High Court

first. Without framing substantial question of law, the High Court does not have valid jurisdiction for entertaining the appeal under section 260A of the Income tax Act. Similar is the position in respect of the appeal to be filed before the Hon'ble Supreme Court as per the provisions of section 261 and 262 of the Income tax Act r.w. Article 132, 133, 134A and 136 of the Constitution of India.

4. DOCTRINE OF MERGER:

4.1. Article 141 of the Constitution of India provides that *"the law declared by the Supreme Court shall be binding on all courts within the territory of India"*. An issue which has been decided by the Hon'ble Supreme Court will be binding on all the courts in India. An order which is the subject matter of appeal, in appeal if decided by the Hon'ble Apex Court, the order against which appeal was made is merged with the order of the Hon'ble Supreme Court.

4.2. The juristic justification of the 'doctrine of merger' may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eyes of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. The juristic justification of the doctrine of merger may be sought in principle that there cannot be, at one and the same time, more than one operative order governing the same issue.

4.3. The doctrine of merger is not a doctrine of rigid and universal application. The application of the doctrine of merger depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. In the case of **State of Madras v. Madurai Mills Co. Ltd. AIR 1967 SC 681**, the Hon'ble Apex Court observed that,

> *"the doctrine of merger was not a doctrine of rigid and universal application. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or the revisional jurisdiction. Basically, therefore, unless the appellate authority has applied its mind to the original order or any issue arising in appeal while passing the appellate order, one should be careful in applying the doctrine of merger to the appellate order."*

4.4. The **Hon'ble Delhi High Court in the case of CIT Vs. Uttam Chand Jain [2000] 245 ITR 838 [07.07.2000]** summed up the principles relating to the doctrine of merger as culled up from various judgments as under: -

(i) The application of the doctrine of merger cannot be rendered inapplicable by drawing a distinction between an application for revision or appeal;

(ii) The application of the doctrine of merger depends on the nature of the appellate or revisional order in each case and on the scope of the statutory provisions conferring the appellate or the revisional jurisdiction. The doctrine of merger is not a doctrine of rigid and universal application. Whether there is fusion or merger of the order of the inferior Tribunal into an order by the superior Tribunal shall have to be determined by finding out the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

(iii) Ordinarily, ad-judgment pronounced in appellate or revisional jurisdiction after issuing a notice of hearing to both the parties would replace the judgment of the lower court, thus, constituting the appellate or revisional judgment as the only final judgment.

(iv) The doctrine of merger does not apply when an appeal is dismissed (i) for default, (ii) as having abated by reason of the omission of the appellant to implead the legal representatives of the deceased respondent, (iii) as barred by limitation.

(v) An appeal dismissed in limine on the ground of the bar of limitation may still be an order in appeal for the purpose of determining whether a right of further appeal would be available or not, but that does not amount to saying that the order appealed against merges into the appellate order dismissing the appeal in limine as barred by time.

4.5. In the case of **Kunhayammedv. State of Kerala [2000] 245 ITR 360 (SC)**, the Hon'ble Supreme Court explained the 'Doctrine of Merger' and held that "*the doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised.* ***It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system.*** *On more occasions than one this Court had an opportunity of dealing with the doctrine of merger."*

5. APPEAL UNDER ARTICLE 133 OF THE CONSTITUTION OF INDIA:

5.1. Where there is an order passed by the Hon'ble High Court, an appeal can be filed under Article 133 of the Constitution against the said order. Article 133 allows appeal from any judgment, decree or final order in civil proceedings subject to a certificate issued by the Hon'ble High Court under Article 134A of the Constitution.

5.2. Here it is to state that where there is a writ petition filed before the Hon'ble High Court under article 226 of the Constitution and disposed of by the Hon'ble High Court, the order of the High Court in writ petition cannot be termed to be judgment in civil proceedings within the meaning of article 133 and therefore certificate under article 134A cannot be granted. In that case, the only course of action available with the assessee be to file a SLP under Article 136 of the Constitution. Reliance is placed in the case of **First Additional Income tax Officer Vs. R. Shanmugha Rajeswara Sethupathi [1963] 48 ITR 647 (Mad.)**. A writ application seeking to quash an assessment order or to issue a writ of prohibition against the taxing authorities cannot come within the scope of the expression 'civil proceedings' as used in article 133 of the Constitution. Article 226 confers powers upon all the High Courts to issue directions, orders or writs for the enforcement of fundamental rights and for any other purposes. In the case of Hajee Suleman v. Custodian, Evacuee Property, (S) AIR 1955 Madh B 108 (Z-3) an order on a petition under Article 226 was held to be not subject to review. When an application for a certificate is made to a High Court, all that it has to decide is whether the facts to be certified-exist or have been established.

5.3. The Hon'ble Andhra Pradesh High Court in the case of **ITO Vs. Maramreddy Sulochanamma [1967] 65 ITR 474 (Andhra Pradesh)** held that, the test *"whether a certain order is final within the meaning of that article is whether that order finally disposed of the rights of the parties covered by the proceeding. The proceedings as started by the ITO was for bringing to tax the amounts which had escaped assessment. All that had been declared in the writ proceedings was that the notices as issued were bad. The question of right to bring to tax or the liability of the assessee had not been*

adjudicated upon under this order. This order of its own force did not affect the merits of the case between the parties by determining any right and liability. It was not an order finally deciding the rights and liability of the parties involved in or forming the subject matter of the Income-tax proceeding. Hence it was not a final order within the meaning of article 133. The nature of the order cannot be affected by reason of any supervening events or any bar created by the statute of limitation. If the order by its own force does not affect the rights and liabilities of the parties involved in the proceedings or finally determine them, it was not a final order within the meaning of article 133 of the constitution."

5.4. Reference is also made on the judgment of the **Hon'ble Apex Court in the case of Seth Premchand Satramdas Vs. State of Bihar [1951] 19 ITR 108 (SC)** wherein the Hon'ble Court held that,

> *"In order to attract the provisions of this clause, it is necessary to show, firstly, that the order under appeal is a final order; and secondly that it was passed in the exercise of the original or appellate jurisdiction of the High Court. The second requirement clearly follows from the concluding part of the clause. It seems to us that the order appealed against in this case, cannot be regarded as a final order, because it does not of its own force bind or affect the rights of the parties. All that the High Court is required to do under Section 21 of the Bihar Sales Tax Act is to decide the question of law raised and send a copy of its judgment to the Board of Revenue. The Board of Revenue then has to dispose of the case in the light of the judgment of the High Court. It is true that the Board's order is based on what is stated by the High Court to be the correct legal position, but the fact remains that the order of the High Court standing by itself does not affect the rights of the parties and the final order in the matter is the order which is passed ultimately by the Board of Revenue."*

5.5. In such cases, where the certificate cannot be issued under Article 134A of the Constitution, the appeal cannot be filed under Article 133 and in such cases, the option available to the persons is to file a SLP before the Hon'ble Apex Court under Article 136 of the Constitution.

6. SPECIAL LEAVE PETITION BEFORE THE HON'BLE SUPREME COURT UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA:

6.1. Under the Constitution of India, the Hon'ble Supreme Court has been given discretionary powers under Article 136. It may in its discretion grant special leave to appeal from any judgment, decree or order in any matter or cause made or passed by any court or tribunal in the territory of India. It may also refuse to grant the leave to appeal. It is not a right to the aggrieved party but a privilege which the Hon'ble Supreme Court of India is vested. Under this Article an aggrieved party may approach the Hon'ble Apex Court in case of any civil or criminal matter for constitutional or legal issue.

6.2. In the case of **Pritam Singh Vs. The State 1950 AIR 169 (SC)**, the Hon'ble Supreme Court explained the scope of Article 136 as under,

> *"The points to be noted in regard to this article are firstly, that it is very general and is not confined merely to criminal cases, as is evident from the words "appeal from any judgment, decree, sentence or order" which occur therein and which obviously cover a wide range of matters; secondly, that the words used in this article are "in any cause or matter," while those*

used in articles 132 to 134 are "civil, criminal or other proceeding," and thirdly, that while in articles 132 to 134 reference is made to appeals from the High Courts, under this article, an appeal will lie from any court or tribunal in the territory of India. On a careful examination of article 136 along with the preceding article, it seems clear that the wide discretion- ary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases. The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist….. Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

6.3. Similarly in the case of **N. Suriyakala Vs. A Mohandoss & Others [2007] 9 SCC 196 [12.02.1997]**, the Hon'ble Supreme Court laid down that,

The use of the words "in its discretion" in Article 136 clearly indicates that Article 136 does not confer a right of appeal upon any party but merely vests a discretion in the Supreme Court to interfere in exceptional cases. Under Article 136 it was not bound to set aside an order even if it was not in conformity with law, since the power under Article 136 was discretionary.

6.4. In the case of **Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai AIR 2004 SC 1815**, the Hon'ble Supreme Court held that,

The discretionary power of the Supreme Court is plenary in the sense that there are no words in Article 136 itself qualifying that power. The very conferment of the discretionary power defies any attempt at exhaustive definition of such power. The power is permitted to be invoked not in a routine fashion but in very exceptional circumstances as ***when a question of law of general public importance arises or a decision sought to be impugned before the Supreme Court shocks the conscience.*** *This overriding and exceptional power has been vested in the Supreme Court to be exercised sparingly and only in furtherance of the cause of justice in the Supreme Court in exceptional cases only when special circumstances are shown to exist.*

It is well settled that Article 136 of the Constitution does not confer a right to appeal on any party; it confers a discretionary power on the Supreme Court to interfere in suitable cases. Article 136 cannot be read as conferring a right on anyone to prefer an appeal to this Court; it only confers a right on a party to file an application seeking leave to appeal and a discretion on the Court to grant or not to grant such leave in its wisdom. When no law confers a statutory right to appeal on a party, Article 136 cannot be called in aid to spell out such a right. The Supreme Court would not under Article 136 constitute itself into a tribunal or court just settling disputes and reduce itself to a mere court of error. The power under Article 136 is an extraordinary power to be exercised in rare and exceptional cases and on well-known principles.

6.5. The Hon'ble Supreme Court in the case of **Ashok Nagar Welfare Association Vs. R.K. Sharma AIR 2002 SC 335** considered the issue of filing of SLP against all kinds of orders without realizing the scope of Article 136 and held that,

> *Even in cases where special leave is granted, the discretionary power vested in the Court continues to remain with the Court even at the stage when the appeal comes up for hearing.* ***Nowadays it has become a practice of filing SLPs against all kinds of orders of the High Court or other authorities without realizing the scope of Article 136. Hence we feel it incumbent on us to reiterate that Article 136 was never meant to be an ordinary forum of appeal at all like Section 96 or even Section 100 CPC.*** *Under the constitutional scheme, ordinarily the last court in the country in ordinary cases was meant to be the High Court. The Supreme Court as the Apex Court in the country was meant to deal with important issues like constitutional questions, questions of law of general importance or where grave injustice had been done. If the Supreme Court entertains all and sundry kinds of cases it will soon be flooded with a huge amount of backlog and will not be able to deal with important questions relating to the Constitution or the law or where grave injustice has been done, for which it was really meant under the Constitutional Scheme. After all, the Supreme Court has limited time at its disposal and it cannot be expected to hear every kind of dispute.*

Thus, a SLP is a special discretion given by the Constitution of India to the Hon'ble Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order. An appeal under Article 133 is different from Article 136 of the Constitution.

7. DOCTRINE OF MERGER IN CASE OF APPEAL UNDER ARTICLE 133 AND IN CASE OF SLP UNDER ARTICLE 136:

7.1. In the recent judgment of the Hon'ble Supreme Court in the case of **Khoday Distilleries Ltd. Vs. Mahadeshwara Sahakara Sakkare Karkhane Ltd. [2019] 262 Taxman 279 (SC)**, the Hon'ble Supreme Court examined the doctrine of merger in great details where a SLP is rejected or accepted and also referred the judgment in the case of **V. A. Salgoacar & Bros. (P) Ltd. Vs. CIT [2000] 243 ITR 383 (SC)** in respect of appeal filed under Article 133 of the Constitution. On the basis of the decision of Supreme Court in the case of **V.A. Salgaocar & Bros. (P) Ltd Vs. CIT (supra)**, the doctrine of merger has a different role in case of dismissal of the appeal filed under Article 133 and SLP filed under Article 136 when they are being dismissed by a non-speaking order that *"Different considerations apply when a special leave petition under article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case, it has been laid down by the Supreme Court that when special leave petition is dismissed, it does not comment on the correctness or otherwise of the order from which leave to appeal is sought. That certainly could not be so when appeal is dismissed though by a non- speaking order. Here the doctrine of merger applies."*

7.2. **The facts of the said case are as under: -**

The respondent Mr. Mahadeshwara Sahakara Sakkare Karkhane filed a money suit before the Additional City Civil Judge which was dismissed by the City Civil Judge as barred by limitation. The respondent filed an appeal against the said order before the High Court. The Hon'ble High Court allowed the appeal of the respondent and passed a decree order. Against the said judgment, the appellant Khoday Distilleries Limited filed a Special Leave Petition (hereinafter referred as 'SLP')

before the Hon'ble Supreme Court which was dismissed by the Hon'ble Supreme Court stating that *"Delay Condoned. Special Leave Petition is dismissed"*. The appellant went back to the High Court seeking review of the judgment given by the High Court earlier against which SLP was filed. The Hon'ble High Court dismissed the review petition filed by the appellant on the ground that the Hon'ble Apex Court already dismissed the SLP and therefore, the order of the High Court cannot be reviewed. The observations of the Hon'ble High Court were as under:

> *"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."*

This review order was challenged by the appellant before the Hon'ble Supreme Court on the ground that when the SLP was dismissed *in limine* by not a speaking order, the order of High Court does not amount to merger with the order of Supreme Court in SLP.

7.3. <u>Question before the Hon'ble Supreme Court:</u>

Whether review petition is maintainable before the High Court seeking review of a judgment against which the special leave petition has been dismissed by this court?

In other words, the question is whether after the rejection of SLP which was filed under Article 136 of the Constitution of India, the order of the High Court against which the SLP was filed got merged with the order given by the Hon'ble Supreme Court in the SLP? Whether where the SLP is dismissed in limine (without any discussion at all), the speaking order given by the High Court will be merged with the said SLP order of the Hon'ble Supreme Court?

7.4. <u>Two Case laws discussed by the Hon'ble Supreme Court in the said judgment:</u>

The Hon'ble Supreme Court in the judgment considered mainly the following two case laws and considered the finding given by the Hon'ble Courts in detail: -

(A) <u>Abbai Maligai Partnership Firm Vs K. Santhakumaran: [1998] 7 SCC 386 (Relied on by the Respondent) – three judge bench decision [09.09.1998]</u>

(i) In the said case, against the order of the High Court, a SLP was filed which was dismissed by the Hon'ble Supreme Court. After the dismissal of the SLP, the respondent filed review petitions in the High Court seeking review of the order of the High Court against which SLP was filed. The Hon'ble Single Judge Bench of High Court reversed the orders made in civil revision petitions. Aggrieved, the appellant filed the review petition before the Hon'ble Apex Court against the review order of the High Court. **The Hon'ble Three Judges Bench held that,**

> *"The High Court was aware that SLPs against the orders had already been dismissed by this court. This High Court, therefore, had no power or jurisdiction to review the self-made order, which was the subject matter of challenge in the SLPs in this court after the challenge had failed. By passing the impugned order, the 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."*

(B) <u>Kunhayammedv. State of Kerala [2000] 245 ITR 360 (SC) 19.07.2000</u>

In the said case, 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. There against 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. The contention of the petitioner was,

> (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.

The Hon’ble three Judges Apex Court Bench held that,

> *A petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by article 136, are two clearly distinct stages. 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.***
>
> *(3) If leave to appeal is granted, the appellate jurisdiction of the Court stands invoked; the gate for entry in 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.*
>
> ***(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, 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 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.

A petition for leave to appeal to the Supreme Court may be dismissed by a non-speaking order or by a speaking order. *Whatever be the phraseology employed in the order of dismissal,* ***if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under article 141 of the Constitution for there is no law which has been declared.*** *If the order of dismissal be supported by reasons, then also the doctrine of merger would not be attracted because the jurisdiction exercised is not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal Still the reasons stated by the Court would attract applicability of article 141, if there is a law declared by the Supreme Court which obviously would be binding on all the Courts and Tribunals in India and certainly the parties thereto. The statement contained in the order, other than on points of law, would be binding on the parties and the Court or Tribunal, whose order was under challenge on the principle of judicial discipline, the Supreme Court being the Apex Court of the country. No Court or Tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by the Supreme Court. The order of the Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave.* ***The declaration of law will be governed by article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply.*** *The Court sometimes leaves the question of law open. Or, it sometimes briefly lays down the principle, maybe, contrary to the one laid down by the High Court and yet would dismiss the special leave petition.* ***The reasons given are intended for purposes of article 141.*** *This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.*

The doctrine of merger and the right of review are concepts which are closely inter-linked. ***If the judgment of the High Court has come up to the Supreme Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of the Supreme Court. In that event, it is not permissible to move the High Court for review because the judgment of the High Court has merged with the judgment of the Supreme Court. But where the special leave petition is dismissed—there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it.*** *It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review, deals with a review application on merits. In a case where the High Court's order has not merged with an order passed by the Supreme Court after the grant of special leave, the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it…..*

The expressions often employed by the Supreme Court while disposing of such petitions are—'heard and dismissed', 'dismissed', 'dismissed as barred by time' and so on. Maybe 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 merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say 'dismissed on merits'. Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. Neither doctrine of merger nor article 141 is attracted to such an order.

'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; and absorption or swallowing up so as to involve a loss of identity and individuality. [See Corpus Juris Secundum VoL LVII,pp. 1067-1068].

To sum up, the conclusions were:

(i) Where an appeal or revision is provided against an order passed by a Court, Tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by article 136 is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under article 136, 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. 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 merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in the subsequent proceedings between the parties.

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

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

7.5. **Judgment delivered by the Hon'ble Apex Court in the case of Khoday Distilleries (supra):**

After considering mainly these two cases, the Hon'ble Apex Court held that "*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 Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

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

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

(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.

On the basis of the said observation, the Hon'ble Supreme Court held in the instant case that,

"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…"

7.6. <u>Observation and Comments on the Judgment of Khoday Distilleries:</u>

(A) <u>Under Article 136 – Special Leave Petition</u>

There are three circumstances which have been considered by the Hon'ble Apex Court while disposing of the appeal in the case of Khoday Distilleries (supra).

1. Dismissal at the stage of special leave petition – without reasons – no res judicata, no merger
2. Dismissal of the special leave petition by speaking or reasoned order – no merger, but rule of discipline and Article 141 attracted
3. Leave granted – dismissal without reasons – merger results

1. <u>Dismissal at stage of special leave without reasons - no res judicata, no merger</u>

(i) While hearing the SLP, the Hon'ble Supreme Court is called upon to see whether the petitioner should be granted leave or not. In such cases, the Hon'ble Court merely exercises its discretionary powers to grant or not to grant leave to the appeal. In the words of the Hon'ble Supreme Court in the case of **Kunhayammedv. State of Kerala (supra),** the petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. In such case, if the SLP is dismissed without giving any reasons for dismissal *in limine*, the rule of res judicata and the doctrine of merger will not be applicable.

(ii) In the case of **Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust and Another 1978 AIR 1283**, the Hon'ble Three Judges Bench held that,

"The effect of non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must by necessary implication be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award

were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order it is difficult to accept the argument that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award."

The dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted."

(iii) The Hon'ble Supreme Court in case of **Indian Oil Corporation Ltd Vs. State of Bihar and Others AIR 1986 SC 1780** held that *"when the order passed by this court was not a speaking one, it is not correct to assume that this court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this court in the Special Leave Petition…. The dismissal of a special leave petition in limine by a non-speaking order does not therefore justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by this Court."*

(iv) In **Yogendra Narayan Chowdhary and Others Vs. Union of India and Others 1996 AIR 751 [30.11.1995]**, the Apex Court held that "the dismissal of Special Leave Petition in limine without assigning reasons does not operate as res judicata."

(v) In the case of **Sree Narayana Dharmasanghom Trust v. Swami Prakasananda 1997 (6) SCC 78**, the Hon'ble Supreme Court held that *"a revisional order of the High Court against which a petition for special leave to appeal was dismissed in limine could not have been reviewed by the High Court subsequent to dismissal of special leave petition by the Supreme Court."* The Hon'ble Three Judges Bench of Supreme Court decided against the said judgment in the case of **Kunhayammed Vs. State of Kerala (supra)** that *"in our opinion, the order is final in the sense that once a special leave petition is dismissed, whether by a speaking or nonspeaking order or whether in limine or on contest, second special leave petition would not lie. However, this statement cannot be stretched and applied to hold that such an order attracts applicability of the doctrine of merger and excludes the jurisdiction of the Court or authority passing the order to review the same."*

2. <u>Dismissal of the special leave petition by speaking or reasoned order – no merger, but rule of discipline and Article 141 attracted</u>

(i) Where there is a SLP discussed the rule of merger does not apply as the jurisdiction exercised is not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. The Hon'ble Apex Court in the case of **Kunhayammed v. State of Kerala** held that,

"A petition for leave to appeal to the Supreme Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for

dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under article 141 of the Constitution for there is no law which has been declared. *If the order of dismissal be supported by reasons, then also the doctrine of merger would not be attracted because the jurisdiction exercised is not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal.* Still **the reasons stated by the Court would attract applicability of article 141, if there is a law declared by the Supreme Court** which obviously would be binding on all the Courts and Tribunals in India and certainly the parties thereto.

(ii) The said view is also supported by the **Hon'ble Apex Court** in the case of **Khoday Distilleries Ltd (Supra)** wherein the following the above judgment in the case of **Kunhayammed v. State of Kerala (supra), held that,**

> *"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."*

(iii) In the case of **Employees Welfare Association Vs. Union of India and Another 1989 (4) SCC 187**, the Hon'ble Supreme Court held that *"when Supreme Court gives reasons while dismissing a special leave petition under Article 136 the decision becomes one which attracts Article 141."*

3. Leave granted – dismissal without reasons – merger results:

(i) If the leave to appeal is granted, the appellate jurisdiction of the courts stands invoked. The gate for entry in 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 noting the respondent.

(ii) 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 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**.

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

(B) Under Appeal under Article 133:

1. An appeal is filed before the Hon'ble Supreme Court under Article 133 of the Constitution of India. Where an appeal is filed and the said appeal is either dismissed in limine, it will be considered as the issue in the appeal is decided by the Hon'ble Supreme Court and the order of the High Court or the tribunal merges into the said appeal. The doctrine of merger applies. In the case of **V. M. Salgaokar & Bros. (P) Ltd. Vs. Commissioner of Income tax [2000] 243 ITR 383 (SC)**, the Hon'ble Supreme Court laid down that,

> *"Different considerations apply when a special leave petition under article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case, it has been laid down by the Supreme Court that when special leave petition is dismissed, it does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under article 136. That certainly could not be so when appeal is dismissed though by a non- speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upheld the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of article 133.* ***This doctrine of merger does not apply in the case of dismissal of special leave petition under article 136. When appeal is dismissed, the order of the High Court is merged with that of the Supreme Court."***

2. The said judgment has been considered by the Hon'ble Supreme Court in the case of **Khoday Distilleries Ltd (Supra)** as well as in the case of **Kunhayammed v. State of Kerala.** Though in both the cases SLP was filed under Article 136 of the Constitution, but in case of an appeal, the Hon'ble Supreme Court in the case of **Kunhayammed v. State of Kerala** held that,

> *"Para 18. We may refer to a recent decision, by two-Judges Bench, of this Court in V.M. Salgaocar & Bros. (P.) Ltd. v. CIT [2000] 160 CTR (SC) 225 holding that* ***when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under article 136. That certainly could not be so when appeal is dismissed though by a non-speaking order.*** *Here the doctrine of merger*

applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of special leave petition under article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court."

3. Therefore, in case of an appeal under Article 133, even though the said appeal is dismissed by a single word, the order against which the said appeal is filed gets merged into the order of the Hon'ble Supreme Court. 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 the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of rule (1) of order 47 of the Code. The doctrine of merger applies.

8. CONCLUSION:

Generally, it is observed that SLPs are filed by the assessee as well as the revenue against the order of the Hon'ble High Court before the Supreme Court under Article 136 of the Constitution of India. Where in case SLP is filed under Article 136 and the leave is granted but the SLP is dismissed, there is a merger of the order of High Court with the order of Hon'ble Supreme Court. In case, the Hon'ble Supreme Court does not grant leave but dismisses SLP by a speaking or non-speaking order, the order of the High Court against which the SLP is filed, does not get merged with the order of the Hon'ble Supreme Court. However, in case where there is an appeal which is filed under Article 133 of the Constitution r.w.s. 261 of the Income tax Act, even the dismissal of the appeal by a non-speaking order by the Hon'ble Supreme Court, the order of the High Court gets merged with the order of Supreme court and it is considered that the issue has been considered by the Hon'ble Supreme Court and decided it. Therefore, it will be binding under Article 141 of the Constitution. In view of the dictum of the law pronounced by the Supreme Court from time to time, it is suggested that where there is a substantial question of the law, the appeal should be filed under Article 133 instead of SLP because in case the appeal is filed under Article 133 and the appeal is dismissed by a non-speaking order, the order of the High Court will get merged with the order of the Supreme Court. In that case it will be the law binding under Article 141 as the order of the High Court will get merged with the order of the Supreme Court in respect of that question of law. This in our view will reduce the litigation as well as filing of the various SLPs before the Supreme Court on the same question of law. In this Article we have discussed the provisions of section 260, 260A and 261 keeping in view that till date National Tax Tribunal has not been established. We are not considering the provisions which were prior to the insertion of section 260A, 260B, 261 and 262 by the Finance Act, 1998.