BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Review Petition No. 6 of 2009**
**In**
**Appeal No. 14 of 2009**

**Date of decision: 19.3.2010**

Shankar Sharma
Ratnam Square, Plot No. 38/39,
Section 19A, Vashi,
Navi Mumbai. …Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A,
G-Block, Bandra Kurla Complex,
Bandra (East), Mumbai. …Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Ankit Lohia, Mr. Ravichandra S. Hegde and Mr. Vishal Khanavkar, Advocates for the Appellant.

Mr. Darius Khambata, Additional Solicitor General with Ms. Daya Gupta and Ms. Chloris John, Advocates for the Respondent.

Coram : Justice N. K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N. K. Sodhi, Presiding Officer

Whether this Tribunal can exercise power of review after the appeal filed in the Supreme Court against the order sought to be reviewed has been dismissed is the primary question that arises for our consideration in this review petition. This petition was filed on 24.11.2009 under section 15U(2)(e) of the Securities and Exchange Board of India Act, 1992 (for short the Act) seeking review of our order dated 28.10.2009 dismissing Appeal no. 14 of 2009 by which the order dated 13.2.2009 passed by the Securities and Exchange Board of India (for short the Board) prohibiting the appellant from accessing the securities market for a period of

one year was upheld. When we pronounced the order in the main appeal, the learned counsel for the appellant made an oral prayer that our order be kept in abeyance as the appellant wanted to file a statutory appeal in the Supreme Court. We issued notice of the oral application to the Board for 3.11.2009 and directed that "Till then, our order shall not be given effect to". On 3.11.2009 we heard the counsel for the parties and accepted the prayer made by the applicant and our order dated 28.10.2009 was kept in abeyance till 30.11.2009 to enable the applicant to file an appeal in the Supreme Court. The review application could not be taken up for hearing for one reason or the other and the stay order was being extended from time to time.

2. The applicant filed on 9.12.2009 an appeal in the Supreme Court under section 15 Z of the Act when the review petition was pending before this Tribunal. That appeal came to be numbered as Civil Appeal no. 37 of 2010 and upon hearing counsel for the parties, the learned Judges of the Supreme Court dismissed the same on 1.2.2010 with the following order:

"The civil appeal is dismissed".

3. The review petition came up for hearing on 11.12.2009 and after hearing both the sides, the Board was granted three weeks time to file a short reply to the review petition. The case was then adjourned to 15.1.2010. It could not be taken up on that date and the case was adjourned to 27.1.2010. In the meantime, the Board filed its reply on 8.1.2010. The applicant then filed a rejoinder on 3.2.2010 by which time his appeal in the Supreme Court had already been dismissed. He did not disclose this fact in the rejoinder. In fact, when the review petition was partly heard on 11.12.2009, he did not inform us that he had filed an appeal in the Supreme Court and instead we were informed that the applicant had been advised to first get the errors of fact rectified which, according to him, had crept into our order of 28.10.2009 before the Supreme Court could consider the appeal. The review petition was being adjourned from time to time and the stay already granted was being extended. It was on 11.2.2010 that the Board filed Misc. Application no.15 of 2010 in the review petition brining to our notice that Civil Appeal no. 37 of 2010 filed by

the applicant against our order had been dismissed on 1.2.2010. The prayer made in the application is that the review petition be dismissed. We have heard the review petition as well as the application filed by the Board.

4. The learned senior counsel appearing for the Board very strenuously argued that since the Supreme Court has dismissed the civil appeal filed by the applicant on merits, the order of this Tribunal stood merged with the order of the Supreme Court and, therefore, the Tribunal has lost the jurisdiction to decide the review petition. He relied upon two judgments of the Supreme Court in Kunhayammed and Others vs State of Kerala and Another (2000) 6 SCC 359 and also on Thungabhadra Industries Ltd. vs Govt. of A.P., AIR 1964 SC 1372 in support of his contention. Shri. Janak Dwarkadas learned senior counsel appearing for the applicant, on the other hand, was equally emphatic in contending that having regard to the nature of the appeal that is heard by the Supreme Court under section 15 Z of the Act which lies only on a question of law, the doctrine of merger does not apply and that even though the appeal filed by the applicant had been dismissed, it was open to this Tribunal to hear and decide the review petition on merits. He placed strong reliance on conclusion (iii) in para 44 of the judgment in Kunhayammed's case (supra) which is reproduced hereunder for ease of reference:

> "(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter."

Having given our thoughtful consideration to the rival submissions made by the learned senior counsel on both sides, we are clearly of the view that since the appeal in the Supreme Court has been dismissed we have no jurisdiction now to decide the review petition on merits and that this issue is squarely covered against the applicant

by the law laid down in Kunhayammed's case (supra). The order passed by this Tribunal now stands merged in the order of the Supreme Court dismissing the appeal. The learned Judges have discussed the logic underlying the doctrine of merger in detail and observed in para 12 of the judgment as under:

> "12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way – whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

Again in para 34 of this judgment their Lordships have clearly held that where the Supreme Court disposes of an appeal with or without reasons, by affirmance or otherwise, the judgment of the High Court would merge with that of the Supreme Court and it would not be permissible for the High Court to review its order. We have only to substitute the word Tribunal for the words High Court and the observations made in the judgment aptly apply as if they were made in the context of this case. We also rely on the following two conclusions arrived at by the Supreme Court in para 44 which, in our opinion, clinch the issue:

> "(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."

There is no denying the fact that the Supreme Court exercises its appellate jurisdiction while dealing with an appeal under section 15 Z of the Act even though it lies only on a question of law. The jurisdiction which the Supreme Court exercises while dealing with an appeal under this provision is not akin to the jurisdiction that it exercises under Article 136 of the Constitution while dealing with a petition seeking leave to appeal. The observations on which the learned senior counsel for the applicant is relying were made in the context of Article 136 of the Constitution. Be that as it may, it cannot be disputed that while hearing an appeal under section 15 Z of the Act against an order of this Tribunal, the Supreme Court can reverse, modify or affirm the order of the Tribunal which is not the case when it deals with a petition under Article 136 of the Constitution. This being so, conclusion (iii) arrived at by the learned Judges in Kunhayammed's case (supra) in para 44 and reproduced hereinabove also supports the view that we are taking.

5. We may also mention in passing that the applicant is seeking review of our order dated 28.10.2009 on the ground that it proceeds on the erroneous ground that the transactions / trades which formed the subject matter of the show cause notice of March, 2008 were different from the transactions which were the basis of the show cause notice of March, 2004. According to the applicant, the two sets of transactions were the same. It is averred that this error is apparent on the face of the record and deserves to be set right. It is on this basis that his learned counsel argued during the course of the appeal that no action could be taken on the basis of the show cause notice of March, 2008 on the principles of res judicata. Another ground on which review has been sought is that the Tribunal failed to notice in its order the plea of res judicata which was argued at the time of hearing of the appeal. These very grounds had been taken by the applicant in his appeal before the Supreme Court and their Lordships did not agree with him and dismissed the appeal. This apart, it is the appellant's own case in his reply to the show cause notice of March, 2008 on the basis of which action has been taken against him that the transactions in the two show cause notices were "completely different". The plea of res judicata was taken on the basis that the sets of transactions referred to in the two show cause notices

were the same. Since we held to the contrary, the plea of res judicata paled into insignificance.

6. Before concluding, we cannot but deprecate the conduct of the applicant on whose prayer we had stayed the operation of our order on 28.10.2009 in not informing us about the dismissal of his appeal in the Supreme Court when he filed his rejoinder on 3.2.2010 before the Tribunal. It is obvious that his intention was to keep us in the dark and enjoy the benefit of the stay for as long as he could and he succeeded till the final hearing of the review petition. As already observed, the fact of the dismissal of the appeal was brought to our notice only by the Board when it filed Misc. Application no.15 of 2010 for the dismissal of the review petition.

In the result, the question posed in the opening part of our order is answered in the negative and the review petition dismissed. After we pronounced the order in the court, the learned senior counsel appearing for the applicant made a prayer that the interim stay granted earlier may be allowed to continue for some more time. Having regard to the fact that we have no power to decide the review petition, the prayer is declined. It goes without saying that the interim order granted earlier stands vacated.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

19.3.2010
Prepared and compared by:
msb/-