M/S. Gojer Bros. (Pvt.) Ltd.

Vs

Shri Ratan Lal Singh

Civil Appeal No. 128(N) of 1972

(Y. V. Chandrachud, P. K. Goswami, R. S. Sarkaria JJ)

01.05.1974

JUDGMENT

CHANDRACHUD, J. -

1. In this appeal by special leave from the judgment of a learned single Judge of the High Court of Calcutta, two questions are raised for our consideration on behalf of the appellants who have obtained against the respondent a decree for eviction : (1) Whether the decree of the trial Court has merged in the decree of the High Court and (2) whether by reason of Section 17-D of the West Bengal Premises Tenancy Act, 1956 the decree for eviction is incapable of execution.

2. Long, long back on May 19, 1953 Messrs. Hind Estate Private Ltd., the predecessors-in-title of the appellants, filed against the respondent a suit for eviction on the ground of non-payment of rent. On November 24, 1958 the learned Second Munsif, at Alipore, passed a decree for possession in favour of the plaintiffs holding that by reason of defaults in the payment of rent, the respondent was not entitled to the protection of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. That decree was confirmed in appeal by the learned Subordinate Judge, Fourth Court, Alipore, on April 12, 1967. During the pendency of the appeal, the appellants had purchased the right, title and interest of the plaintiffs in the suit premises and they had also obtained an assignment of the decretal rights in their favour. They were therefore brought on the record of the appeal in place of the original plaintiffs. The respondent filed Second Appeal No. 1255 of 1967 against the decree of the first of the appellate Court and that appeal, after a contested hearing, was dismissed by a Division Bench of the High Court of Calcutta on January 8, 1969. While dismissing the appeal, the High Court granted to the respondent time to vacate the suit premises till the end of January, 1970 on the respondent giving a written undertaking to the Court that he will handover quiet and peaceful possession of the premises to the appellants on the expiry of the aforesaid period.

3. The West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 was repealed by Section 40 of the West Bengal Premises Tenancy Act, XII of 1956. During the Proclamation of Emergency issued by the President of India on February 20, 1968, Act XII of 1956 was amended by the West Bengal Premises Tenancy (Amendment) Act, President's Act 4 of 1968, which was given retrospective effect from August 26, 1967. After the cessation of the emergency, the West Bengal Legislature passed the West Bengal Premises Tenancy (Amendment) Act, 1969 with a view to re-enacting with modification President's Act 4 of 1968.

4. In between the decree for possession passed by the High Court in the appellant's favour on January 8, 1969 and the expiry of the period allowed to the respondent to vacate the premises, several amendments were made to the West Bengal Premises Tenancy Act, XII of 1956, ("The Act

of 1956") by the West Bengal Premises Tenancy (Second Amendment) Act, 1969 ("The Act of 1969") which came into force on November 14, 1969. We are concerned in this appeal with the provisions of Section 17-D which was introduced in the Act of 1956 by the Act of 1969. That section, in so far as material, reads thus :

> 17-D. Power of Court to set aside decrees passed on account of default in the payment of rent.
>
> (1) Where before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1966, a decree for the recovery of possession of any premises was passed -
>
> #(a) * * * *##
>
> (b) in a suit under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of that Act,

but the possession of such premises had not been recovered from the tenant by the execution of the decree, the tenant may within a period of sixty days from the date of commencement of the West Bengal Premises Tenancy (Second Amendment) Act, 1969, make an application to the Court which passed the decree to set aside the decree.

Explanation. - Where the decree was passed in the exercise of appellate jurisdiction, an application under this sub-section shall be made to the Court of first instance.

> (2) Where an application has been made under sub-section (1) for setting aside a decree, all proceedings in execution of the decree shall remain stayed until the application is disposed of.
>
> Sub-section (3) of Section 17-D provides that on receipt of an application under sub-section (1) the Court shall cause a notice thereof to be served on the landlord and after hearing such evidence as the parties may adduce, determine the question referred to in clauses (a) and (b) of that sub-section. The Court is then required to give to the tenant further time not exceeding sixty days to deposit the amount found due under clauses (a) and (b) of sub-section (3) together with such costs as the Court may allow. If the tenant deposits the amount within the time granted under sub-section (3), the Court under sub-section (4) has to allow the application of the tenant, set aside the decree for the recovery of possession and dismiss the suit.

5. On January 12, 1970 which was a few days before he had undertaken to vacate the premises, the respondent made an application under Section 17-D asking that the decree for possession passed against him be set aside. By a judgment dated July 15, 1970 the learned Munsif, Second Court, Alipore, dismissed that application on the ground that the decree for possession passed by the trial Court on November 24, 1958, had merged in the decree passed by the High Court on January 8, 1969, that in truth and in substance the operative decree was the one passed by the High Court and as that decree was passed after August 26, 1967, being the date of the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, the application filed by the respondent under Section 17-D of the Act of 1956 was not maintainable.

6. The respondent filed a revision application in the High Court of Calcutta against the Judgment of the learned Munsif. By a judgment dated May 31, 1971 a learned single Judge of the High Court allowed the revision application, granted the application filed by the respondent under Section 17-D and directed the dismissal of the suit. The learned Judge has taken the view that in cases where an appellate Court dismisses the appeal, the principle of merger of the decree of the lower Court with that of the appellate Court has no application and therefore the effective decree in the case was the one passed by the trial Court on November 24, 1958 which was before the commencement of the President's Act 4 of 1968. This Court has granted to the appellants special leave to appeal from the judgment of the High Court.

7. It is not in dispute that the decree dated November 24, 1958 for possession of the suit premises was passed by the trial Court in a suit filed by the appellant's predecessors-in-interest under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of that Act, that is to say, on the ground that the respondent had defaulted in the payment of rent. Clause (b) of Section 17-D(1) is therefore complied with.

8. The question which arises for consideration is whether the decree for the recovery of possession can be said to have been passed against the respondent "before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968", that is before August 26, 1967. If it was passed before that date the respondent would be entitled to claim the benefit of Section 17-D, in which event the decree passed in the suit has to be aside and there would be then no outstanding decree to execute.

9. It is indisputable that a decree for possession was in fact passed in favour of the appellant's predecessors-in-interest by the trial Court on November 24, 1958 which was before the commencement of the Act of 1968. But that decree was taken in appeal first to the Court of the Subordinate Judge which confirmed the decree and then to the High Court which, after a contested hearing, dismissed the defendant's appeal and confirmed the decree passed by the Subordinate Judge. The decree of the High Court is dated January 8, 1969 and was passed after, not before, the commencement of the Act of 1968. The question to be considered is whether the decree passed by the trial Court can be deemed to have merged in the decree passed by the High Court.

10. Learned counsel for both the sides have cited before us a large number of decisions bearing on the principle of merger but a few preliminary observations will facilitate a better understanding of those decisions.

11. 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. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and in 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.

12. Stated in this form the principle may appear to be unexceptionable but the problem has many facets. What, if the higher court dismisses the proceeding before it summarily without a speaking order ? Does the judgment of the lower court still merge in the unspeaking order of the higher court ? What, if the powers of the higher court are invoked in the exercise of its revisional and not appellate jurisdiction ? Does a judgment or an order passed in the exercise of a severally restricted jurisdiction like that under Section 115 of the Code of Civil Procedure wipe out of existence a

decree or order passed in the exercise of a wider jurisdiction as may be exercised by a court possessed of a suit ? Does it make any difference to the application of the doctrine of merger that the higher court has not modified or reversed the judgment of the lower court but has merely affirmed it ? These nuances had once raised issues on which conflicting views were expressed by the courts. Over the years, the area of conflict has considerably narrowed down and most of the problems touched by us have been resolved by this Court.

13. It is only proper that we keep ourselves within the bounds of the issue arising in the case. We are not concerned to determine whether a decree passed in a suit can merge with an order passed in the exercise of revisional jurisdiction because the decree of the trial Court in the instant case was challenged first by an appeal filed in the District Court and then in a Second Appeal filed in the High Court. We are also not concerned to determine whether the decree passed by a trial Court can merge in an unspeaking order by the higher court while summarily dismissing the proceeding because the High Court has given a considered judgment after a contested hearing. The principle therefore, that there is no decree as such of the appellate court if it dismisses the appeal for default of appearance or for want of prosecution or on the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in Order 41, Rule 10 of the Code of Civil Procedure, can have no application to the instant case. Nor indeed are we concerned with that class of cases in which the suit covers a horizon wider than the appeal, which happens when only a part of the decree passed in the suit is carried in appeal to the higher court. Here, the decree in its entirety was challenged before the appellate Courts.

14. Section 17-D of the Act of 1956 confers power on the Court "to set aside decrees" passed on account of the tenant's default in the payment of rent. This power was conferred evidently in order to give further relief to defaulting tenants, as stated Statement of Objects and Reasons of the Bill (Calcutta Gazette Extraordinary, dated August 2, 1969). An effective and meaningful of the power to set aside the decree for possession postulates a power to set aside an operative decree; for, to set aside the decree of the Court of first instance and to allow the decree of the appellate courts to remain outstanding would be but an empty exercise of the beneficent power given by the section. Therefore, the power to set aside the decree for possession must be constructed to mean a power to set aside the decree which can be put into execution. The decree which affects the rights of a judgment-debtor is the decree which is capable of execution for it is in that decree that the rights and obligations of the parties are crystallised.

15. Section 17-D in terms speaks of the power of the Court to set aside "a decree for the recovery of possession of any premises" if, "the possession of such premises had not been recovered from the tenant by the execution of the decree". The decree to be set aside is thus that decree which is capable of execution of which the landlord has not yet obtained possession of the premises. What is important for the purpose of Section 17-D is to find which is the decree capable of execution. The Section enables the judgment-debtor to "make an application to the Court which passed the decree to set aside the decree", provided that where the decree is passed in the exercise of appellate jurisdiction, an application for setting aside the decree may be made to the Court of first instance. By sub-section (2) of Section 17-D, if an application is made for setting aside a decree, "all proceedings in execution of the decree remain stayed until the application is disposed of". This provision emphasises what is clear from the other provisions of the Section that the concern of the law is to arm the court with the power to set aside the operative decree by executing which alone the judgment-creditor could obtain real and effective relief.

16. In case where the decree of the trial Court is carried in appeal and the appellate Court disposes

of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial Court. In Jowad Hussain v. Gendan Singh (53 IA 197 : AIR 1926 PC 63 : 51 MLJ 781), the Privy Council while holding that the limitation of three years within which an application for a final decree must be made runs from the date of the decree of the appellate Court, quoted with approval the statement of law contained in the judgment of a learned Judge of the Allahabad High Court to the following effect : "When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause" (Per Banerji, J. in Gajadhar Singh v. Kishan Jiwan Lal, ILR 39 All 641 : 42 IC 93 : AIR 1917 All 163). The Privy Council also adopted the statement contained in a judgment of Tudball, J. to this effect : "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties". Thus, when the decree of the Court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council (Bhup Indar v. Bijai, (1900) 27 IA 209 : ILR 23 All 152 : 5 CWN 52). In that case the decree passed by a District Judge in 1887 awarded "future mesne profits" to the plaintiff. That decree was reversed by the High Court but was confirmed by the Privy Council on May 11, 1895. When the matter came back in executive proceedings the Privy Council held that the decree which the courts had to execute was the one passed by it in 1895 and since by that decree the District Judge's decree was confirmed, the decree of 1985 clearly carried the means profits upto its own date.

17. An application of this very principle yields the result that if the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended (Brij Narain v. Tejbal Bikram, (1910) 37 IA 70 : ILR 32 All 295); or that the limitation for executing a decree runs from the date of the decree capable of execution and that is the decree of the appellate court which supersedes that of the court of first instance (53 IA 197 : AIR 1926 PC 63 : 51 MLJ 781); or that if mesne profits are ordered from the date of suit until the expiry of three years after the date of the decree, the decree, the decree to be considered is the decree capable of execution so that if the decree of the trial Court is confirmed in appeal, three years will begin to run from the date of the appellate decree (Bhup Indar v. Bijai, (1900) 27 IA 209 : ILR 23 All 152 : 5 CWN 52).

18. The decree, therefore, which Section 17-D empowers the Court to set aside is the decree which is capable of execution which, in this case, is the decree passed by the High Court on January 8, 1969.

19. The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate court is that in such the decree the decree of the trial Court is merged in the decree of the appellate Court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extended to other proceedings like revisions and even to proceedings before quasi-judicial and executive authorities.

20. It will now be appropriate to refer to the decisions bearing on the principle of merger.

21. In C. I. T. v. M/s. Amritlal Bhogilal & Co. (1959 SCR 713 : AIR 1958 SC 868 : 34 ITR 130), the question which arose for decision was whether the order passed by the Income-tax Officer allowing the registration of a firm merged in the order passed by the Appellate Assistant

Commissioner in the appeals filed by the firm against the order of assessment. If it did, the Commissioner of Income-tax could not in the exercise of his revisional powers under Section 33B(1) set aside the order of registration passed by the Income-tax Officer. This Court held on the merits of the matter that the appellate order of the Appellate Assistant Commissioner was the only order which was valid and enforceable in law, what merged in the appellate order was the Income-tax Officer's order's under appeal and not his order of registration which was not and could not have become the subject-matter of an appeal before the appellate authority. The position in regard to the doctrine of merger was stated thus by Gajendragadkar, J. who spoke for the Court : (at p. 720)

There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement.

22. Collector of Customs, Calcutta v. East India Commercial Co. Ltd. ((1963) 2 SCR 563 : AIR 1963 SC 1124 : (1963) 2 SCJ 230), is a typical example of that class of cases in which prior to the amendment of Article 226 of the Constitution by the insertion of Clause 1A, the High Courts were faced with the question whether a writ could issue against an authority whose seat was situated beyond the territorial jurisdiction of the High Court. The respondent filed a write petition in the Calcutta High Court against the decision of the Central Board of Revenue which had dismissed his appeal. A Full Bench of the High Court held that though it had no jurisdiction to issue writ against the Central Board of Revenue which was permanently located within the jurisdiction, the Board having merely dismissed the respondent's appeal against the order passed by the Collector of Customs, the real effective order was that of the Collector whose seat was located within the jurisdiction of the High Court and therefore a writ could issue against him. After referring to the decision of the High Courts of Allahabad, Nagpur, Pepsu and Rajasthan which had taken the view that the order of the original authority merges in the appeallate order even when the appellate authority dismisses the appeal with out any modification of the order appealed against Wanchoo, J. speaking for the Constitutional Bench observed thus : (at pp. 569)

The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reserved the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if High Court has no jurisdiction to issue a write to the appellate authority it cannot issue a writ to the original authority. .... It seems to us that on principal it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reserved the original order or modified to or confirmed it. .....

It is this principle, viz., that the appellate order is the operative order after the appeal is disposed of,

which is in our opinion the basis of the rule that the decree of the lower Court merges in the decree or the appellate Court, and on the same principle it would not be incorrect to say the original authority is merged in the order of the appellate authority whatsoever its decision - whether of reversal or modification or more confirmation.

The decision of the High Court was accordingly set aside by this Court.

23. In Madan Gopal Rungta v. Secretary to the Government of Orissa ((1962) Supp 3 SCR 906 : AIR 1962 SC 1513) which also involved a similar question relating to the territorial jurisdiction of the High Court, the appellant, Madan Gopal Rungta, filed an application for review to the Central Government against the order passed by the Government of Orissa rejecting his application for grant of a mineral lease. The judgment of this Court affirming the view of the High Court that it had no jurisdiction to issue a writ against the Central Government is undoubtedly based on the terms of Rule 60 of the Mineral Concession Rules, 1949 under which whenever a matter is brought to the Central Government it is its order which is effective and final; but it was observed that -

where there is a review petition and the Central Government passes an order on such petition one way or the other it is the Central Government's order that prevails and the State Government's order must in those circumstances merged in the order of the Central government. (p. 914)

24. The principle that the decree of the trial Court merges in the decree of the appellate court was held to be applicable in U. J. S. Chopra v. State of Bombay ((1955) 2 SCR 94 : AIR 1955 SC 633) to orders passed in criminal proceedings. In that case the High Court dismissed summarily an appeal filed by an accused against his conviction and sentence. Thereafter, the State of Bombay filed an application in the High Court for enhancement of the sentence. While holding that the summary dismissal of the appeal preferred by the accused did not preclude him from taking advantage of the provisions of Section 439(6) of the Code of Criminal Procedure and showing cause against his conviction when he was subsequently called upon to show cause why the sentence imposed on him should not be enhanced. Bhagwati and Imam JJ. observed :

A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties ..... would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below. (pp. 133-134).

Das, J. agreed with the conclusion of the majority as regards the right of the accused to challenge the conviction under section 439(6) but he went a step further and said that there is a merger or replacement of the judgment of the lower court whenever the High Court disposed of the appeal or revision and that "it makes no difference whether the dismissal is summary or otherwise". (p. 118).

25. An interesting question arose in Shanker Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat ((1970) 1 SCR 322 : (1969) 2 SCC 74) where after a single Judge had dismissed a Civil Revision Application filed by the tenant under Section 115 of the Code of Civil Procedure, against a decree passed by the District Court, a Division Bench of the Bench of the Bombay High Court entertained the tenant's writ petition under Articles 226 and 227 of the Constitution against the same decree and allowed it. The Bombay High Court had followed its earlier judgment in Sipahimalani's case (K. B. Sipahimalani v. Fidahussein Vallibhoy, ILR 1956 Bom 422, 442 : 58 Bom LR 344) which had taken the view that an order passed by the lower court does not merged in the order passed by the revisional court because whereas a right of appeal is a vested right and appeal is a continuation or

rehearing of the suit, a revision is not a continuation or re-hearing of the suit and it is not obligatory upon the revisional court to interfere with the order even if it is improper or illegal. This Court disapproved of that view and held following judgment of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey (59 IA 283, 287 : AIR 1932 PC 165 : ILR 60 Cal 1) that the revisional jurisdiction is a part and parcel of the appellate jurisdiction of the High Court and therefore the principle of merger would apply to orders passed in the exercise of revisional jurisdiction also.

26. In Somnath Sahu v. State of Orissa ((1969) 3 SCC 384) the principle of merger was extended to an executive order dismissing a Government servant. The appellant in that case was dismissed by an order passed by Respondent No. 4, the Indian Aluminum Company Ltd., Calcutta. The appeal filed by the appellant to the State Government was dismissed on January 2, 1962. The appellant thereafter moved the Orissa High Court under Article 226 of the Constitution asking that the order passed by the State Government and Respondent No. 4 be quashed, on the ground that no notice was given to him for any misconduct and no inquiry was held by Respondent No. 4 into the alleged misconduct before passing the order of dismissal. This Court assumed in favour of the appellant that the order passed by Respondent No. 4 was illegal but it held that it had merged in the appellate order of the State Government dated January 2, 1962 and unless the order of the State Government was shown to be defective, the appellant would not be entitled to any relief. Speaking on behalf of the Court, Ramaswami, J. observed :

There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a Tribunal the decision of the appellate authority is the operative decision in law if the appellate authority modifies or reverses it. In the law position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement.

27. The learned Judge of the High Court has referred to some of these decision in his judgment but he took the view :

I am of opinion that in cases where the appellate court merely dismisses the appeal, the principle of merger have no application in cases of execution of the original decree except as to limitation and will not affect an executable decree passed by an inferior court, in so far as its execution is concerned. The position would be otherwise if the decree is modified or varied by such appellate authority as, in such event, the original decree will be inexecutable.

This conclusion is clearly opposed to the view taken by this Court in the decisions referred to above and the learned Judge was in error in making a distinction between an appellate judgment whereby an appeal is dismissed and an appellate judgment modifying or reversing the decree of the lower court. This distinction is unsound and is based on no discernible principle.

28. Two more judgments of this Court must be noticed because the learned Judge has derived sustenance to his view from those judgments. Learned counsel for the respondent has also relied on them in support of his submission that in this case there can be no merger of the trial Court's decree in that of the appellate Court.

29. The first of these cases is The State of U. P. v. Mohammad Nooh (1958 SCR 595 : AIR 1958 SC 86 : 1958 SCJ 242). On April 20, 1948 the District Superintendent of Police passed an order of

dismissal against the respondent Mohammad Nooh who was a head constable. The respondent filed an appeal to the Deputy Inspector General of Police which was dismissed on May 7, 1949. He then filed a revision application to the Inspector-General of Police which was also dismissed on April 22, 1950. The respondent then filed a writ petition in the High Court of Allahabad under Article 226 of the Constitution praying that the order of dismissal be set aside. The High Court granted the writ on the ground that the violation of the rules natural justice and fair play rendered the order of dismissal illegal. In an appeal by the State of U.P., this Court held by a majority that Article 226 of the Constitution is not retrospective and the High Court could not exercise its powers under this Article to quash the order of dismissal passed before the commencement of the Constitution.

30. It was contended before this Court on behalf of the respondent Mohammad Nooh that the order of dismissal dated April 20, 1948 had merged in the order passed on appeal on June 7, 1949, that both these orders merged in the order passed by the Inspector-General of Police on April 22, 1950 and since the order last mentioned was passed after the Constitution had come into force, that High Court had jurisdiction to issue the writ under Article 226. This contention was negatived by the Court on two grounds : Firstly, that though departmental authorities holding an inquiry into charges made against an employee have the trapping of course of law, they cannot be compared with regular courts manned by persons trained in law and therefore the order of dismissal, the order passed in appeal and the order passed in revision "can hardly be equated with any propriety with decree made in a civil suit under the Code of Civil Procedure"; secondly, "that while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in Batuk Nath v. Munni Dei ((1914) 41 IA 104 : AIR 1914 PC 65 : ILR 36 All 1284), or for computing the period of limitation for an application for final decree in a mortgage suit as in Jowad Hussain v. Gendan Singh."

31. The observations last quoted from the judgment of Das, C.J do lend support to the contention of the respondent that the principle of merger has, at best, a limited application but we are of the view that the observations are evidently made in the context of the peculiar facts of the case and their application ought not to be extended beyond those facts. After making the observations extracted above, Das, C.J. proceeded to say :

The filling of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective. In that view of the matter the original order of dismissal passed on April 20, 1948, was not suspended by the presentation of appeal by the respondent nor was its operation interrupted when the Deputy Inspector-General of Police simply dismissed the appeal from that order or the Inspector-General simply dismissed the application for revision. The original order of dismissal, if there were no inherent infirmities in it, was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes herein before mentioned. That order of dismissal having been passed before the Constitution and rights having accrued to the appellant State and liabilities having attached to the respondent before the Constitution came into force, the subsequent conferment of jurisdiction and powers on the High Court can have no retrospective operation on such rights and liabilities.

This passage leaves no doubt that the judgment is based on the premise that the original order of dismissal was operative on its own strength and that since that order was passed prior to the Constitution, the High Court had no jurisdiction to set it aside under Article 226. In Madan Gopai Rungta v. Secretary to the Government of Orissa (supra) a Constitution Bench of this Court held

that "the facts in Mohammad Nooh's case (supra) were of a special kind" and therefore the reasoning in that case would not apply to the facts of the case before the Constitution Bench to which we have already made a reference. In Collector of Customs, v. East India Commercial co. Ltd. (supra), the same Constitution Bench reiterated that "Mohammad Nooh's case was a special case which stands on its own facts." As observed in that decision, even if the principle of merger were applicable the fact would still have remained that the dismissal of Mohammad Nooh was prior to the Constitution and therefore he was not entitled to take advantage of the provisions of the Constitution.

32. The other decision on which the respondent relies is State of Madras v. Madurai Mills Co., Ltd. ((1967) 1 SCR 732 : AIR 1967 SC 681 : 19 STC 144.) It was held in that case that the order of assessment dated November 23, 1952, had not merged in the revisional order dated August 21, 1954 passed by the Deputy Commissioner of Commercial Taxes "because the question of exemption on the value of yarn purchased from outside the State of Madras was not the subject-matter of revision." The attention of the Court was drawn to Amritlal Bhogilal's case (supra), to which we have already referred, but Ramaswami, J. who spoke for the Court said :

But the doctrine of merger is not a doctrine of rigid and universal application and it can not be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion of merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular State. In our opinion, 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 revisional jurisdiction.

These observations cannot justify the view that in the instant case there can be no merger of the decree passed by the trial Court in the decree of the High Court. The Court, in fact, relied on Amritlal Bhogilal's case while pointing out that if the subject-matter of the two proceedings is not identical, there can be no merger. Just as in Amritlal Bhogilal's case the question of registration of the assessee-firm was not before the appellate authority and therefore there can be no merger of the order of the Income-tax Officer in the appellate order, so in the case of Madurai Mills there could be no merger of the assessment order in the revisional order as the question regarding exclusion of the value of yarn purchased from outside the State was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes.

33. In the instant case the subject-matter of the suit and the subject matter of the appeal are identical. The entire decree of the trial Court was taken in appeal to the first appellate Court and then to the High Court. The appellate order also shows that the appellate Court and then to the High court The appellate order also shows that the appeal after being heard on merits, was dismissed with the modification that the respondent should vacate the premises by the end of January, 1970. The decree of the High Court dated January 8, 1969, reads thus :

It is ordered and decreed that the decree of the court of appeal below be and same is hereby affirmed and this appeal dismissed subject to this that the defendant appellate, having duly field the stipulated undertaking, through his learned Advocate, is allowed time till the end of January, 1970, for vacating the disputed premises and delivering up quiet and peaceable possession thereof to the decree-holder respondent on contradiction that the said defendant appellant deposits in the trial court, to the credit of the decree-holder respondent, on condition that the said defendant appellant deposits in the trial court, to the credit of the decree-holder respondent, within two months from this

date, the out standing areas, if any, on account of rents or means profits, as the case may be, and also goes on depositing, in the same court to the same credit, month by month, regularly, according to the English calendar, within the 15th of the next succeeding month according to the same calendar, a sum of Rs. 175 (Rupees one hundred and seventy-five) per month, on account of current rents or mesne profits.

And it is further ordered that in the events of the said defendant's failure to make any of the above deposits, this decree shall become executable at once.

34. We are accordingly of the opinion that the decree of the trial court dated November 24, 1958 merged in the decree of the high court dated January 8, 1969. Since the decree of the High court was passed after the commencement of the west Bengal premises Tenancy (Amendment) Act, 1968, that is to say after August 26, 1967, section 17-D of the Act of 1956 can have no application and therefore the decree of the High court which is the only decree to be executed cannot be set aside under that Section.

35. We therefore allow the appeal, set aside of judgment of the High court dated May 31, 1971 and restore that of the Munsif, Second Court Alipore dated July 15, 1970. The respondent shall pay to the appellants the courts of this appeal and of the revision before the High court.

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