SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Naeem Akhter Afghan
Justice Muhammad Shafi Siddiqui
Justice Shakeel Ahmad

C.P.L.A.2478/2024
(Against the judgment dated 06.05.2024 passed by the Peshawar High Court, Peshawar in FAO No.129-P of 2023)

District Officer Frontier Constabulary Hayatabad, Peshawar ...Petitioner(s)

Versus

Haji Amir Badshah and others ...Respondent(s)

For the Petitioner(s) : Mr. Farman Ullah Khattak, ASC

For the Respondent(s) : N.R.

Date of Hearing : 23.04.2025

JUDGMENT

Shakeel Ahmad, J.- This Civil Petition for Leave to Appeal filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, arises out of the judgment and decree dated 6th May, 2024 passed by the Peshawar High Court, Peshawar, in FAO.No129-P of 2023 whereby and whereunder the order dated 31.05.2023 passed by the Additional District Judge-III/Executing Court, was set aside and the Execution Petition filed by the respondents, was restored for decision in accordance with law.

2. It is seen from the record that out of the total land measuring 42 Kanals and 15 Marlas comprising Khasra Nos.1499/1, 1499/2, 1632/1500/2, and 1632/1500/4, 38 Kanals were acquired for the public purpose, i.e., construction of accommodation for the Frontier Constabulary, as reflected in Award No.1302/LAC/NTA dated 04.04.2008. The respondents/affectees, being aggrieved by the amount of compensation, filed a reference under Section 18 of the Land Acquisition Act, 1894, which was sent to the Referee Court for adjudication. After fulfilling all legal and procedural formalities, the petitioner and respondents No.15 to 18 were proceeded against ex-parte. Finally, vide ex-parte judgment and decree dated

29.04.2010, the Referee Court enhanced the amount of compensation to Rs.3,45,000/- per Marla, along with simple interest at the rate of 6% and 15% compulsory acquisition charges from the date of taking over possession of the acquired land.

3. Not content with the judgment and decree of the Referee Court to the extent of the amount of compensation, the respondents/affectees instituted RFA No. 276 of 2010, whereas the petitioner filed cross-objections No.07-P/2022 before the Peshawar High Court, Peshawar, during the pendency of the said appeal, the affectees filed an Execution Petition before the Referee Court/Additional District Judge-III, Peshawar, on 14.02.2017, seeking implementation of the judgment dated 29.04.2010, passed by the Referee Court.

4. On 29.11.2022, the petitioner, after a lapse of 3 years, 01 month, and 20 days, filed an Objection Petition, questioning therein the maintainability of the Execution Petition. In the meanwhile, RFA No.276/2010 filed by the respondents/affectees and cross-objections No.07-P/2022 were dismissed on 02.03.2023, maintaining the judgment and decree of the Referee Court dated 29.04.2010, copy whereof was produced before the Executing Court. The Executing Court, after providing the right of audience to the learned counsel for the parties, dismissed the Execution Petition on the ground of limitation, vide order dated 31.05.2023. Aggrieved by the said order of the Executing Court, the respondents/affectees filed RFA No. 276 of 2010 before the Peshawar High Court, Peshawar, which was allowed, and the impugned judgment of the Referee Court was set aside, thereby restoring the Execution Petition. Hence this petition.

5. It was submitted by the learned counsel for the petitioner that the Execution Petition was not filed by the respondents within the stipulated period. According to him, it was filed after a lapse of 7 years of the passing of the judgment and decree of the Referee Court, therefore, the Executing Court had rightly dismissed the Execution Petition brought by the respondents, being barred by time. He next submitted that the High Court wrongly relied upon Section

48, CPC while counting the period of limitation from the date of the judgment and decree of the High Court rendered in RFA No.276 of 2010 and cross-objections No.07-P/2022 and on the principle of merger, thus fell into error, which resulted in miscarriage of justice, calling for interference.

6. Heard and record perused.

7. Having considered the arguments of the learned counsel for the petitioner and examining the record, we are of the view that the only question which requires consideration by this Court is whether a fresh Execution Petition, filed following the judgment of an Appellate Court, is to be governed by the extended period of limitation of six years as provided under Section 48 of the Civil Procedure Code (CPC), or by Article 181 of the Limitation Act, 1908.

8. It appears from the record that being aggrieved by the Judgment and decree of the Trial Court/Referee Court dated 29.04.2010 to the extent of compensation, the respondents/affectees filed RFA No.276-P of 2010 for further enhancement, while the petitioner instituted cross-objection No.07-P of 2020. During the pendency of the appeal the respondents/affectees filed an Execution Petition on 14.02.2017, seeking implementation of the judgment and decree dated 29.04.2010 passed by the Referee Court. After providing the right of audience to the learned counsel for the parties the RFA instituted by the respondents/affectees as well as cross-objection filed by the petitioner were dismissed vide a consolidated judgment dated 02.03.2023, affirming the judgment and decree of the Trial Court/Referee Court. On dismissal of the appeal, the respondents/affectees filed an application for placing on record the judgment and decree of the appellate Court and also for its execution on 09.05.2023. However, the execution petition was dismissed vide order dated 31.05.2023, on the ground of limitation. Not content with the said order of the Executing Court, the respondents filed FAO No.129-P of 2023 before Peshawar High Court, Peshawar, which was allowed firstly on the ground that due to the principle of merger, the decree of the Trial Court had merged with that of the Appellate Court, thus a fresh application subsequent to the first one would be

governed by the extended limitation period of six years as provided under section 48 of CPC, and not by Article 181 of the Limitation Act, 1908.

9. Under the above circumstances, this Court is called upon to see whether the findings of the High Court on the issue of fresh Execution Petition, filed after the Appellate Court's judgment, is governed by Section 48 CPC due to the principle of merger are correct or not?

10. Before dilating upon the issue framed hereinabove, it will be advantageous to reproduce Section 48, CPC as under:-

> *"48. Execution barred in certain cases.-(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of [six] years from--*
> *(a) the date of the decree sought to be executed, or,*
> *(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of default in making the payment or delivery in respect of which the applicant seeks to execute the decree.*
> *(2) Nothing in this section shall be deemed--*
> *(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of [six] years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within [six] years immediately before the date of the application; or*
> *(b) to limit or otherwise affect the operation of article "[183 of the First Schedule to the Limitation Act, 1908]."*

10. Article 181 of the Limitation Act, on the other hand, provides a three year limitation for an application, not otherwise provided for. The principle of merger holds that when a Superior Court passes a judgment in appeal, irrespective of the fact whether it was set aside or modified or affirmed, the decree of the lower court merges with that of the appellate court. The result of merger has been authoritatively laid down both in Pakistan and India.

In *Sahibzadi Maharunisa and another v. Mst. Ghulam Sughran and another*[1], it was held as under:-

> *"(d) Judgment ---*
>
> *----Merger, doctrine of---Scope---Judgment of a lower forum merging into judgment of a higher forum---Doctrine of merger was applicable to the reversal and modification cases and also to all those cases in which the judgment etc. of a lower forum had been affirmed in*

[1] *(PLD 2016 SC 358)*

> *appeal or revision by a higher forum(s) (subject to certain exceptions) [p. 371] D"*

In the case reported as *Maluvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others*[2] *this Court* exhaustively considered application of the rule of merger in relation to appeals and also to the revisional jurisdiction and authoritatively ruled that:-

> *"It appears that in holding that the period of limitation for execution of the decree commenced from the date of the decision by the Appellate Court, the rule that the decree of the Court of first instance, merged into the decree of Appellate Court, which alone can be executed, was not present to the mind of the learned Judge. It is to be remembered that till such time, an appeal or revision from a decree is not filed, or such proceedings are pending but no stay order has been issued, such decree remains capable of execution but when the Court of last instance passes the decree only that decree can be executed, irrespective of the fact, that the decree of the lower Court is affirmed, reversed or modified."*

Additionally:-

> *"In Lala Brij Narain v. Kunwar Tejbal Bikram Bahadur (37 I.A. 70) the Privy Council has taken the view that the trial Court ceases to have the jurisdiction to amend decree, when it has been affirmed by the Appellate Court. This would also strengthen the rule that after affirmation of the decree of the trial Court, the decree in existence is only that of the Appellate Court. This view has generally been followed in the sub-continent..."*

The rule of merger was subsequently followed in Nasrullah Khan's case[3] wherein it was held as under: -

> *"**From the above it is clear that for all legal purposes, it is the final decree/order of the last Court in the series, even if such decree etc. be of affirmation, which has to be executed and should be considered and treated to be the final judgment/decree/order in terms of Section 12(2), C.P.C. for approaching the forum**. Thus, notwithstanding the reversal or modification of the decree/order, if the decree/order of a forum below, which has been affirmed by the higher forum on merits, both on the points of the facts and the law involved therein, it shall be that decree/order, which attains the status of the final decree/order etc. within the purview of section 12(2), C.P.C. It is so because the higher forum has not only-endorsed the point(s) of fact and law and has agreed with the reasoning and conclusion of the lower forum, but may be, has upheld the decision(s) challenged before it, by substituting and supplying its own reasons and by substantially doing away with the reasoning of the decision(s) challenged before it. Thus, it would be ludicrous to conceive and hold that the questions of facts and law which have been finally approved, endorsed, affirmed and settled by the higher forum should be allowed to be examined, annulled and obliterated by a forum below, whose decision stands*

[2] (1992 SCMR 241)
[3] (PLD 2013 SC 478)

> *affirmed in the above manner. Therefore, we are of the considered view that the impugned judgment in this case has been rightly founded on the principle of merger; however before parting it may be observed that in the case Khawaja Muhammad Yousaf (supra), an exception has been taken to the rule of merger in relation to the apex Court, particularly in respect of those judgments/orders which are affirmed by this Court in the sense that leave has been refused."*

In the case reported as Commissioner of *Income-Tax, Bombay v. M/S Amritlal Bhogilal and Company*[4] it was observed that:-

> *"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..."*

In this behalf reference may also be made to the case reported as *Kunhayammed and others v. State of Kerala and another*[5], wherein it was held as follows:-

> *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 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 doc-trine 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. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Art. 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 dis-posing of petition for special leave to appeal. The doctrine of merger can therefore be ap-plied to the former and not to the latter. (Paras 12, 43)*

In this context, further reliance may be placed on the judgment reported as *Collector of Customs, Calcutta v. East*

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[4] (AIR 1958 SC 868)
[5] *(AIR 2000 SC 2587)*

India Commercial Co. Ltd., Calcutta and others[6]. Following the judgments quoted above, we are of the view that the principle of merger applies to reversal and modification and also to all those cases, in which judgment of a lower Court is affirmed in appeal or revision by the higher forum. Therefore, the starting point of limitation of a fresh Execution Petition, subsequent to the first one in the instant case, is the date of the final judgment of the final court of appeal. By applying the principle of merger, we hold that, in the instant case, the judgment and decree of the Trial Court merged with that of Appellate Court. Thus, it is the latter decree which is operative and executable, therefore, the High Court rightly treated the fresh application for execution of the appellate decree as filed within the limitation under section 48 CPC, and not under Article 181 of the Limitation Act.

11. In light of the above, we hold that the fresh Execution Petition filed by the petitioner subsequent to the first one was well within the limitation, as it falls within six years after the decree of the Appellate Court's judgment. The bar of limitation under Article 181 of the Limitation Act does not apply due to the specific application of Section 48 CPC and the principle of merger.

12. We find no illegality, irregularity or jurisdictional defect in the impugned judgment calling for interference. This petition being bereft of any merit is dismissed and leave is refused. No order as to costs.

Judge

Judge

Judge

Islamabad
23.04.2025
APPROVED FOR REPORTING
M.Rizwan/*

[6] *(AIR 1963 SC 1124)*