GOJER BROS. PVT. LTD.

v.

RATAN LAL SINGH

May 1, 1974

[*Y. V. Chandrachud, P. K. Goswami and R. S. Sarkaria, JJ.*]

West Bengal Premises Tenancy (Amendment) Act 1968—*S. 17D—Whether it applies to an appellate decree passed by the High Court after coming into force of the said Act—If the decree of the trial Court merges into the degree of the High Court.*

In 1953 the predecessors-in-title of the appellants filed a suit for eviction against the respondent on the ground of non-payment of rent. In 1958, the learned Second Munsif passed a decree for possession in favour of the plaintiffs holding that the respondent was not entitled to the protection of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950. The decree was confirmed in appeal by the learned Subordinate Judge, in 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. The respondent filed a second appeal and that too was dismissed by the High Court by a judgment dated January 5, 1969. The respondent gave a written undertaking that he will give quiet possession to the appellants after the expiry of the period granted by the Court.

The West Bengal Premises Rent Control (Temporary provisions) Act, 1950 was repealed by S. 40 of the West Bengal Premises Tenancy Act 1955 which was later amended in 1968, with retrospective effect and in between the decree for possession passed by the High Court and the expiry of the period allowed to the respondent to vacate the premises, several amendments were made in the West Bengal Premises Tenancy Act 1955. The present appeal is concerned with Section 17D which was introduced in 1969. The said section provides that where before the commencement of the West Bengal Premises Tenancy (Amendment) Act 1968 a decree for the recovery of possession was passed in a suit under the 1950 Act by reason only of clause (1) of the proviso to sub section (1) of Sec. 12 of that Act but the possession had not been recovered, the tenant may apply within 60 days from the date of commencement of the West Bengal Premises Tenancy (Second Amendment) Act 1969, to the court which passed the decree to set aside the decree.

The respondent, on January 12, 1970, which was a few days before he had undertaken to vacate the premises, made an application under S. 17D asking that the decree for possession passed against him be set aside. The learned Munsiff however, dismissed the application on the ground that the decree for possession passed by the trial Court had merged in the decree passed by the High Court and as that decree was passed after the date of commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, the application by the respondent was not maintainable.

The respondent filed a revision application in the High Court against the judgment of the learned Munsif and the High Court allowed the revision application, granted the application filed by the respondent under S. 17D and directed the dismissal of the suit. The appellants appealed to the Supreme Court by Special leave.

The question which arose 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. The Trial Court passed the decree on Nov. 24, 1958 which was before the commencement of the Act of 1968; but the decree of High Court is dated January 5, 1969. The question to be considered was whether the decree passed by the trial court can be deemed to have merged in the decree passed by the High Court.

A Allowing the appeal,

HELD : (1) The doctrine of merger is based on 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 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. [398F-G]

B

Jowad Hussain v. *Gendan Singh & Ors.* 53 I.A. 197, *Bhup Indar* v. *Bijai*, 27 I.A. 209, *Brij Narain* v. *Tejpal* 37 I.A. 70; *C.I.T. Bombay* v. *M/s. Amritlal Bhogilal & Co.* [1959] S.C.R. 713; *Collector of Customs* v. *East India Commercial Co. Ltd.*: [1963] 2 S.C.R. 563; *Madan Gopal Rungta* v. *Secy. to the Government of Orissa* [1962] Supp. (3) S.C.R. 906; *U. J. S. Chopra* v. *State of Bombay*, [1955] 2 SCR 94; *Shankar Ramachandra Abhyankar* v. *Krishnaji Dattatraya Bapat* [1970] 1 S.C.R. 322; *Nagendra Nath Dey* v. *Suresh Ch. Dey* 59 IA 283 etc. are referred to and *State of Madras* v. *Madurai Mills Co. Ltd.* [1967] 1 S.C.R. 732 & others distinguished.

C

(2) In the present case, the subject matter of the suit and the subject matter of the appeal were identical. The entire decree of the trial court was taken in appeal to the first appellate court and then to the High Court. The appeal in the High Court was dismissed after being heard on merits with the modification that the respondent should vacate the premises by the end of January 1970. Therefore, the decree of the trial court dated November 24, 1958 merged in the decree of the High Court dated Jan. 8, 1969. Since the decree of the High Court was passed after the commencement of the West Bengal Premises Tenancy (Amendment) Act 1968, section 17D 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. [407E-F; 408A-B]

D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 128 of 1972.

E

Appeal by Special Leave from the Judgment & Order dated the 31st May, 1971 of the Calcutta High Court in Civil Rule No. 2519 of 1970.

B. Sen, Som Nath Chatterjee, B.P. Maheshwari and *Suresh Sethi*, for the Appellant.

F

P. Chatterjee and *Sukumar Ghose*, for the Respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, J. 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.

G

Long, long back on May 19, 1953 Messrs. Hind State 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, Alipore, passed a decree for possession in favour of the plantiffs 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

H

Provisions) Act, 1950. That decree was confirmed in appeal by the learned Subordinate Judge, 4th Court, Alipore, on April 12, 1967. During the pendency of the appeal, the appellants had purchased the right, title and interest of the plantiffs in the suit premises and they had also abtained an assignment of the decretal rights in their favour. They were therefore brought on the record of the appeal in place of the original plantiffs. The respondent filed Second Appeal No. 1255 of 1967 against the decree of the 1st appellate court and that appeal, after a contested hearing, was dismised by a Division Bench of the High Court of Calcutta on January 8, 1969. While dismising 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 hand over quiet and peaceful possession of the premises to the appellants on the expiry of the aforesaid period.

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.

In between the decree for possession passed by the High Court in the appellants' 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, 1968, 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

A 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
B 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."

C 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 questions 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
D 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.

On January 12, 1970 which was a few days before he had under-
E taken 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 pased by the trial court on November 24, 1958, had merged in the decree pased by the High Court on January 8, 1969, that in truth and in substance the operative
F 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.

The respondent filed a revision application in the High Court of
G 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 case 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
H 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 Act 4 of 1968. This Court has granted to the appellants special leave to appeal from the judgment of the High Court.

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 appellants' predecessors-in-interest under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (1) 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.

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 set aside and there would be then no outstanding decree to execute.

It is indisputable that a decree for possession was in fact passed in favour of the appellants 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 taken to the High Court which, after a contested hearing, dismissed the defendants' appeal and confirmed the decree passed by the Subordinate Judge. The decree of the High Court is dated January 5, 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.

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.

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 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.

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

A 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.

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 than is 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 passed 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.

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 in the Statement of Objects and Reasons of the Bill (Calcutta Gazette Extra Ordinary, dated August 2, 1969). An effective and meaningful exercise 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 decrees of the appellate courts to remain outstanding would be but an empty exercise of the beneficient power given by the section. Therefore, the power to set aside the decree for possession must be construed to mean a power to set aside the decree which can be put into execution. The decree which affects the rights of the defandant is the decree which is capable of execution for it is in that decree that the rights and obligations of the parties are crystallised.

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 and in execution of which the landlord has not yet obtained possession of the premises. What is important for the purposes of section 17D 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 shall remain stayed until the application is disposed of". This provision emphasis 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.

In cases 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* vs. *Gendan Singh & Ors.*,(1) 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".(2) 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.(3) In that case the decree passed by a District Judge in 1887 awarded "future mesne profit" 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 execution 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 1895 clearly carried the mesne profits up to its own date.

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(4), or that the limitation for executing a decree runs from

(1) 53 I.A. 197.

(2) Per Banerji J. in *Ga'andhar Singh* v. *Kishan Jiwan Lal* I.L.R. 39 All. 641.

(3) *Bhup Inder* v. *Bijai*, 27 I.A. 209. (4) *Brij Narain* v. *Tejpal*; 37 I.A. 70.

A 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(1); 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 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.(2)

B

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.

The fundamental reason of the rule that where there has been an C appeal, the decree to be executed is the decree of the appellate court is that in such cases 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.

D

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

In *Commissioner of Income-tax Bombay* vs. *M/s Amritlal Bhogilal & Co.*,(3) the question which arose for decision was whether the order passed by the Income-tax Officer allowing the registration E 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 though the appellate order of the Appellate Assistant Commissioner was the only order which was valid F and enforceable in law, what merged in the appellate order was the Income-tax Officer's order 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:

G

> "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

H

(1) *Jowad Hussain* vs. *Gendan Singh*, 53 I.A. 197.
(2) *Bhup Inder* vs. *Bijai*, 27 I.A. 209.
(3) [1959] S.C.R. 713.

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."

Collctor of Customs, Calcutta vs. *East India Commercial Co. Ltd.*,(1) 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 writ 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 a writ against the Central Board of Revenue which was permanently located outside its territorial 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 as against him. After referring to the decisions 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 appellate order even when the appellate authority dismisses the appeal without any modification of the order appealed against, Wanchoo J. speaking for the Constitutional Bench observed thus:

"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 reverse 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 the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority..... It seems to us that on principle 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 reversed the original order or modified it or confirmed it.....

(1) [1963] 2 S.C.R. 563.

A

> 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 of the appellate court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision—whether of reversal or modification or mere confirmation."

B

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

In *Madan Gopal Rungta* vs. *Secretary to the Government of Orissa*(1) 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 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 merge in the order of the Central Government" (p. 914).

C

D

E

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*(2) 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 juridiction 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

F

G

H

(1) [1962] Supp. (3) S.C.R. 936. (2) [1955] 2 S.C.R. 94.

and that "it makes no difference whether the dismissal is summary or otherwise". (p. 118). A

An interesting question arose in *Shanker Ramchandra Abhyankar* v. *Krishnaji Dattatryaya Bapat*(1) 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 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(2) which had taken the view that an order passed by the lower court does not merge in the order passed by the revisional court because whereas a right of appeal is a vested right and an appeal is a continuation or re-hearing of the suit, a revision is not 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 a judgment of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*(3) 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. B C D

In *Somnath Sahu* v. *The State of Orissa and others*(4) 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 Aluminium 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 orders passed by the State Government and respondent No. 4 be quashed, on the ground that no notice was given to him for 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 antitled to any relief. Speaking on behalf of the Court Ramaswami J. observed "There can 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 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 is subsisting and is operative and capable of enforcement." E F G

The learned Judge of the High Court has referred to some of these decisions in his judgment but he took the view : "I am of opinion that H

(1) [1970] 1 S.C.R. 322.
(2) 58 B.L.R. 344.
(3) 59 I.A. 283, 287.
(4) [1969] 3 S.C.C. 384.

A 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 orginal decree will be inexecutable." This conclusion is clearly opposed the view B 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.

Two more judgments of this Court must be noticed because the C 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.

The first of these cases is : *The State of Uttar Pradesh* v. *Mohammad Nooh.*(1) On April 20, 1948 the District Superintendent of Police D 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 E aside. The High Court granted the writ on the ground that the violation of the rules of 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 that Article 226 to quash the order of dismissal passed before the commencement of the Constitution.

F

It was contended before this Court on behalf of the respondent Mohammad Nooh that the order of dismisal 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, the High Court had G 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 trappings of courts 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 decrees H 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

(1) [1958] S.C.R. 595.

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,*(1) or for computing the period of limitation for an application for final decree in a mortgate suit as in *Jowad Hussain* v. *Gendan Singh.*(2)"

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 filing 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 was 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 hereinbefore 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 Gopal* Vs. *Secretary to the Government of Orissa*(3) a Constitution Bench of this Court held that "the facts in Mohammad Nooh's case 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, Calcutta* vs. *East India Commercial Co. Ltd.,*(4) 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.

The other decision on which the respondent relies is *State of Madras* vs. *Madurai Mills Co. Ltd.*(5) It was held in that case that the order of assessment dated November 23, 1952, had not merged in

(1) [1914] L.R. 41 I.A. 104.
(2) [1926] L.R. 53 I.A. 197.
(3) [1962] Supp. (3) S.C.R. 906.
(4) [1963] 2 S.C.R. 563.
(5) [1967] 1 S.C.R. 732.

A 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 *Amrital Bhogilal's* case(1), 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 cannot 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 or 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 statute. 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 could 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.

In the instant case the subject-matter of the suit and the subject-matter of the appeal were 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 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 the same is hereby affirmed and this appeal dismissed subject to this that the defendant appellant, having duly filed 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 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 outsanding arrears, if any, on account of rents or mesne 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

(1) [1959] S.C.R. 713.

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 event of the said defendant's failure to make any of the above deposits, this decree shall become executable at once."

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 17D 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.

We therefore allow the appeal, set aside the 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 costs of this appeal and of the Revision before the High Court.

S.C. *Appeal allowed.*