

The application was only argued on this point and became contested.

The court applied Section 148 of the Civil Procedure Code together with rule 46 of Chapter XXXVIII of the Original Side Rules which gave it power to extend the period of time fixed by it to do any act. On 11th July, 2005 the court allowed the application. On 18th July, 2005 this order was clarified by prescribing “six weeks from the date thereof” for completion of the building.

Aggrieved, the appellant preferred an appeal before a division bench of this court. It was dismissed on 16th October, 2007 by a reasoned judgment.

In the third column of the tabular statement in the execution application (EC NO.220 of 2014) taken out by the respondents to enforce this consent decree, where there is provision for the date of the decree, their advocate had inserted 21st May, 2002, as the date of the consent decree.

Mr. Sakya Sen, learned advocate appearing for the appellant submits that the original consent decree had merged with the subsequent order dated 11th July, 2005. Thereafter, both these pronouncements of the court had merged in the judgment and order of the division bench dated 16th October, 2007. Hence the decree to be executed was one dated 16th October, 2007. Thus, the date of the decree in the tabular statement was wrong, the execution application was defective, not maintainable and had to be dismissed.

Now if this point of the appellant judgment debtor was to succeed, then the execution application would have to be dismissed. A further execution application would not be maintainable, being barred by the laws of limitation.

Some provisions of the Civil Procedure Code and the Original Side Rules of this court have now to be looked into.

Usually, the decree is executed by the court which passed the decree.

Where the decree has been passed on appeal, the court of the first instance is taken as the court which passed the decree. (See Sections 37 and 38 of

the Code). In Order 21 Rule 11(2) of the Code it is provided that an application for execution of the decree shall be by a written application where amongst other things the date of the decree is to be mentioned. Under sub-section (3) the applicant is to produce a certified copy of the decree.

The most crucial provision is Order 21 Rule 17 which says that on receiving an application for execution of the decree the court shall verify whether the requirements of Order 21 Rule 11 sub-section (3) have been complied with. If it finds that there is non-compliance “the court shall allow the defect to be remedied” “then and there” or within the time to be fixed by it.

Chapter XVII of the Original Side Rules of this court contains a heading under Rule 9: Generally: Execution Proceedings in the Calcutta High Court. It says that the application would be in Form-1 and that a certified copy of the decree is to accompany the application in all cases. Form-1 contains the tabular statement. The third column refers to the date of the decree.

Even the Original Side Rules do not say that for any mistake in the date of the decree in the tabular statement, the execution application is liable to be dismissed.

In those circumstances, even if there is a mistake in the date of the decree it is rectifiable by an order of court. After rectification the selfsame execution application may be proceeded with.

MERGER:-

What is the status of the decree or order when it has been dealt with by an appellate court on appeal was discussed by the Supreme Court in **Tirumalachetti Rajaram vs. Tirumalachetti Radhakrishnayya Chetty & Ors.** reported in **AIR 1961 SC 1795**. It inter alia said that an appellate court had two options with regard to the judgment under appeal. Either it would affirm it or vary it. In the first case, it would be a “decree of affirmance” whereas in the second case it would be a “decree of variation”.

“Affirmation” or “variation” was the result of an act of adjudication. If there was no act of adjudication but variation of the decree or order e.g reduction in cost awarded then it would be neither of the two. It would not affect the original decree or order.

Now, when there has been adjudication with regard to a decree or order by a superior court and either a decree/order of affirmance or a decree/order of variation has been passed the question arises as to the decree or order which has to be taken as final. In **M/s Gojer Bros. (Pvt.) Ltd. vs. Shri Ratan Lal Singh** reported in **(1974) 2 SCC 453**, the Supreme Court dealt with the doctrine of merger. It started off by reiterating the principle that there could not be more than one decree or order operative in a particular subject matter. If a judgment of a lower court has been dealt with by an appellate court resulting in a judgment of affirmance or variation, after a substantive adjudication with reasons, then it could be said that the judgment of the lower court has been superseded by the judgment of the superior court and that the judgment of the lower court as affirmed or varied has merged with the judgment of the appellate court.

In **Chandi Prasad & Ors. vs. Jagdish Prasad & Ors.** reported in **(2004) 8 SCC 724**, the Supreme Court was concerned with the date of the decree when appeals were preferred at different levels against the decree. When an appeal is preferred against the decree, when the appellate court affirms, modifies or reverses the decree, the decree of the trial court merges with the decree of the appellate court. The date of the appellate court’s judgment and decree would be the date of the decree for the purpose of computing the period of limitation in filing the execution application. The Supreme Court opined as follows:-

“23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. v. CIT”

A similar view was expressed by the court in **Shanthi vs. T.D Vishwanathan & Anr.** reported in **(2019) 11 SCC 419**.

The Supreme Court revisited the issue in **Kaikhosrou (Chick) Kavasji Framji vs. Union of India & Anr.** reported in **(2019) 20 SCC 705** and affirmed its earlier view.

Now the bone of contention between the parties is this.

In the execution application taken out by the respondents, in the third column of the tabular statement the date of the decree was entered as 21st May, 2002. It was said on behalf of the appellant that there is no decree dated 21st May, 2002 and that it has merged with the judgment and order of the division bench dated 16th October, 2007. Therefore, the execution application was not maintainable and liable to be dismissed. If such was the fate a new execution application would not lie as it would be clearly barred by the law of limitation.

In **Tirumalachetti Rajaram vs. Tirumalachetti Radhakrishnayya Chetty & Ors.** reported in **AIR 1961 SC 1795**, the Supreme Court had said that the order in appeal just reducing the cost would neither be a decree of affirmance nor one of variation. Hence it could not be said that the original decree or order had merged in the latter order.

In order to be a merger there had to be an act of adjudication regarding the subject matter of the original decree or order.

The order dated 11th July, 2005 corrected on 18th July, 2005 merely extended the time for compliance of obligations under the consent decree dated 21st May, 2002. It could not be termed as an order of variation since no adjudication on the subject matter of the decree or order was involved and the court using its discretion had only extended the time for compliance of the terms of the consent decree, a collateral matter. Thus, there was no merger of the decree dated 21st May, 2002 with the order dated 11th July, 2005 as corrected by the order dated 18th July, 2005. It thereafter follows that when there was no merger of these two decisions of the court the judgment on appeal therefrom on 16th October, 2007 could not result in merger.

The insertion of 21st May, 2002 in the tabular statement of the execution application describing it as the date of decree is in perfect order. Even if for the sake of assumption, I assume that the date was wrongly inserted, I do not think that it is fatal. It is curable by giving leave to the decree holder to amend the tabular statement.

Such leave is not necessary in view of my above finding.

There is no merit in this appeal. I would dismiss it, affirming the judgment and order of the learned court below.

No order as to costs.

Urgent certified photo copy of this judgment and order if applied for be furnished to the appearing parties on priority basis upon completion of necessary formalities.

I Agree

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)