IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE TARIQ PARVEZ

CIVIL APPEALS NO.1176 AND 1177 OF 2015
AND CIVIL PETITION NO.1428-L OF 2015
(Against the order dated 11.6.2015 of the Lahore High Court, Bahawalpur Bench passed in C.M.Nos.385, 388/2009 & 2051/2015)

Sahabzadi Maharunisa ...in C.As.1176 & 1177/2015
Sahibzadi Madhia Abbasi ...in C.P.1428-L/2015
...Appellant(s)/Petitioner(s)

VERSUS

Mst. Ghulam Sughran and another ...in C.As.1176 & 1177/2015
Sahibzadi Faroq Kamal Abbasi, etc. ...in C.P.1428-L/2015
...Respondent(s)

For the appellant(s): (in C.As.1176 & 1177/2015)	Mr. Nadeem Iqbal Chaudhry, ASC Qazi Zia Zahid, ASC
For the petitioner(s): (in C.P.1428-L/2015)	Mr. M. Ozair Chughtai, ASC/AOR
For respondents 8 & 12: (in C.As.1176 & 1177/2015)	Mr. M. Ozair Chughtai, ASC/AOR
For respondents 2(xviii) & 4: (in C.As.1176 & 1177/2015)	Mr. Ejaz Ahmed Chaudhry, ASC
For respondents 15 & 22: (in C.P.1428-L/2015)	Mr. Ejaz Ahmed Chaudhry, ASC
Amicus curiae:	Malik Muhammad Qayyum, Sr. ASC Ch. Mushtaq Ahmed Khan, Sr. ASC Syed Najam-ul-Hassan Kazmi, Sr. ASC
Date of hearing:	19.01.2016

...

JUDGMENT

MIAN SAQIB NISAR, J.- In the instant matters we are called upon to resolve the proposition as to which is to be considered the "**Court which passed the final judgment, decree or order**" within the meaning of Section 12(2) of the Code of Civil Procedure, 1908 *(CPC)* where an aggrieved person shall file such an application.

In the context of the above the facts of the instant appeals *(along with the CPLA)* are:- respondents No.1 to 4 *(plaintiffs)* filed a suit for possession against respondents No.5 to 11 *(defendants)* assailing therein the validity of a gift mutation No.162 attested on 25.9.1944 by virtue whereof Muhammad Yar, the predecessor-in-interest of the plaintiffs, gifted his property *(suit property)* in favour of Ahmad Yar, his brother. The suit was initiated on 18.10.1965 and was partly decreed on 11.6.1968. Both the parties being aggrieved of the above decree, challenged the same through appeals, the plaintiffs filed RFA No.11/1968, while the defendants instituted RFA No.27/1968. The appeal filed by the plaintiff was partly allowed by the learned High Court *vide* judgment dated 24.3.1986, but that of defendants was dismissed through the same judgment. The defendants filed CA No.193/1986 and CP No.73/1986, whereas the plaintiffs filed CP No.473/1986, before this Court, all challenging the judgment dated 24.3.1986, while one Murad Bibi and Surriya Begum also filed applications to be impleaded as parties before this Court in the abovementioned appeal and/or petitions but were turned down with the observation that they may avail the remedy before the appropriate forum in appropriate proceedings. Thereafter, the appeal and petitions were dismissed by this Court *vide* judgment dated 26.6.1991.

2. Aggrieved of the said judgments and claiming those to have been procured by the respondents through fraud and misrepresentation, the appellant *(in CAs No.1176 and 1177/2015)* filed applications under Section 12(2) of the CPC *vide* CMs No.385 and 388/2009 in RFAs No.11 and 27/1968 respectively, and the petitioner *(in CP No.1428-L/2015)* filed a similar application through CM

No.2051/2015 in RFA No.11/1968. These applications have been dismissed *vide* the impugned judgment dated 11.6.2015 holding that the application before the High Court is not competently filed, rather in the light of the law laid down by this Court in **Nasrullah Khan and others Vs. Mukhtar-ul-Hassan and others (PLD 2013 SC 478)** the appellate forum is the Supreme Court of Pakistan. Leave was granted on 6.11.2015 to consider whether the applications under Section 12(2) of the CPC were rightly dismissed on the grounds that they were only competent before this Court and also to consider the true import of the case of **Nasrullah Khan** *(supra)*; the order is reproduced below:-

> *"Learned counsel for the petitioner states that the final judgment in the instant matter had been passed by the learned High Court in its appellate jurisdiction, and when such judgment and decree was assailed before this Court, it was kept intact. Therefore, the view set out by the learned High Court while dismissing the application of the petitioner under Section 12(2) CPC being not maintainable in light of the law laid down in* ***Nasrullah Khan and others Vs. Mukhtar-ul-Hassan and others (PLD 2013 SC 478)*** *is not correct as the rule of merger is not attracted to cases where judgments of the learned High Court have simply been kept intact and no modification or reversal has taken place. In such an eventuality the final judgment and order shall be that of the learned High Court. Leave is granted to consider the above. As a short point is involved, let this matter be listed for hearing within six weeks. We also appoint M/s Malik Muhammad Qayyum, Syed Najam-ul-Hassan Kazmi and Ch. Mushtaq Ahmed Khan, learned Sr. ASCs as amicus curiae to assist the court on the points raised; and notice be issued to them accordingly."*

3. In order to make this opinion concise we are not stating in detail the arguments/pleas raised by the learned counsel for the parties and learned amicus, which *(pleas)* are reflected in the reasons assigned herein. However it may be stated that, in brief, the argument of the learned counsel(s) for the appellants is that the principle of merger is applicable to such application *[under Section 12(2) of the CPC]* **but** only where a judgment, decree or order passed by a court when appealed against or challenged in the revisional jurisdiction has been set aside, reversed, modified etc.; **however** where it *(judgment etc.)* has simply been affirmed by the higher forum, the rule of merger is not attracted and the final judgment, decree or order shall remain that of the court which passed the judgment etc. before its affirmation. This according to the learned counsel shall be the rule applicable at all the levels of adjudication including the Supreme Court. On the contrary, the learned counsel for the respondents have pressed for the application of the rule of merger even to the judgments etc. which have been affirmed in appeal/revision though subject to certain exceptions which shall be highlighted in the course of this opinion. This is also the position of all the three amicus, who have forcefully added that the rule of merger should also be extended and made applicable to the decisions of affirmation passed by this Court **but** with the exception that when it *(this Court)* decides a matter on merits after grant of leave or while deciding an appeal directly filed before the Supreme Court under Article 185(2) of the Constitution of the Islamic Republic of Pakistan, 1973 *(Constitution)*, certain exceptions to the rule of merger will apply.

4. Heard. Before proceeding to examine the proposition and provide an answer thereto, we find it expedient to explain the concept

of merger by referring to the definition of the words 'merge' and 'merger'. According to Chambers English Dictionary (7th Edition), 'merge' means *"to dip or plunge; to cause to be swallowed up or absorbed in something greater or superior: to cause to coalesce, combine, or amalgamate – to be swallowed up or lost: to coalesce: to lose identity in something else"*. 'Merger' has been assigned the meaning *"a sinking of an estate, title, etc., in one of larger extent or of higher value: a combine, an absorption; or an act or process of margining"*. The Oxford English Dictionary (1933) defines 'merge' as *"to dip, plunge; to sink or extinguish (a lesser estate, title, etc.) in one which is greater or superior. Hence gen., to cause (something) to be absorbed into something else, so as to lose its own character or identity; to sink or make to disappear"* and 'merger' as *"extinguishment of a right, estate, contract, action, etc, by absorption in another"*. The definition of 'merge' provided in Corpus Juris Secundum (1936) is *"to sink or disappear in something else; to be lost to view or absorbed into something else; to become absorbed or extinguished; to be combined or be swallowed up; to lose identity or individuality; to sink the identity or individuality of; to cause to disappear; to make to disappear in something else; to cause to be absorbed or engrossed"* and 'merger' is *"absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality; in merger there is a carrying on of the substance of the thing, except that the substance is merged into, and becomes a part of, a separate thing with a new identity".* The word 'merge' has been explained in The Constitution of India by Prof. S. R. Bhansali as *"to sink or disappear in something else; to become absorbed or extinguished, to be combined or be swallowed up"*, and 'merger' as *"the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality"*. On account of

the definitions above, it is obvious that 'to merge' or 'merger' is where something is absorbed into another and/or has coalesced into another identity by losing its own original character. In the **Nasrullah Khan** case *(supra)* we have held that merger of a judgment/decree means *"that it is integrated, implanted, inculcated, infixed and instilled into the decree of the higher forum and becomes the decree/order of the later forum for all legal intents and implications"*. It is relevant to mention here that according to settled law, an appeal *(in particular)* is a continuation of the original proceedings and when an appeal is filed the entire case is reopened for examination both on the question(s) of fact and the points of law involved in any *lis* *(Note: a second appeal, however, is subject to the conditions laid down in Sections 100 and 102 CPC)*. Be that as it may, the legal position and the concept of merger in relation to an appeal has been considered and authoritatively resolved in the judgment reported as **F.A. Khan Vs. The Government of Pakistan (PLD 1964 SC 520)**. The facts of the case were:- that an employee of the Land Customs Department was dismissed from service *vide* order dated 15.8.1950 passed by the Collector of Land Customs. He filed an appeal before the Central Board of Revenue *(in the departmental hierarchy)* which was dismissed on 7.5.1952. On 25.6.1958 he filed a suit for declaration challenging the order of his dismissal and the one passed in appeal. The defendant *(customs department)* took up the preliminary objection that such suit was barred as per Article 120 of the Limitation Act, 1908 *(Limitation Act)* because the dismissal order dated 15.8.1950 was being challenged beyond the period of six years. Considering the above legal point, the learned Bench of this Court found:-

> *"…in respect of the nature of an appeal the following propositions may be regarded as established:*

> *(i) when an appeal is filed the matter becomes sub-judice and is reheard by the appellate Court which does not Act merely as a Court of error;*
>
> *(ii) after there has been an appeal even though an appellate Court simply affirms the order of the original Court the only decree or order in existence is the order of the appellate Court;*
>
> *(iii) the original and appellate proceedings are steps in one proceedings.*
>
> *…the passing of an order subject to appeal will not necessitate the filing of a suit for it is only a step in a proceeding and not a final order.* ***In any case once an appeal is filed the matter becomes sub-judice and when the appellate authority passes an order the order of the original authority disappears and merges in the order of the appellate authority so that there remains in existence only the appellate order and this order can be made the basis of a suit.****"*
>
> *(Emphasis supplied by us)*

Thus while taking into account the date of dismissal of the appeal as the relevant date for the purposes of limitation in **F. A. Khan** *(supra)* the suit was held to be within time, meaning thereby that the rule of merger was settled and applied in the context of limitation *(Note: It may be relevant to mention that in this judgment considerable case law was considered while enunciating the law that the rule of merger shall be attracted).* However this Court in the judgment reported as **Joydeb Agarwala Vs. Baitulmal Karkhana Ltd. (PLD 1965 SC 37)** took a different view that:-

> *"Certain contentions raised by Mr. T. H. Khan may be very briefly disposed of. He contended that the trial Court lacked jurisdiction to interfere with the decree because it had become final through being upheld in appeal in the High*

> *Court and not having been appealed against further, and secondly, that only the High Court could alter the decree which had become merged in the decree of the High Court. The mere fact of the decree having become immune to further appeal by the dismissal of the appeal in the High Court and the lack of further appeal does not render the decree a decree of any other Court except that of first instance. No modification was made in the decree by the High Court, and the argument of merger is rendered of no weight by the consideration that in fact the High Court rejected the appeal".*

The facts of the case were:- that a decree for specific performance in favour of the plaintiff passed by the Trial Court attained finality at the level of the High Court in appeal because the defendant's appeal was dismissed subsequent to which the plaintiff filed an application for amendment of the decree, which *(matter)* finally came before this Court wherein it was held as quoted above, that the rule of merger shall not apply. It is very important to note that the earlier judgment in **F. A. Khan** *(supra)* for whatever reason eluded the attention of this Court while rendering the opinion in **Joydeb Agarwala** *(Note: the Court also hardly took into account any previous case law on the subject, which was referred to in **F.A. Khan**'s case)*. In the case reported as **Maluvi Abdul Qayyum Vs. Syed Ali Asghar Shah and 5 others (1992 SCMR 241)** wherein the Court was called upon to resolve the proposition about the application of the rule of merger in relation to appeals and also to the revisional jurisdiction, the two verdicts of the Court *(supra)*, **F.A. Khan** and **Joydeb Agarwala**, came up for examination and further case law on the subject was exhaustively considered and this Court came to a definite and authoritative conclusion that the rule of merger shall be

attracted to the case(s) of affirmation of decisions in appeal/revision; the view of the Court was expressed in the following words:-

> *"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…"*

As regards the revisional jurisdiction it was opined:-

> *"The same object is achieved when a revision from the decree of the lower Court is accepted.* ***Thus in a way revisional jurisdiction partakes of appellate jurisdiction.*** *A case on this point is the one decided by a Full Bench of Madras High Court in Chappan v. Moidin Kutti (ILR 1899 Madras 68) where Subramania, J expressed*

> *the view that appellate jurisdiction includes revisional powers."*
>
> *(Emphasis supplied by us)*

Furthermore:-

> *"9. These judicial announcements leave no room for doubt that for the purpose of execution the rule of merger equally applies to the decree passed in exercise of revisional jurisdiction. This issue may also be examined from another angle. Take the case of a suit, which is dismissed by the trial Court and with this dismissal the First Appellate Court does not interfere, but it is decreed by the revisional Court. There should be no doubt that the decree of the Court of revision can well be executed. So far as executability of a final decree is concerned, does it make any difference, if the decree of the First Appellate Court is affirmed by the revisional Court?"*

It is clear from the ratio of the noted judgment that an exception was taken to the law laid down in **Joydeb Agarwala** and the law laid down in on **F.A. Khan**'s case was endorsed; rightly so, because in the **Joydeb Agarwala** case the earlier verdict i.e. **F.A. Khan** and the settled law on the rule of merger *(note:- referred to and relied upon in **F.A. Khan**)* was not taken into consideration and therefore the said decision *(**Joydeb Agarwala** case)* with due deference, is *per incuriam*. We have not come across better decisions in our jurisdiction explaining the rule of merger than **F.A. Khan** and **Maulvi Abdul Qayyum** cases. This rule has also been reiterated in **Nasrullah Khan**'s case *(supra)*, wherein it has been specified 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) CPC 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 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."*
>
> *(Emphasis supplied by us)*

In the verdict of this Court reported as **Muhammad Yousaf through Legal Heirs and others Vs. Noor Din and others (PLD 2002 SC 391)** it has been held as under:-

> *"4. The law on the subject now stands clarified and settled in view of the dictum laid down in Khawaja Muhammad Yousaf v. Federal Government through Secretary, Ministry of Kashmir Affairs and Northern Areas*

and others 1999 SCMR 1516 ***that if the Supreme Court merely reaffirms a judgment or order of a High Court by refusing leave to appeal the final judgment in terms of section 12(2), C.P.C. will be of the High Court and not of the Supreme Court and if the Supreme Court reverses a judgment of a High Court and records a finding on question of fact or law contrary to what was held by the High Court, the final judgment or order would be of the Supreme Court for the purpose of section 12(2), C.P.C.*** *The same view was reiterated in Abid Kamal v. Mudassar Mustafa and others 2000 SCMR 900.*

5. Adverting to the case in hand we find that by dismissing the petition for leave to appeal this Court had affirmed and not reversed the judgment of the Lahore High Court. The final judgment in terms of section 12(2), C.P.C. is, therefore, of the High Court and as such there can be no dispute with the proposition that jurisdiction to entertain and decide the application under section 12(2), C.P.C. moved by the petitioners vests exclusively in the Lahore High Court."

(Emphasis supplied by us)

We may now consider the important case law from the Indian jurisdiction, wherein the concept and the rule of merger has been elucidated and applied i.e. in **Commissioner of Income-Tax, Bombay Vs. M/s Amritlal Bhogilal and Co. (AIR 1958 SC 868)** it was held 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 **Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd., Calcutta and others (AIR 1963 SC 1124)**, the rule was laid down that:-

> *"…though it may be that the appellate authority has merely confirmed the order of the original authority and dismissed the appeal. 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."*

In **Lakshminarayan Guin & Ors Vs. Niranjan Modak [(1985) 1 SCC 270]** the court concluded:-

> *"It is well settled that when a trial court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on the merits, the trial court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules."*

In **Kunhayammed and others Vs. State of Kerala and another (AIR 2000 SC 2587)** the Court has lucidly set out the concept of merger, its logic, scope and application and concluded as under:-

> *"To sum up our conclusions are :-*
>
> *(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law."*

But considering whether the rule of merger shall be applicable where leave has been refused by the Supreme Court it was held:-

> *"(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal.* ***The doctrine of merger can therefore be applied to the former and not to the latter.***
>
> *(Emphasis supplied by us)*
>
> *(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*

> *(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.*
>
> *(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation."*

This judgment has been affirmed and the view set out therein has been fully endorsed and acknowledged in a later judgment from the Indian jurisdiction reported as **Bakshi Dev Raj and Anr. Vs. Sudheer Kumar (AIR 2011 SC 3137)**.

5. From the ratio of the case law cited above *(from both jurisdictions)*, it is clear that the doctrine of merger has been duly applied to the reversal and modification cases and also to all those cases in which the judgment etc. of a lower forum has been affirmed in appeal or revision by a higher forum(s) *(Note: though there are certain exceptions to this rule which shall be specified in the concluding part of this opinion)*. We may like to add here that the rule of merger shall also extend to the

writ jurisdiction of the learned High Court(s) where the decisions of the lower fora, such as Tribunals and Special Courts etc. when challenged have been affirmed by the court in exercise of its constitutional jurisdiction.

6. The learned counsel(s) for the appellants in support of their contentions, cited certain judgments of this Court, which *(case law)* according to them are directly on the subject of 12(2) *qua* the forum where such application should be filed. The learned counsel for the respondents and the learned amicus countered that such dicta do not impinge upon the rule of merger which is unequivocally attracted to the decisions of the higher forum affirming the judgments of the lower fora and that those cases are distinguishable or fall within the exception(s) to the rule of merger. The first judgment cited is **Government of Sindh and another Vs. Ch. Fazal Muhammad and another (PLD 1991 SC 197)**. The facts of the case were:- that the respondent of the case *(Ch. Fazal Muhammad)* filed an application under Section 14 of the Arbitration Act, 1940 against the appellant *(Government of Sindh)* and after notice to the appellant and upon hearing it, the award was made rule of the court; appeal of the appellant was dismissed for non-prosecution; the restoration application also was not pursued and thus dismissed. Thereafter an application under Section 12(2) of the CPC was filed perhaps before the appellate court *(Note: as this is not quite clear from the facts narrated in the judgment)* which was dismissed throughout, and when the matter came to this Court the focal point was whether in such circumstances the application was maintainable, but there was no such issue about the forum where such application should be filed. The Court held:-

> *"10. It will be seen from the above that the appellants had opportunity to take all the objections to the award and if they did not plead all the facts and raised all the objections to the award which were available to them for an application under sections 30 and 33 of the Arbitration Act they have to blame themselves. Under Section 12(2), C.P.C. a party can question the validity of a judgment, decree or order on the plea of fraud etc. In this case the challenge is not to judgment, decree or order but to the award itself. This could be done only under section 30 or 33 of the Arbitration Act. Even a review of the judgment, decree or order could not be sought because if new or important matter was discovered the appellant had to satisfy, in order to succeed, that they had exercised due diligence and in spite of that the facts pleaded in the application under Section 12(2) were not within their knowledge.*
>
> *12. Accordingly, an application under section 12(2), C.P.C. also was not maintainable."*

It is thus noticed that the legal point involved herein was neither in issue nor was dilated upon and resolved by this Court in the judgment *supra*. In **Secretary, Ministry of Religious Affairs and Minorities and 2 others Vs. Syed Abdul Majid (1993 SCMR 1171)** the factual backdrop was:- that the transfer of the property *(in question)* as evacuee in favour of the respondent *(of the case namely Abdul Majid)* by the Settlement Department was annulled by the Chairman Evacuee Trust Property *(CETP)* declaring it to be Evacuee Trust Property. This order was challenged by the respondent in the constitutional jurisdiction of the High Court and he succeeded. The leave application before this Court by Secretary Ministry of Religious Affairs *(the Secretary)* was dismissed as being barred by time. Thereafter

the Secretary moved an application under Section 12(2) of the CPC before the High Court which was disallowed; the moot points before this Court in the case were two fold, one about the forum having jurisdiction in the matter and another a legal issue about the application of MLR 57. The Court on the first point, which is relevant for this judgment categorically held:-

> *"In this connection the next point for consideration is whether in view of the fact that this Court had dismissed civil petition for leave to appeal filed by the appellants against the judgment of the High Court, application under section 12(2), C.P.C. could be filed in the High Court or in the Supreme Court. As held in the Government of Sindh and another v. Ch. Fazal Muhammad PLD 1991 SC 197, such application can be filed in the Court which passed the final order.* ***The final order in the present case was passed by the High Court and therefore the application filed by the appellants there was competent****".*
>
> *(Emphasis supplied by us)*

In **Khawaja Muhammad Yousaf Vs. Federal Government through Secretary, Ministry of Kashmir Affairs and Northern Areas and others (1999 SCMR 1516)** the allotment of the land in favour of the appellant of the case *(Khawaja Muhammad Yousaf)* as a displaced person from the State of Jammu and Kashmir which was mutated in his name by the Tehsildar was set aside by the Collector in appeal; this order was reversed by the Additional Commissioner on appeal of Kh. Yousaf. Against the order of the Additional Commissioner, the Federal Government went in revision before the Member, Board of Revenue which was rejected on 25.2.1988; the constitutional petition of the Government was dismissed by the learned High Court *vide*

judgment dated 15.8.1989. This judgment was challenged by some private person(s) by filing applications under Section 12(2) of the CPC before the High Court on the ground(s) that the allotment of Kh. Yousaf is the result of fraud etc. and, therefore, the said judgment be set aside. The applications were allowed and the judgment dated 15.8.1989 was set aside; leave was granted by this Court *inter alia* to *"examine the legal question as to, whether an application under section 12(2), C.P.C. could have been filed by the private respondents before the High Court"*. In order to answer the above question, the Court was required to determine *"which of the judgments/orders can be treated as a final judgment/order in terms of subsection (2) of section 12 C.P.C."* The Court however on examination of the two earlier judgments of **Government of Sindh** and **Secretary, Ministry of Religious Affairs** approved the latter dictum while concluding:-

> *"In our view, the law enunciated in the above case of Secretary, Ministry of Religious Affairs and Minorities and 2 others v. Syed Abdul Majid (supra) reflects the correct legal position. If this Court merely reaffirms a judgment or order of a High Court by refusing leave, the final judgment in terms of subsection (2) of section 12, C.P.C. will be of the High Court and not of the Supreme Court. However, if the Supreme Court, reverses a judgment of a High Court and records a finding on question of fact or law contrary to what was held by the High Court, in that event the final judgment or order would be of the Supreme Court for the purpose of subsection (2) of section 12, C.P.C. In this view of the matter, the final judgment in the case in hand was of High Court as it reversed the findings recorded by the forums provided under the Settlement Law"*.

In **Abid Kamal Vs. Muddassar Mustafa and others (2000 SCMR 900)** the petitioner who had approached this Court directly under

Section 12(2) during the course of hearing of the matter, while accepting **Secretary, Ministry of Religious Affairs** *(supra)* as the valid law laid down by this Court sought the permission of the Court to withdraw his petition with the observation that the court seized of the matter *(which he would approach)* should sympathetically consider the condonation of delay with regard to the time spent pursuing his remedy before this Court, the Court held:-

> *"…In both the cases i.e. 1993 SCMR 1171 and 1999 SCMR 1516 the ratio decidendi is that if Supreme Court merely affirms judgment or order of High Court by refusing leave the final judgment in terms of section 12(2), C.P.C. will be of the High Court and not of the Supreme Court, and if, however, Supreme Court reverses a judgment of a High Court and records a finding on question of fact or law contrary to what was held by the High Court, in that event the final judgment or order would be of the Supreme Court for the purposes of section 12(2), C. P. C..*
>
> *4.* ***In the case in hand as well this Court had refused to grant leave to respondent Muddassar Mustafa and others, therefore, keeping in view these facts we are of the opinion that application under section 12(2), C.P.C. subject to all just exceptions will be competent before the Court which had finally decided the appeal****."*
>
> *(Emphasis supplied by us)*

In **Bakhtiar Ahmed Vs. Mst. Shamim Akhtar and others (2013 SCMR 5)** while the question of limitation in the context of Section 48 of the CPC was under consideration and the rule of merger was taken into account; it was held that mere filing of leave petition before this Court and the decision thereupon shall not attract the rule of merger

and extend the period of limitation. In this regard the relevant portion reads as:-

> *"There being no, statutory remedy of appeal or revision available against said decree and the only remedy available was filing a petition for leave to appeal before this Court, which is a constitutional court, therefore, unless the operation of the impugned decree is suspended or the petition is converted in to an appeal the petitioner cannot presume that the period of limitation has been clogged. Mere filing of petition before this court would not automatically enlarge the time of filing the execution application.* ***Needless to mention here that in case relief is granted by this Court after allowing the appeal with leave of the Court then in the said eventuality the order of this Court would merge into order of the lower forums as such the period of limitation would start from the order of this Court****"*.
>
> *(Emphasis supplied by us)*

7. From the analysis of the above case law, it transpires that in none of these judgments has the rule of merger been taken into consideration *(Note: exception in* ***Bakhtiar Ahmed*** *case, but that too in a different context)* in the context of the provisions of Section 12(2) of the CPC. Rather such principle was conceived and applied in clear terms in **Nasrullah Khan**'s case *(supra)* for the first time which enunciation of law is in line with the rule of merger as defined, perceived and applied in our jurisprudence and also the Indian jurisprudence *(Note: all the definitions/dicta have been cited in paragraphs No.4 to 6 of this opinion)*. Moreover in none of the judgments that we have considered has it been held that the rule of merger shall not apply to the decisions passed in affirmation in appeal/revision/writ. All the later judgments, subject to their own peculiar features as highlighted

above, have followed the ratio of the judgment reported as **Secretary, Ministry of Religious Affairs** *(supra)*. The distinguishing feature of the law laid down therein is that the Court is inclined to apply the rule of merger to the affirmation decision in appeal when the same is on merits with the proviso that the said doctrine shall not be attracted where the decision of the lower forum has been simply upheld in the manner that this Court had declined to interfere with such decision, through the refusal of leave to appeal. It is thus clear that where a matter has been heard and decided by this Court in appeal and the verdict of the lower forum has been affirmed on merits the rule of merger shall duly apply, and thus the application under Section 12(2) of the CPC subject to the exceptions mentioned in the concluding part of this judgment can be competently filed before this Court. For the plea raised by the appellants' side that in view of Order I Rule 5 of the Supreme Court Rules, 1980 *(Rules)* the provisions of CPC are not applicable to the proceedings before the Supreme Court, suffice it to say that there is no bar upon the Court to apply and resort to the principles of CPC and thus it is within the absolute prerogative and discretion of this Court to entertain and decide such an application *(under Section 12(2) CPC)*.

8. In order to sum up the discussion on the subject, we find that the following are the situations *(with certain exceptions)* which would be relevant to the determination of the **final court** within the purview of Section 12(2) of the CPC:-

(i) Where an appeal/revision/writ is accepted, the judgment etc. is reversed, varied, modified or affirmed;

(ii) Where an appeal/revision/writ is not disposed of on merits but on some other grounds;

(iii) Where direct appeals or those after the grant of leave are allowed or dismissed and the judgment etc. of the learned High Court(s)/Tribunals or special forums below has been varied, altered, reversed or affirmed by this Court;

(iv) Where the petition(s) for leave to appeal under the Constitution is declined;

9. With respect to these four situations, our conclusion is as under:-

(i) In the cases where the remedy of appeal/revision is provided against a judgment etc. or a remedy of writ is availed, the appellate/revisional/constitutional forum records reasons on the consideration of the issues of law and/or fact the judgment etc. of the subordinate court/forum will merge into the decision of the appellate court etc. irrespective of the fact that such judgment reverses, varies or affirms the decision of the subordinate court/forum and its decision will be operative and capable of enforcement on the principle of merger, the application under Section 12(2) of the CPC will be maintainable before the appellate/revisional/constitutional forum *(High Court, District Court, Tribunal or Special Court as the case may be)*;

(ii) In the situation mentioned at serial No.(ii) above, there are certain **exceptions** to the rule of merger which *(rule)* shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of *locus standi*; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the *lis* or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of *laches*. It may be mentioned that such exceptions shall also be attracted to the

decision(s) of the Supreme Court, where applicable. However where the case falls within the noted exceptions the forum for an application under Section 12(2) of the CPC is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum;

(iii) In the cases of reversal or modification of the judgment of the High Court(s), Tribunal(s) or Special Courts before this Court, or those affirmed in appeal *(where the matter does not fall within the exceptions)* the judgment of the Supreme Court shall be deemed to be final for moving an appropriate application on the plea of lack of jurisdiction, misrepresentation and fraud;

(iv) In the cases where leave is declined by this Court, the judgment etc. of the lower fora will remain intact and final and will not merge into the leave refusing order, for the purposes of an application under Section 12(2) of the CPC which can only be filed before the last forum i.e. the learned High Court(s) if the matter has been decided in the appellate/revisional/writ jurisdiction by the said court, or if the matter has come to this Court directly for leave from a Tribunal/Special Court *(see Article 212 of the Constitution)*. However where the petition for leave to appeal has been dismissed with detailed reasons and a thorough decision of the questions of law and fact has been made, the judgment of the High Court(s)/Tribunal will though not merge into the order of the Supreme Court yet in order to avoid a ludicrous situation that once a question of law and fact has been elaborately and explicitly dealt with by this Court in the leave refusing order and the court below may not be in a position to adjudicate upon those points without commenting on the order/reasons of the Supreme Court and to reopen the matter, an application in the nature of Section 12(2) of the CPC can be filed before this Court, leaving it to the absolute discretion of this Court to either decide such application itself or send the matter to the lower fora for the decision;

9. The above are the detailed reasons for the short order of even date whereby these cases were dismissed, which reads as:-

"For the reasons to be recorded later, we do not find any merit in these cases which are hereby dismissed."

However before parting we may express our appreciation for the valuable input and assistance provided by all the three amicus.

JUDGE

JUDGE

JUDGE

Islamabad, the
19th January, 2016
Approved For Reporting
Waqas Naseer/*