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**Sukh Ram Dass and ors. Vs. the District and Sessions Judge and ors.**

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**Court** : Punjab and Haryana

**Decided On :** Feb-20-2009

**Reported in** : (2009)154PLR655

**Judge** : Ranjit Singh, J.

**Appellant** : Sukh Ram Dass and ors.

**Respondent** : The District and Sessions Judge and ors.

**Disposition** : Petition dismissed

**Judgement** :

**Ranjit Singh, J.**

1. Issue of significant importance concerning the Doctrine of Merger and that of Res judicata would arise for consideration in the present writ petition. At stake is the right of the petitioners and that of respondent No. 2 concerning the property, which was mortgaged before partition by respondent No. 2 to a person, who migrated to Pakistan after partition. Whether such a mortgaged property become evacuee property to be dealt with by custodian would be another important question requiring determination?.

2. The petitioners while challenging order, Annexure P6, passed by District and Sessions Judge, Hoshiarpur (respondent No. l) exercising revisional powers under

the Evacuee Interest (Separation) Act, 1951 (for short 'the Act') would urge that respondent No. 1 could not have set at naught the proceedings finally determined by competent officer after 16 years, that too without sufficient cause shown, when the sale in favour of the petitioners had been confirmed and finalised much earlier.

3. The facts, as pleaded, are that respondent No. 2 mortgaged his land measuring 64 kanals 17 marlas with Shri Tuffail Mohmad alias Abdul Hamid of village Mohydinpur Gazi for a sum of Rs. 8,000/- vide a registered deed dated 10.3.1947. Mutation No. 539 was sanctioned on the basis of this mortgaged deed on March 7, 1949. Respondent No. 2 also mortgaged another land measuring 11 kanals 16 marlas with Naseerudin son of Mehtab and Fazaludin son of Peer Ditta for sum of Rs. 1,000/- through a mortgage deed dated January 5, 1946 and December 28, 1946. Mortgagees migrated to Pakistan and the land statedly became a composite property. On December 29, 1958, competent officer declared that both these properties had vested in the custodian. On an appeal, this order passed by the competent officer, however, was set-aside and he was directed to decide the case afresh. Competent Officer again took up the case after remand and entered the cases as Claim No. 4484/4498 with respect to land measuring 11 kanals 16 marlas mortgaged vide deed dated January 5, 1946 and December 28, 1946. The competent officer entered the another case as Claim No. 4497-4485 in respect of the land 64 Kanals 17 Marias mortgaged through deed dated March 10, 1947. Thereafter, Competent Officer directed respondent No. 2 to deposit mortgage money with respect to Claim No. 4484/4498. Respondent No. 2, however, did not comply with the orders despite grant of extension of time for depositing the amount. Rather, it is averred that respondent No. 2 made a categorical statement on November 19, 1962 before the competent officer that he did not want to redeem this land as the same had been allotted to displaced persons in consolidation and the land had been included in the Tucks of allottees. The competent officer accordingly declared that this land had vested in the custodian free from all encumbrances as the mortgagee had expressed his unwillingness to redeem the land.

4. It is stated that the claim in respect of mortgage deed dated March 10, 1947 though was not submitted in time, but still the competent officer entertained the

claim on October 12, 1962. He accordingly ordered that mortgagee can redeem the land on payment of Rs. 8002/- (Rs. 2/- being notice charges). The money was required to be deposited in the treasury and the challan was to be presented before the competent officer on November 17, 1962. The mortgage amount, however, was not deposited. The competent officer extended the time upto January 1, 1963. Neither the amount was deposited on the date fixed nor the mortgagee appeared before the competent officer.

5. The competent officer accordingly ordered the sale of composite property, which was conducted on February 11, 1963 after notice to respondent No. 2. Respondent No. 2, challenged the auction sale by filing application dated February 13, 1963. While entertaining the application, the competent officer adjourned the proceedings to March 18, 1963, while affording one more opportunity to respondent No. 2 to deposit the mortgage money. Mortgage amount still was not deposited by respondent No. 2. It is urged that there is no provision under the Act for extending the time for deposit of mortgage money after the property had been put to sale and despite concession shown by competent officer, the same was not availed.

6. The petitioners otherwise were die highest bidders at die auction sale. The sale was confirmed in their favour by the competent officer vide order dated April 30, 1963 and the sale certificate was duly issued to them. It is stated that the order confirming the sale was an appealable under Section 14 of the Act, but still no appeal was filed against the same. The petitioners would urge that this order, thus, became final.

7. Respondent No. 2 subsequently filed a civil suit for redemption of land covered by mortgage deed dated March 10, 1947. This suit was contested by the petitioners. The civil court dismissed the suit on March 25, 197S. It is to be noted that die suit was not dismissed on merits as the court found that it did not have any jurisdiction to entertain the same. Respondent No. 2 thereafter filed a writ petition No. 3735 of 1975 before this Court to challenge order dated April 30, 1963. After notice of motion, the writ petition was dismissed in limine on July 15, 1975, order reading 'Dismissed'.

8. From the foregoing facts/pleadings, the petitioners would plead that the order of sale and confirmed by the competent officer would merge into the order passed by the High Court and, thus, would become final. Still, respondent No. 2 succeeded in getting suo motu reference made under Section 15 of the Act from the department. Respondent No. 2 also filed a revision petition on December 7, 1979 purporting to be under Section 15 of the Act before respondent No. 1. The petitioners submitted written reply to this revision petition. Respondent No. 1 through his order dated April 30, 1982 set-aside the order dated November 19, 1962 passed in Claim No. 4484/4498 and the order confirming the sale of the auction sale dated April 30, 1963. This order passed by respondent No. 1 is under challenge in the present writ petition.

9. While issuing notice of motion, die further proceedings before die competent officer were stayed on 28.5.1982. The writ petition was admitted on 29.11.1982 and the stay was ordered to be continued. In a written statement filed on behalf of respondent No. 2, the pleas raised in the writ petition are controverted. While explaining the statement made by respondent No. 2, that he declined to redeem the land, it is stated that mis statement has been misconstrued as it was only concerning mat part of the land of die respondent, which was subject matter of one mortgage, leading to Claim No. 4484/4498. It is stated that in fact after consolidation, die total land of die petitioners was formed into one Tuck and was allotted. Prior to this, the respondent had two tucks of land, which were separately mortgaged by separate deeds but subsequently, after consolidation, the total holding of die land was reduced to 58 kanals only. This reduction, as per me respondent, was due to the reason mat total holding had to be reduced because of reservation made for common purposes under Section 18 of me East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (for short 'me Consolidation Act') and that the kanals prior to consolidation were smaller and not standard kanals and further that some of the land of die respondent was Barani and after consolidation he got whole of the land as A class. It is also disclosed that the total allotment being 58 kanals, respondent No. 2 thought that his block of 11 kanals 16 marlas had been allotted to the allottees and under this misconception, he made a statement that since part of his land has been allotted to the allottees, he did not want to redeem it. Respondent No. 2 accordingly pleads that the

statement made under misconception of facts would not bind him.

10. Respondent No. 2 has otherwise denied if he was aware of the sale proceedings as stated in para 8 of the petition. It is further pleaded that the competent officer has no jurisdiction to sell the nonevacuee interest. Plea is that it was incumbent upon the competent officer to first separate the evacuee interest from non-evacuee interest under the provisions of the Act and only then the competent officer could have sold the evacuee interest only. It is in this background pleaded that the sale ab-initio was without jurisdiction and the exercise of revisional power was not to show any concession to respondent No. 2 as is being made out by the petitioners.

11. Respondent No. 2 would further find fault with the manner of auction where petitioners claimed to be highest bidder. By disclosing that there were hardly any people, who had come to bid for the land and those few who had come on the spot had connived with each other as would be apparent from the facts that only one bid of Rs. 100/-more than the reserved price was given and the land was sold to the first bidder. It is claimed that the market value of the land at that time was Rs. 50,000/-. The fact that answering respondent had filed a civil suit and the same was dismissed is conceded by highlighting that the same was dismissed for want of jurisdiction. It is accordingly stated that the civil court did not discuss the merits of the controversy. While conceding the dismissal of civil writ petition in limine, it is pointed out that the High Court also did not adjudicate in regard to the rights of the parties and as such it is stated that the dismissal of the writ petition would not bar the statutory remedies. Respondent No. 2, in this background, would further plead that his rights did not vest in the custodian and, thus, the competent officer would not be competent to sell these rights in auction. Thus, respondent No. 2 would justify the action of the State in taking up the matter suo-motu, which, according to him, was to do justice. In addition, respondent No. 2 had also filed a revision petition. He (respondent No. 2), thus, would plead for dismissal of the writ petition.

12. Mr. ML. Sarin, Senior Advocate has primarily made twofold submission before me to challenge the impugned order, Annexure P-6. He would strongly advocate that the order of competent officer dated 30.3.1963 confirming the sale had

merged into the High Court order dated 15.7.1975, through which the writ petition filed by respondent No. 2 was dismissed. He would accordingly plead that once the decision of the inferior court merges with the decision of the superior court, challenge can only be directed against the decision of the superior court. The Counsel would further contend that the doctrine of merger would apply in this case. Whether statutory appeal or revision is available or not is wholly irrelevant, says the Counsel. He further says that respondent No. 1 was not justified in observing that the decision of the High Court dismissing the petition with one word 'dismissed' would not be such which can attain the character of merger or finality. As per the Counsel, the decision of the High Court, dismissing the writ petition filed by respondent No. 2, would operate as res judicata in subsequent proceedings before any court or before any authority constituted under the Act. The Counsel would also submit that the revisional power had been exercised to set at naught the proceedings, which finally determined the right of parties on 30.4.1963 after a lapse of 16 years. As per the Counsel, the phrase 'any time' used in Section 15 of the Act could not have been assumed to mean that the authority can entertain the petition after lapse of 16 years when respondent No. 2 had the knowledge of the order passed on 30.4.1963. In addition, he pleads that the impugned order is nullity because Sher Singh, one of the auction purchaser (arrayed as respondent No. 6 in the revision petition) had died on 23.12.1980. His L.Rs. were not brought on record before the pronouncement of the judgment. Objection in this regard was raised but was not considered.

13. The Counsel appearing for respondents would, however, seriously join issue with the Counsel for the petitioners and would urge that the order passed in the civil writ petition dismissing the same with one word 'dismissed' cannot operate as res judicata. They would also point out that respondent No. 1 had exercised his revisional jurisdiction. It was before respondent No. 2 filed a revision under Section 15 of the Act. They would submit that there is no bar for the State to challenge an auction sale which was patently without jurisdiction. Contesting the ground that the order is nullity as having been passed against one of the respondent, who was no more, it is pleaded that it was the responsibility of the respondents, who were equally interested in the property and were present before the court to implead the L.R of the dead respondent. It is stated that no such objection was ever raised

before the revisional court and, thus, the order would not be rendered as nullity on this ground as pleaded by the Counsel for the petitioners.

14. Before proceeding ahead to consider the legal submissions made by respective parties regarding doctrine of merger and res judicata, some undisputed facts, which have resulted in passing of the impugned order, may need to be noticed.

15. Respondent No. 2 had mortgaged two sets of land separately. The person to whom the land was mortgaged had migrated to Pakistan. Both the pieces of land, thus, became composite property. The competent officer vested this land in the custodian through his order dated 29.12.1958. Against this order, Joginder Singh, respondent No. 2, filed an appeal which was accepted by Appellate Officer through order dated 24.3.1962 and the relevant observations in this regard are as under:

I, therefore, am of the opinion that he was not served and the order made under Section 11 of the Evacuee Interest (Separation) Act without the publication of General notice and personal service, was without jurisdiction and nullity. Even otherwise, no non-evacuee interest can vest in the Custodian under the Evacuee Interest (Separation) Act. The Act has been enacted for the separation of the Evacuee interest from those of nonevacuees. Moreover, his interest in the land could not vest in the custodian in view of the recent Supreme Court ruling A.I.R. 1961 (page 1391). I, therefore, accept the appeal, set aside the order impugned, after condoning the delay and direct that the claim may be decided now on merits.

16. Respondent No. 2 had submitted his statement of claim under Sub-section (1) of Section 7 of the Act on 12.10.1962. However, before his this statement could be filed, the consolidation proceedings took place and the land measuring 58 kanals was allotted in lieu of these two pieces of land mortgaged by respondent No. 2, Joginder Singh. The statement of claim dated 12.10.1962 primarily was in respect of a land mortgaged by respondent No. 2 for Rs. 8000/- with Tufail Mohd., but he mentioned in the claim that he had mortgaged the land in lieu of which 58 kanals has been allotted through two different mutauns for Rs. 8,000/- and Rs. 1,000/-. It is in this background, respondent No. 2 made a stated on 19.11.1962 that the land

mortgaged and covered by cases No. 4484 and 4498, measuring 11 kanals 16 marlas had been allotted to the displaced persons during consolidation proceedings, along with the other mortgaged land covered by cases No. 4497 and 4485/1210. He did not wish to redeem the land. Obviously, this statement was only concerning land measuring 11 kanals 16 marlas covered by claim cases No4484 and 4498. Competent officer had already passed an order on 12.10.1962 directing respondent No. 2 to get the land redeemed on deposit of Rs. 8,000/- along with the other pieces of land, mortgaged for Rs. 1,000/- as both the lands had merged during the consolidation proceedings. Respondent No. 2 was required to produce the treasury receipt showing deposit of Rs. 8,000/- on 17.11.1962. He, however, did not deposit the amount till 1.1.1963 and so the competent officer directed the sale of property through his order dated 1.1.1963.

17. As to what were the directions regarding first bid would be important to notice. Direction was that first bid would be for Rs. 8,000/-. It is, thus, obvious that the competent officer did not take into account the second mortgage effected by respondent No. 2 for Rs. 1,000/-. The highest bid for the land was for Rs. 8100/- on 11.2.1963. This bid was accepted and the sale in favour of the highest bidder was confirmed on 30.4.1963. Thus, this sale has been done completely ignoring the other mortgage of land made by respondent No. 2 (Joginder Singh) for Rs. 1,000/-.

18. The competent officer had passed an order on 19.11.1962 vesting the land in Custodian free from all encumbrances and liabilities through an order which reads as under:

In view of the statement of the claimant, the land involved in cases No. 4484 and 4498 is hereby vested in Custodian free from all encumbrances and liabilities.

19. The statement of respondent No. 2 (Joginder Singh) which was made on 19.11.1962, reads as under:

The land involved in cases No. 4484 and 4498 has been allotted to displaced persons and in consolidation that has been included in taks of the allottees. Hence I do not want to redeem. The land be vested in the custodian free from all

encumbrances and liabilities.

20. Respondent No. 2 had first filed a civil suit and when the same was dismissed for want of jurisdiction, then a writ petition, which was dismissed on 15.7.1975. His (Respondent No. 2) grievance in the revision petition is that the competent officer had illegally vested the land covered by claim cases No. 4484 and 4498 in the Custodian, free from all encumbrance through his order dated 19.11.1962 simply because he did not make the payment without following procedure prescribed under Section 10 of the Act. Regarding claim case No. 4497 and 4485, it was pleaded that the competent officer could not order the sale of entire land including the land covered by cases No. 4484 and 4498 for recovery of amount of Rs. 8000/- (only).

21. The petitioners resisted the said revision petition on the ground that it was not maintainable and that it was hopelessly barred by time and also barred by principles of res judicata. As already noticed, the State had also filed a revision by pleading that competent officer had ordered the vesting of property covered by claim cases No. 4484 and 4498 in custodian through his order dated 19.11.1962, although the equity of redemption was still available to the mortgagor and competent officer could not vest the non-evacuee interest in the mortgaged property in the Custodian. Regarding the other property covered by cases No. 4497 and 4485, it is pleaded that simply because the mortgagor failed to pay the mortgage amount, the mortgaged property could not be ordered to be sold for the recovery of mortgage amount of Rs. 8,000/- only, particularly when the property, ordered to be sold, included both sets of mortgaged property merged together in 58 kanals of land allotted after consolidation proceedings. The objection is that the competent officer did not take any steps to segregate the land covered by the two mortgages and the entire land was sold for recovery of mortgage amount of Rs. 8,000/- only. Thus, a mortgage amount of Rs. 1,000/- was altogether ignored at the time of ordering the sale. It is even the case of the State that the price of the land was about Rs. 50,000/-, but was auctioned at a ridiculous low price of Rs. 8100/-. It was, thus, put under challenge.

22. While allowing the revision petition, all the pleas raised by the petitioners were considered. The petitioners had raised the plea of limitation, estoppel, res judicata etc. The plea of estoppel, as raised by the petitioners, was declined on the ground that the statement made by respondent No. 2 was qualified statement and he stated therein concerning the land involved in cases No. 4484 and 4498. In view of this statement, the competent officer was required to separate the two pieces of land before putting them on sale and could not have done so by making them a single block. As rightly observed, the equity redemption was still available to respondent No. 2 when the impugned order dated 19.11.1962 was passed.

23. If the object of the Act is noticed, then it is not to vest in the Custodian property which was not an evacuee property, but only to vest in him the evacuee interest in the property. Section 11 of the Act clearly provides that any property cannot vest in custodian which is not an evacuee property, particularly in cases where the competent officer is aware of the fact that the evacuee had only the right to recover the mortgage amount from the non-evacuee mortgagor. Thus, the order vesting the disputed land in the custodian free from all encumbrances and liabilities was held absolutely illegal. The plea of res judicata, as raised and which was termed as halfhearted by the revisional authority, was also dismissed on the ground that this cannot operate as res judicata to debar him to initiate present proceedings, which were intended to rectify the illegalities committed by the competent officer.

24. Learned Counsel for the petitioners has referred to number of precedents. Reference is first made to Amarjit Singh and Ors. v. Financial Commissioner, Taxation, Punjab, Chandigarh and Ors. A.I.R. 1978 P&H; 329 in support of plea of res judicata and doctrine of merger. It is observed that where writ petition against the revisional order of Financial Commissioner is dismissed, then the Financial Commissioner has no jurisdiction to review his previous order. In this case, the court has observed that doctrine of merger has a direct bearing on the principle of res judicata as the objects to be achieved by the application of this doctrine are twofold, i.e., (a) to avoid multiplicity of proceedings, and (b) to achieve the finality in decision. In The Kiranj Cooperative Credit and Service Society Ltd. v. State of Haryana , this Court has held that dismissal in limine of writ petition against an

order, such order will stand merged in that of the High Court and the decision of the High Court even in limine cannot be set-aside by the inferior court even though it may be exercising statutory remedy by way of review or revision. While taking this view, the Division Bench followed the Full Bench decision in the case of Daya Wanti v. Yadvindra Public School, Patiala and Ors. , which, in fact had affirmed the decision in Amarjit Singh's case (supra). The Full Bench in the case of Daya Wanti (supra) has held that dismissal of an appeal or revision by a superior court has the effect of merging of the decision of the inferior court with that of the superior court and that the doctrine of merger applies, it be a decision in a revision petition or appeal or dismissal of a writ petition in limine by the court. Reference is also made to The State of Maharashtra and Anr. v. Shri Prabhakar Bhikaji Ingle 1996 (3) ST 245 to urge that where the Supreme Court had affirmed the order passed by the Tribunal by dismissing the SLP, then the Administrative Tribunal would not be justified in reviewing its own order which is so affirmed by dismissal of SLP. Reliance is also placed on the case of Sree Narayana Dharma Sangam Trust v Swami Prakasananda and Ors. Judgment Today 1997 (5) S.C. 100 to highlight the doctrine of merger. In this case, the High Court was held justified in refusing to review its order passed in revision where the High Court order has merged in the order passed by the Apex Court.

25. On the point of delay, attention is invited to the case of Gram Panchayat Kakran v. Additional Director of Consolidation and Anr. 1998 (1) RLR 170. The Hon'ble Supreme Court in this case has viewed that though no limitation is prescribed for moving an application under Section 42 of the East Punjab Holdings (Consolidation and Fragmentation) Rule, 1949, but party aggrieved is required to move the appropriate authority for relief within a reasonable time and that application made after inordinate delay is not to be entertained. The case of Amar Singh and Ors. v. Mehnga Singh and Ors. (1965) 67 PLR 120, is relied to say that when the legal representatives of a deceased respondent are not brought on record in appeal against a declaratory decree jointly passed in favour of deceased respondent and his brother, the appeal would abate in toto. In this regard only, support is sought from the observations made in the case of Bank of India v. Mehta Brothers and Ors. J.T. 2008(10) S.C.5 471.

26. On the other hand, the Counsel for the respondents has referred to Haqiquat v. The Additional Director Consolidation of Holdings, Punjab and Ors. 1981 P.L.J. 239. While interpreting the words 'at any time' appearing in Section 42 of the Consolidation Act, it is held that power can be exercised without any limitation of time but should not be exercised arbitrarily and power being discretionary and judicial would be exercised reasonably. In regard to pleas of doctrine of merger and res judicata, heavy reliance is placed on the observations made by the Supreme Court in the case of Kunhayammed and Ors. v. State of Kerala and Anr. : [2000]245ITR360(SC) , which would require consideration in detail.

27. The Counsel for the respondents would also rely upon the observations made by the Five Judges Bench of the Hon'ble Supreme Court in State of U.P. and Ors. v. Dr. Vijay Anand Maharaj : [1962]45ITR414(SC) . While talking about the order passed under Article 226 of the Constitution, it is held that application under the said Article was not a 'proceeding under the Principal Act' i.e. U.P. Agriculturist Income Tax Act, 1948 (3 of 1949) nor a continuation of a proceeding under the Act and Section 11 of the Act. It is further observed that jurisdiction to issue writ under Article 226 is the original jurisdiction as distinguished from appellate or revisional jurisdiction. It may be described as extraordinary original jurisdiction and it could not therefore be contended that a petition under Article 226 was a continuation of the proceedings under the U.P. Act 14 of 1956.

28. Let us now revert back to the submissions made by learned Counsel for the petitioners to challenge the impugned order. By referring to various cases, as already noticed above, Mr. Sarin would contend that the order passed by the competent officer had merged with the order passed by this Court in the writ petition and hence this could not have been challenged in the revision before respondent No. 1. His plea further is that the order dismissing the writ petition would act as res judicata in the subsequent proceedings. Besides, he has also raised a plea of a delay on the part of respondent No. 2 to file the revision petition. In support of his plea of merger/res judicata, the Counsel has relied on various cases as noted above. In fact, the Supreme Court has considered the doctrine of merger and res judicata in detail in Kunhayammed's case (supra) and almost all the decisions, which were considered by the Full Bench of this Court in Daya

Wanti's case (supra) have been considered by the Hon'ble Supreme Court. Thus, the view that has been culled out by the Hon'ble Supreme Court in Kunhayammed's case (supra) would now prevail as being an authoritative pronouncement in the field. Other judgments passed by this Court probably would have to make way for the law laid down by the Hon'ble Supreme Court in this case.

29. In Kunhayammed's case (supra), the Hon'ble Supreme Court has traced out the judicial opinion of the Supreme Court as it progressed through the times.

30. In CIT v. Amritlal Bhogilal and Co. : [1958]34ITR130(SC) , the Hon'ble Supreme Court held:

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.

31. In State of Madras v. Madurai Mills Co. Ltd. : [1967]1SCR732 , the Supreme Court viewed that doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that whenever there are two orders, one by inferior authority and other by superior authority, passed in an appeal or revision there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or revisional order and the scope of appeal or revision contemplated by the particular statute. It is further observed that the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of statutory provisions conferring the appellate or revisional jurisdiction. In U.J.S. Chopra v. State of Bombay : [1975]1SCR394 , it is held as under:

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

32. The doctrine not being of universal or unlimited application has to apply having regard to the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view. In Workmen v. Board of Trustee of the Cochin Port Trust (1978) 3 S.C.C. 199, three-judges bench of the Supreme Court has held that dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. It was observed that dismissal of a special leave petition under Article 136 against the order of tribunal would not necessarily bar the entertainment of a writ petition under Article 226 of the Constitution against the order of the tribunal.

33. The issue came up before the Supreme Court in the case of Indian Oil Corporation Ltd. v. State of Bihar A.I.R. 1986 Sc 1780, where the special leave petition was dismissed against the award made by the Labour Court. Thereafter, the employer had approached the High Court by filing a writ petition under Article 226 of the Constitution of India. The plea that the High Court cannot entertain this petition in view of the order passed by the Supreme Court in special leave petition prevailed with the High Court, which was again challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court observed as under:

The effect of a non-speaking order of dismissal of a special leave petition, without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A

writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be re-opened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

34.The Hon'ble Supreme Court in Kunhayammed's case, (supra) went on to refer certain decisions in which contrary view was taken by the Court. In Sree Narayana Dharmasanghom Trust v. Swami Prakasananda (1997) 6 S.C.C. 78, it is observed that subsequent to dismissal of special leave petition, the High Court could not have reviewed the order. Observations of the Supreme Court are:

'It is settled law that even the dismissal of special leave petition in limine operates as a final order between the parties'. In our opinion, the order is final in the sense that once a special leave petition is dismissed, whether by a speaking or non-speaking order or whether in limine or on contest, second special leave petition would not lie. However, this statement cannot be stretched and applied to hold that such an order attracts applicability of doctrine of merger and excludes the jurisdiction of the Court or authority passing the order to review the same.

35. Explaining the view expressed in the case of State of Maharashtra v. Prabhakar Bhikaji Ingle (1996) 3 S.C.C. 436, the Hon'ble Supreme Court has observed:

The view taken by a two-Judge Bench of this Court is that the dismissal of special leave petition without a speaking order does not constitute res judicata but the order dealt with in S.L.P., disposed of by a non-speaking order cannot be subjected to review by the Tribunal. In our opinion the law has been too broadly stated through the said observation. Learned Judges have been guided by the

consideration of judicial discipline which, as we would shortly deal with, is a principle of great relevance and may be attracted in an appropriate case. But we find it difficult to subscribe to the view, as expressed in this decision, that dismissal of SLP without a speaking order amounts to confirmation by Supreme Court of the order against which leave was sought for and the order had stood merged in the order of Supreme Court.

(emphasis mine)

36. On this case, the petitioners' Counsel has placed strong reliance which is reported as 1996 (3) ST 495.

37. Having discussed various judgments, the Supreme Court in Kunhayammed's case (supra) observed as under:

A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of juridical discipline, this Court being the Apex Court of the country. No Court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be

governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

38. Reference here may also be made to the case of Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat : [1970]1SCR322 , where three conditions for applicability of doctrine of merger are noticed. These are: (i) the jurisdiction exercised should be appellate or revisional jurisdiction; (ii) the jurisdiction should have been exercised after issue of notice; and (iii) after a full hearing in presence of both the parties. It is only then that the appellate or revisional court order would replace the judgment of the lower court and constitute the only final judgment.

39. In Kunhayammed's case (supra), the Supreme Court was to itself notice that from the catalogue of the available decisions of the Supreme Court brought to the notice of the court on the point at issue, there was several two-Judge benches decision having conflict of opinion which was needed to be set at rest. Noticing that the source of power conferring binding efficacy on the decisions of the Supreme Court is not uniform in all such decision, the court proceeded to make reference to the principles in this regard, which were (i) Article 141 of the Constitution, (ii) doctrine of merger, (iii) res judicata, and (iv) rule of discipline flowing from the court being the highest court of law. It is then noticed that the special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentailing him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on.

40. It is then noticed that the expression, while disposing of such petitions are 'heard and dismissed', 'dismissed', 'dismissed as barred by time' and so on. The Hon'ble Supreme Court, thereafter went on to opine that:

Mere rejection of special leave petition does not take away the jurisdiction of the Court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of IIIIIIIII 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other Court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

(emphasis mine)

The Hon'ble Supreme Court has summed up the conclusions, as under:

(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.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted

and special leave petition is converted into an appeal.

(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 or 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 mine)

(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.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

41. It would be noticeable that Full Bench of this Court in Daya Wanti's case (supra) has relied upon number of decisions, like CIT, Madurai Mills Co. Ltd., State of U.P. v. Mohammad Nooh and Shankar Ramchandra Abhyankar' (supra).

42. Full Bench of this Court had approved the ratio of law laid down in Amarjit Singh's case (supra), which has in turn referred to some of the decisions, which have been discussed by the Hon'ble Supreme Court. The decision of the Hon'ble Supreme Court in the case of Prabhakar Bhikaji Ingle (supra) relied upon by the Counsel for the petitioners has been explained by the Supreme Court in the case of Kunhayammed (supra).

43. The views that can be culled out from the various judgments noted above and considered in detail by the Hon'ble Supreme Court in Kunhayammed's case (supra) can be noted in brief as under:

1. That the view that dismissal of SLP without a speaking order amounts to confirmation by the Supreme Court of the order against which leave was sought for and that order had stood merged in the order of the Hon'ble Supreme Court as expressed in Prabhakar Bhikaji Ingle's case (supra) was not subscribed in Kunhayammed's case.

2. That a non-speaking order, i.e., it does not assign any reasons for dismissing special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Hon'ble Supreme Court under Article 141 of the Constitution;

3. Even if the order of dismissal is supported by reasons, then also the doctrine of merger would not be attracted because the jurisdiction exercised was not appellate jurisdiction but merely a discretionary jurisdiction;

4. That the reasons stated by the court would attract applicability of Article 141 of the Constitution and any declaration of law by the Supreme Court would obviously be binding on all courts and tribunals in India and certainly the parties thereto;

5. That the statement contained in the order other than on points of law would bind the parties;

6. That this would be binding on the court or tribunal, whose order was under challenge on the principle of judicial discipline;

7. That conditions for applicability of doctrine of merger are that: jurisdiction exercised should be appellate or revisional jurisdiction; should be exercised after issue of notice; and after hearing in presence of both the parties;

8. That doctrine of merger will apply where order impugned is reversed, modified or affirmed while exercising appellate jurisdiction;

9. That doctrine of merger is not of universal or unlimited application.

44. The above list may not be exhaustive, but is the one which can be culled out from various decision of the Hon'ble Supreme Court. Majority of these reasons and considerations noted by the Supreme Court in holding that the doctrine of merger would not apply where the case is dismissed by passing a non-speaking order or that it is passed in exercise of discretionary jurisdiction and not by way of appeal, revision etc. or dismissal of special leave petition in limine would equally apply to a case where such order is passed in a writ petition, which is dismissed in limine by passing a non-speaking order. In fact, in support reference can be made to Daryao and Ors. v. State of U.P. and Ors. : [1962]1SCR574 , wherein it is, inter-alia, observed as under:

If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend (sic) the nature

of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which are already indicated. If the petition is dismissed in limine without passing a speaking order than such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32 because in such a case there has been no decision on the merits by the Court.

45. Even otherwise, it can be noticed that the High Court has neither exclusive nor concurrent jurisdiction to decide cases under Articles 226 and 227 of the Constitution and it is limited in seeing that the inferior court or tribunal would be kept within bonds of their jurisdiction. The ratio in Daryao's case (supra) is clear to the effect that principles of res judicata actual or constructive would not apply if a writ petition is dismissed in limine without passing a speaking order. In Workmen v. Board of Trustee of the Cochin Port Trust (supra) it was held that it would be stretching too far to say that dismissal of special leave petition under Article 136 of the Constitution in limine by a non-speaking order would involve rejection of all the grounds urged in the petition. Consequently, a separate proceeding urging the very same ground, like a writ petition under Article 226, was not barred on the principle of constructive res judicata. This principle was affirmed in Ahmedabad . v. The Workmen and Anr. : (1981)ILLJ489SC , where special leave petition was dismissed as withdrawn and the Supreme Court held that appellate court would not be barred by res judicata for maintaining petition under Article 226 of the Constitution.

46. Thus, I am not inclined to accept the plea that the order passed by competent authority had merged with the order passed by the High Court in writ and thus

would not act as a bar for the revisional authority to pass the impugned order. The earlier order would also not act as res judicata for this Court to entertain the present writ petition.

47. The plea raised on behalf of the petitioners that on account of a delay in making the approach, the revision could not have been entertained and that the phrase 'any time' used in the Section cannot be stretched to allow filing of petition after lapse of sixteen years. In support, learned Counsel has placed reliance on the case of Gram Panchayat Kakran (supra) where similar words used in Section 42 of the East Punjab Holdings (Consolidation and Fragmentation) Act were under consideration. No doubt, the Hon'ble Supreme Court in this case has observed that aggrieved party is required to move the authority within a reasonable time and that application made after inordinate delay is not to be entertained, but it would depend upon facts in each case, especially so when no period of limitation otherwise is provided. The learned Counsel for the respondent is justified in referring to the case of Haqiquat (supra), where it is held that the power can be exercised without any limitation of time but should not be exercised arbitrarily and power being discretionary and judicial is to be exercised reasonably. Respondent No. 2 had obviously not slept over his right, but on an advise had chosen wrong forum in first filing a civil suit and thereafter a writ petition to impugn the same order. He was not sitting idle but was in a process to contest the order passed against his interest. It is in this background that the plea of respondent No. 2 is required to be appreciated, there being no limitation provided. The requirement would be only to see if the exercise of revisional jurisdiction had led to any arbitrary exercise of power. That is not even the case pleaded.

48. In fact, the order under challenge was impugned on the ground of being without jurisdiction. Number of issues that were raised by respondent No. 2 in the revision, which was also filed by the State, did require consideration and these went to effect the jurisdiction of the competent officer to pass an order which was impugned in the revision. It is to be noticed that the property at issue was not an evacuee property. Only an evacuee interest in the property could have come to vest in the custodian. The revisional authority appears to have rightly referred to the contents of Section 7 of the Act to say that the property cannot vest in the

custodian, which was not an evacuee property. The competent officer was aware that the evacuee had only a right to recover the mortgage amount from the nonevacuee mortgagor. Section 11 of the Act would not vest in custodian any property which was not an evacuee property. It was also held that combine reading of Sections 7, 8, 10 and 11 of the Act is that the non-evacuee interest in the evacuee property is to be separated and once that interest is separated, the evacuee property vest, free from all encumbrances and liabilities, in the custodian. Attar Singh Anr. v. Bhaik Chand and Anr. 1966 Current Law Journal 696. It was only in the absence of any claim that the competent officer could vest whole of the property in the custodian free from all encumbrances and liabilities. Even this Court held in Devinder Nath alias Devinder Singh and Ors. v. Kishori Lal and Ors. A.I.R. 1993 P&H; 169 that competent officer has to determine and separate the evacuee interest in a composite property and when the evacuee interest was limited to mortgagee's rights in the property, then only that much portion of the land could be vested in the custodian and even non-submission of claim by interested party was held not to mean that a limited evacuee interest of mortgagee's right would be automatically converted into full ownership of the property. Hon'ble Supreme Court in Abdul Hakim Khan and Ors. v. Regional Settlement Commissioner-cum-Custodian of Evacuee Property, Bhopal and Ors. : [1962]1SCR531 has clearly held the object of the Act is not to vest in the Custodian property, which was not evacuee property, but to vest in him only the evacuee interest in the property after determining or separating, as the case may be, that interest from the interests of other persons in the manner laid down. Thus, now to non-suit respondent No. 2 only on the ground that he had filed the revision after sixteen years, when there is no limitation provided would amount to doing injustice. The word 'any time' has also been interpreted in large number of judgments by this Court to hold that such a petition could be filed without much fear of limitation and indeed petition under Section 42 have been entertained even after lapse of 30-40 years. Reference in this regard can also be made to the cases of Kheman v. Additional Director C/H, Ferozepore and Ors. 1970 P.L.J. 494, Kundan Singh v. Additional Director, Consolidation of Holdings, Punjab, Jullundur and Anr. , Jasmer Kaur and Anr. v. State of Punjab and Ors. 1983 (II) All ILLR 428, Darshan Singh and Ors. v. Mohinder Kaur (now deceased) and Ors. 1986

P.L.J. 4, Chetan Singh v. Addl. Director, Land Holdings, Pb. 1987 R.R.R. 13, Harcharan Singh and Ors. v. Additional Director, Consolidation of Holdings Punjab and Ors. 1991 P.L.J. 91 and Zile Singh v. Chunni Lal 1993 (1) R.R.R. 570 and Gram Panchayat, Shitabgarh v. Director, Consolidation of Holdings, Pb. (1992) 122 P.L.R. 616. In this case, the Government has also filed the petition, which would show that there was no consideration other than merits which were there before the revisional authority and it could not be imputed with any malice or motive either in law or otherwise to entertain the revision petition even if it was delayed. There is no limitation for the Government to revise the illegal order without jurisdiction.

49. The submission made on behalf of the petitioners that revisional court has decided against one of the respondent, who was dead would render the impugned order a nullity as his L.Rs. were not brought on record again cannot be accepted. The reliance placed on Amar Singh's case (supra) may not help the cause of the petitioners much. This judgment apparently does not take into consideration the provisions of Order 22 Rule 4 CPC, as now amended by this Court for their application to States of Punjab, Haryana and Chandigarh. Order 22 Rule 4 has been substituted to read 'where within the time limited by law no application is made under Sub-rule (1), the suit shall not abate as against the deceased-defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place'. Reference may also be made to Order 22 Rule 2-B CPC, which have been inserted after Rule 2 to the said order providing 'the duty to bring on record legal representatives of deceased-defendant shall be of the heirs of the deceased and not of the person who is dominus litis'. Thus, where no application is made, the suit is not to abate as against the deceased-defendant. L.Rs. of the defendant are now equally responsible to file an application for being impleaded. Even no objection has been raised before the revisional court on this count. It is also pointed out that some other respondents had contested the revision and had an equal interest in the property and they could have sought impleadment of the L.Rs. of the dead respondent. None of the L.Rs. of the deceased-respondent has come forward for setting-aside of the decree qua him on the ground that they were not aware of the suit. Even if he decides to do so, he would have to show that he had

not intentionally failed to make an application to bring himself on record. As per the amendment made applicable to the States of Punjab, Haryana and Chandigarh, before setting-aside the decree under Sub-rule (4) of Order 22, the court is to satisfy prima-facie that if the L.Rs. had been brought on record, a different result might have reached in the suit. Accordingly, this limb of the submission of the Counsel for the petitioners is also of no avail to him.

50. There is, thus, no merit in the plea raised in the writ petition by the Counsel and the same is dismissed. There shall be no order as to costs.

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