JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

F.A.O. No. 141 of 2024

M/s R.P. Corporation (Pvt.) Limited
Vs.
Syed Zaheer Hussain Naqvi

F.A.O. No. 155 of 2024

Syed Zaheer Hussain Naqvi
Vs.
M/s R.P. Corporation (Pvt.) Limited

Appellant/Judgment Debtor by : Mr. Fahad Khan Tareen Advocate.

Respondent/Decree Holder by : Mr. Zaheer Bashir Ansari Advocate.

Date of Hearing : **27-1-2025.**

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SAMAN RAFAT IMTIAZ, J.-

1. Through the instant judgment, I propose to decide both the above titled Appeals as they involve common questions of facts and law between the same parties.

2. The brief facts leading up to the filing of the instant Appeals are that the Plaintiff [Syed Zaheer Hussain Naqvi] filed a Suit for Recovery of Rs.5,500,000/- against the Defendant [M/s R.P. Corporation (Private) Limited]. The Defendant filed his written statement. However, thereafter, the Defendant stopped appearing as a result of which ex-parte proceedings

were initiated against him on 15-10-2022 and the Plaintiff produced his evidence ex-parte. Eventually, the Suit was decreed vide Ex-parte Judgment and Decree dated 30-9-2011.

3. On 15-12-2012 the Defendant filed an application for setting aside of the Ex-parte Judgment and Decree dated 30-9-2011 which was accepted by the learned Civil Judge 1st Class, Islamabad-West **("Trial Court")** vide Order dated 12-1-2017 whereby the Ex-parte Judgment and Decree was set aside subject to cost of Rs. 20,000/-. The Trial Court framed Issues and the parties were directed to produce evidence.

4. Meanwhile, the Plaintiff filed Civil Revision No. 127 of 2017 before this Court assailing the Order dated 12-1-2017. No stay was passed during its pendency. The Civil Revision was dismissed vide Judgment dated 8-6-2022.

5. Nevertheless, on 22-11-2022 the Trial Court recalled the Order dated 12-1-2017 on account of the Defendant's failure to fulfill the condition imposed therein for payment of cost Rs. 20,000/- and restored the Ex-parte Judgment and Decree dated 30-9-2011.

6. Thereafter the Plaintiff/Decree Holder filed Execution Petition on 16-2-2023. The Defendant/Judgment Debtor filed Objection Petition on the grounds that the Execution Petition was time barred and that the Ex-Parte Judgment and Decree dated 30-9-2011 was passed only to the extent of recovery of Rs.3,400,000/- and as such the mark-up sought by the Plaintiff/Decree Holder's at flat rate of 11% on the decreetal amount of Rs.3,400,000/ is beyond the decree. The Executing Court vide the Order dated 16-9-2024 **("Impugned Order")** partially dismissed the Objection Petition to the extent of the objection that the Plaintiff/Decree Holder's execution petition was time barred and with regard to the non-existence of decree sheet but allowed it to the extent of markup.

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7. The Defendant/Judgment Debtor (for ease of reference hereinafter referred to as Appellant/Judgment Debtor) has preferred F.A.O. No. 141 of 2024 assailing the Impugned Order passed by the Executing Court to the extent that the Objection Petition has been dismissed with regard to the execution petition being time barred.

8. On the other hand, the Plaintiff/Decree Holder (for ease of reference hereinafter referred to as Respondent/Decree Holder) has also assailed the Impugned Order by preferring F.A.O. No. 155/2024 to the extent that the Objection Petition has been allowed in respect of markup.

9. In respect of F.A.O. No. 141 of 2024, the learned counsel for the Appellant/Judgment Debtor submitted that to the extent that the Objection petition has been dismissed the Impugned Oder has been passed without cogent reason. He highlighted that the execution petition was filed by the Respondent/Decree Holder after a lapse of more than eleven years and as such was time barred. He emphasized that though the Appellant/Judgment Debtor had filed an application for setting aside of the Ex-parte Judgment and Decree dated 30-9-2011 but no stay order had been passed by the Trial Court during the pendency thereof. The Trial Court eventually accepted the Appellant/Judgment Debtor's application vide Order dated 12-1-2017 but by such time the Respondent/Decree Holder's limitation period for filing of execution petition under Article 181 of the Limitation Act, 1908 **("Limitation Act")** had expired. He explained that the first execution petition is filed under Article 181 which prescribes three years as the limitation period whereas subsequent applications are governed by Section 48, CPC. He argued that the Respondent/Decree Holder did not file execution petition within three years as prescribed under Article 181 of Limitation Act therefore he cannot avail the benefit of the extended period provided under Section 48 CPC. The learned counsel also pointed out that no stay was granted in the Civil Revision No. 127 of 2017 filed by the Respondent/Decree Holder before this Court assailing the Order dated 12-

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1-2017 either, which was in any event dismissed vide Judgment dated 8-6-2022. The learned counsel submitted that the Order dated 12-1-2017 whereby the Ex-parte Judgment and Decree was set aside was subject to cost which was not paid by the Appellant/Judgment Debtor and as such the Trial Court recalled the same on 22-11-2022 and restored the Ex-parte Judgment and Decree dated 30-9-2011 but that no fresh decree sheet was drawn up at such time as such the rule of merger was not attracted. He argued that the Order dated 22-11-2022 simply clarifies the position that since the condition imposed vide Order dated 12-1-2017 was not complied with the Ex-parte Judgment and Decree dated 30-9-2011 stood restored but that no fresh right to file for execution accrued to the Respondent/Decree Holder as a result thereof. With regard to F.A.O. No. 155 of 2024, the learned counsel submitted that the same is time barred. Even otherwise he argued that since no mark-up was granted vide the Ex-parte Judgment and Decree dated 30-9-2011, the Executing Court cannot go beyond the decree and grant the same.

10. The learned counsel for the Respondent/Decree Holder submitted in respect of F.A.O. No. 141 of 2024 that even if the rule of merger is not applied, time does not start running under Article 181 of the Limitation Act from the date of decree rather it starts to run from the date the right to apply accrues. As such, he submitted that the right to apply for execution of the Ex-parte Judgment and Decree dated 30-9-2011 accrued to the Respondent/Decree Holder on 22-11-2022 when the order setting aside the Ex-parte Judgment and Decree was recalled and the Ex-parte Judgment and Decree was restored. The Respondent/Decree Holder filed the execution petition on 16-2-2023 which was therefore within the limitation period prescribed under Article 181 of the Limitation Act. The learned counsel refuted the argument that F.A.O. No. 155 of 2024 is time barred and submitted that limitation is governed by Article 156 of the Limitation Act which provides a period of ninety days. He argued that even though mark-

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up had neither been claimed by the Respondent/Decree Holder nor granted vide the Ex-parte Judgment and Decree dated 30-9-2011, it ought to be given due to the passage of time.

11. I have heard the learned counsel for the parties and have perused the record.

F.A.O. No. 141 of 2024:

12. The main question raised by the Appellant/Judgment Debtor in this appeal is whether the learned Executing Court erred in law by holding vide the Impugned Order that the petition filed on 16-2-2023 by the Respondent/Decree-holder for the execution of the Ex-parte Judgment and Decree dated 30-9-2011 was within the limitation period.

What is the applicable limitation period for execution proceedings and when did it begin to run?

13. It is undisputed that the applicable period of limitation to institute execution proceedings is governed by the residuary Article 181 of the Limitation Act, which stipulates three years limitation period that begins to run from the date when the right to apply accrues for applications for which no period of limitation is provided elsewhere in the schedule to the Limitation Act or by Section 48, CPC. It is well settled that the limitation period for the first application for execution of a decree is three years under Article 181 *ibid* whereas the subsequent applications are governed by Section 48, CPC which provides a period of 6 years[1]. The parties before this Court are in agreement that the Respondent/Decree Holder only filed one execution petition in respect of which the Appellant/Judgment Debtor filed its objection petition which was decided vide the Impugned order and

[1] *Sher Dil Khan vs. Baby Maimoona and others*, 2016 CLC 256; *Khalid Latif vs. United Bank Limited, Shah Alam Market, Lahore and 4 others*, 2006 CLD 885; *Zari Taraqiayati Bank Ltd. vs. Zafar Pervaiz*, 2005 CLC 303; *Habib Bank Ltd. vs. Zulfiqar Ali Khan and others,* 2002 CLD 1758; *Muhammad Ilyas and others vs. Muhammad and others*, 1999 MLD 1432; and *Mahboob Khan vs. Hassan Khan Durrani*, PLD 1990 SC 778.

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as such the relevant provision in the instant case is Article 181 of the Limitation Act.

14. The right to apply for execution of the Ex-parte Judgment and Decree accrued to the Respondent/Decree Holder the day the decree sheet was prepared, which was on 30-9-2011[2]. But the Respondent/Decree Holder did not institute execution proceedings within the three year limitation period.

Does filing of an application for setting aside of an ex-parte judgment and decree operate as a stay?

15. During the limitation period, on 15-12-2012, the Appellant/Judgment Debtor filed an application for setting aside of the Ex-parte Judgment and Decree but no stay order was passed by the Trial Court during its pendency.

16. In similar circumstances, a Division Bench of the Peshawar High Court concluded in the case of *United Bank Limited vs. Messrs Victory Engineering Company, S.I.E. Abbottabad*, 1998 CLC 690 that since the matter was *sub judice* on account of the judgment debtor's application for setting aside of the ex-parte judgment and decree for four years the decree holder was justified in not applying for execution and that it had the right to file for execution upon rejection of such application for setting aside of the ex-parte judgment and decree which was therefore held to be within the limitation period.

17. With utmost respect I beg to disagree with such holding. It is well settled that once limitation commences to run it continues to do so unless it is stopped by an express statutory provision[3]. As emphasized by the

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[2] *National Bank of Pakistan vs. Gammon of Pakistan Ltd.*, 2009 CLD 330; *Hqbib Bank Ltd. vs. Zulfiqar Ali Khan and others*, 2002 CLD 1758;*Muhammad Ilyas and others vs. Muhammad and others*, 1999 MLD 1432.

[3] *Province of Sindh and 3 others vs. Thakur Das and others*, 2022 MLD 174; *Commissioner of Income Tax/Wealth Tax, Legal Division, Multan vs. Lady Dr. Musarrat Mumtaz C/O DHQ Hospital, D.G. Khan*, 2011 PTD 2358.

Supreme Court in *Siraj Din and others vs. Mst. Khurshid Begum and others,* 2007 SCMR 1792 it hardly needs any explanation that unless a case falls within any of the exceptions contained in Section 4 to 25 of the Limitation Act no exemption can be sought from the bar of limitation arising under the Limitation Act.

18. Section 15 of the Limitation Act unambiguously provides that the time during the continuation of the injunction or order by way of which the institution or execution of an application for execution of a decree has been stayed shall be excluded for computing the period of limitation prescribed for the application for the execution of a decree. However, there is no provision of law whereby the time during which an application seeking setting aside of a judgment and decree remains pending can be excluded from the computation of the limitation period for the application for the execution of such a decree in the absence of a stay. In other words, unless the institution or execution of a judgment and decree is stayed by an order the mere filing of an application for setting aside thereof does not operate as a stay.

19. The Supreme Court in *Maulvi Abdul Qayyum vs. Ali Asghar Shah*, 1992 SCMR 241 has categorically held that while Section 15 of the Limitation Act provides that the time during which execution proceedings remain suspended is to be excluded from computation of the limitation period for execution of a decree but where no stay is in operation the decree passed by the trial court continues to maintain its identity and is capable of execution. Therefore, filing of an application for setting aside of the Ex-parte Judgment and Decree dated 30-9-2011 by the Appellant/Judgment Debtor by itself did not pose any legal hindrance for the Respondent/Decree Holder from initiating proceedings for the execution thereof or provided any justification for not doing so nor can the time consumed in deciding such application be excluded from the computation of limitation for purposes of execution proceedings.

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20. I am fortified in my view by the judgment passed in *Sheikh Muhammad Ijaz v. Sheikh Muhammad Mushtaq*, 2014 MLD 646 whereby the Lahore High Court upheld the order of the executing court dismissing the application filed by the judgment debtor for stay of execution despite the fact that the Supreme Court had granted leave to appeal in respect of the order of the High Court upholding the dismissal of the application for setting aside of the ex-parte judgment and decree. The reason for rejection of stay application was that no stay order had been passed by the Supreme Court while granting leave. In other words, mere grant of leave to appeal by the Supreme Court in respect of the dismissal of the application for setting aside of the ex-parte judgment and decree was found not to be sufficient reason to grant stay of execution proceedings.

21. Similarly, in *Mst. Parveen vs. Liaquat Hayat*, 2010 CLC 1395, the Lahore High Court upheld the decision of the lower appellate court of dismissing the application of the judgment debtor seeking suspension of the decree during pendency of his application for setting aside of the ex-parte judgment and decree. The Lahore High Court agreed with the lower appellate court that no irreparable harm would be caused to the judgment debtor as he would be entitled to recover the immovable property in case he succeeds in his application whereas the balance of convenience was found to lie with the decree holder who would be more inconvenienced if the fruit of the decree was taken away.

22. The aforementioned cases confirm that mere filing of an application for setting aside of an ex-parte judgment and decree does not entitle the judgment debtor to suspension of execution proceedings on application much less to an automatic stay. Therefore the limitation did not stop running against the Respondent/Decree-holder on account of filing of the application for setting aside of the Ex-parte Judgment and Decree dated 30-09-2011 by the Appellant/Judgment Debtor in which no stay was passed.

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What is the effect of the expiry of the limitation period during pendency of an application for setting aside of an ex-parte judgment and decree?

23. The effect of expiry of the limitation period during pendency of the application for setting aside of an ex-parte judgment and decree would depend on (a) whether during such pendency stay was in operation against the institution or execution of an application for execution of the ex-parte judgment and decree; and (b) the outcome of such application.

24. In case stay was in operation and the application is dismissed, the time during which such stay was in operation would be excluded from the limitation period by virtue of Section 15 of the Limitation Act.

25. In case there was no stay in the field during pendency of the application for setting aside of the ex-parte judgment and decree and if such application is ultimately rejected the execution petition would be time barred for reasons aforesaid.

26. Where however, the application for setting aside is allowed the judgment and decree is set aside with the result that the suit is deemed pending for re-adjudication[4]. The judgment and decree passed after such re-adjudication would entail its own limitation period starting from the date of such judgment and decree.

27. In the instant case, there was no stay during the pendency of the Appellant/Judgment Debtor's application for setting aside the Ex-parte Judgment and Decree dated 30-9-2011. The three year limitation period under Article 181 of the Limitation Act for the execution of the Ex-parte Judgment and Decree dated 30-9-2011 expired on 29-9-2014.

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[4] *Saifullah Khan through legal heirs vs. Zia Ullah Khan*, 2023 YLR 78; *Mst. Zohran Bibi and others vs. Ghulam Qadir and others*, 2022 MLD 250; *Dr. Anwar Hussain Siddiqui vs. Additional District Judge, Islamabad-West and others*, 2021 CLC 2005; *Muhammad Iqbal vs. Additional District Judge and others,* 2019 YLR 43; *Hussain Bux alias Mohammed Hussain through Attorney vs. Nabi Bux and 6 others,* 2016 YLR 1597.

28. It is important to bear in mind that although the Respondent/Decree Holder's remedy to seek execution of the Ex-parte Judgment and Decree dated 30-9-2011 had become time barred on 29-9-2014 but the right of the Respondent/Decree Holder thereunder remained intact[5]. However, once an ex-parte judgment and decree is set aside there remains no conclusive determination of the rights of the parties in the field with regard to the matters in controversy in the suit.

29. In the instant case, the Appellant/Judgment Debtor's application for setting aside the Ex-parte Judgment and Decree dated 30-9-2011 was allowed on 12-1-2017 albeit subject to payment of cost. The Trial Court framed Issues on 30-1-2017 and started recording evidence. Had the Appellant/Judgment Debtor complied with the condition imposed vide the Order dated 12-1-2017 and the Trial Court had passed a judgment and decree on merits after recording evidence and hearing the parties the limitation period for the execution thereof would start from the date of such judgment and decree and in that case the expiry of limitation with regard to the Ex-parte Judgment and Decree dated 30-9-2011 during pendency of the application for setting aside such decree would become immaterial as well as the question of stay. Therefore, allowing of the Appellant/Judgment Debtor's application for setting aside of the Ex-parte Judgment and Decree dated 30-9-2011 was perhaps a blessing in disguise for the Respondent/Decree Holder as he was presented with another opportunity of securing a favourable judgment and decree and the chance to have it executed within its limitation period.

30. As luck would have it (or perhaps by design) the Appellant/Judgment Debtor did not comply with the condition imposed vide the Order on 12-1-2017 whereby the Ex-parte Judgment and Decree was set aside. The Civil Revision petition instituted by the Respondent//Decree Holder against the said order was dismissed on 8-6-

[5] *Habib Bank Limited vs. Muhammad Abbas and 2 others*, PLD 2001 SC 489.

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2022. Thereafter, the Trial Court passed Order dated 22-11-2022, whereby the Order dated 12-1-2017 was recalled and the Ex-parte Judgment and Decree dated 30-9-2011 restored. Subsequently, the Respondent//Decree Holder filed his petition on 16-2-2023 seeking execution of the Ex-parte Judgment and Decree dated 30-9-2011.

31. The Appellant/Judgment Debtor filed Objections, which the Executing Court vide the Impugned Order dismissed to the extent of the Appellant/Judgment Debtor's objection that the execution filed on 16-2-2023 was time barred by holding that time would reckon from the date when the right to apply for execution accrued to the Respondent/Decree Holder which the learned Executing Court held was when the case was finally disposed of by the last court order on 22-11-2022 giving rise to a fresh period of limitation by applying the rule of merger in reliance upon *Maulvi Abdul Qayyum vs. Ali Asghar Shah*, 1992 SCMR 241.

Maulvi Abdul Qayyum vs. Ali Asghar Shah, 1992 SCMR 241:

32. In the case of *Maulvi Abdul Qayyum (Supra)* the leave to appeal filed before the Supreme Court was against the order of the High Court passed in revision whereby the execution petition filed by the decree holder was dismissed as time barred. According to the High Court the time started running from the date of the first appellate order dismissing the appeal against the impugned judgment and decree of the trial court and not from the date of dismissal of the civil revision, whereby the decree of the first appellate court was reaffirmed and judgment and decree was drawn up. The Supreme Court observed that the reason that influenced the Single Bench of the High Court was that while there was a stay suspending the operation of the impugned judgment and decree of the trial court in the field during pendency of the first appeal no such stay had been granted by the High Court in the civil revision which was ultimately dismissed. The Supreme Court held that the High Court was correct in its observance of

uncertified

Section 15 of the Limitation Act whereby the time during which execution proceedings remain suspended is to be excluded from computation of the limitation period for execution of a decree but where no stay is in operation the decree passed by the trial court continues to maintain its identity and is capable of execution. Nevertheless, the Supreme Court allowed the appeal against such High Court order on the ground that the rule that the decree of the court of first instance merges into the decree of the appellate court which alone can be executed was not present to the mind of the learned Judge. In such context the Supreme Court held that "*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".* [Emphasis added].

33. The Supreme Court of Pakistan also considered whether the rule of merger which is usually regarded as an attribute of appellate jurisdiction can be extended to the revisional jurisdiction so as to furnish a starting point of limitation under Article 181 of the Limitation Act to a revisional decree modifying or affirming the decree of the lower court. The Supreme Court held that the rule of merger applies equally to the decree passed in exercise of revisional jurisdiction notwithstanding the distinction between the remedy of appeal and revision. In reaching such conclusion the Supreme Court observed that although an appeal is a continuation of the original proceedings while the remedy of revision is discretionary and certain limitations apply to the revisional court but in both cases the decree of the lower court is put in jeopardy and correction of error in the proceedings of the lower court is a common characteristic of both the remedies. It was also observed that the concept of acceptance of an appeal is that the lower court has failed to pass the decree which should have been

uncertified

passed and the same object is achieved when a revision from the decree of lower court is accepted.

Does the Rule of Merger apply in the absence of challenge before a higher forum?

34. In view of the foregoing, the first question that ought to be answered by this Court is whether the rule of merger can be applied in a case which neither involves a decree passed by a higher forum in appeal nor in revision but involves restoration of an Ex-parte Judgment and Decree by the Trial Court upon recall of the conditional order for setting aside of such Ex-parte Judgment and Decree on account of failure to fulfill the condition of payment of cost.

35. The Supreme Court of India in the case of *Commissioner of Wealth Tax vs. Uttam Chand Jani,* 2001 PTD 1529 held that the doctrine of merger would have no application in respect of an issue which is not the subject matter of a challenge before any higher forum. Similarly, the Lahore High Court in *Messrs Hong Kong Chinese Restaurant, Main Boulevard Culgerg, Lahore vs. Assistant Commissioner of Income Tax, Circle 6, Lahore and another*, 2002 PTD 1878 held that an order amended by the tax authorities or the tribunal cannot be said to have merged with a previous order for the reason that the doctrine of merger only forestalls interference by a lower forum after that order has gone through the scrutiny of a higher forum. In the case of the *Bashir Ahmed Badini, D&SJ, Dera Allah Yar and others vs. Honourable Chairman and Members of Administration Committee and Promotion Committee of Honourable High Court of Balochistan and others*, 2022 SCMR 448 the Supreme Court shed light on the matter as follows:

> *"20. In the earlier judgment, the Tribunal without setting aside the Notification impugned in that appeals, held that the appellants in all said service appeals as well as non-appealing Judicial Officers who were also appointed on regular basis prior to the regularization of ad hoc services of the private respondents were declared senior to the private*

Uncertified

> *respondents and after declaring the said appellants as well as non-appealing Judicial Officers senior to the private respondents, their cases were referred to the Administration Committee of the High Court of Balochistan for consideration of their promotion to the next grade from the date when the respondents were promoted. In the impugned judgment of the Tribunal in the present appeals also, the earlier judgment was acknowledged and recapitulated that the Tribunal's judgment dated 25th April 2016 passed in Service Judicial Appeal No.01 of 2002 was judgment in rem and shall be implemented in letter and spirit. The aforesaid order was challenged in this Court but Civil Petitions were dismissed on 20-6-2016 thereafter, Civil Review Petitions Nos. 326 to 330 of 2016 were filed but vide order dated 26-9-2016 the review petitions were also dismissed. In this scenario, the doctrine of merger is somewhat applicable.* ***In essence, the doctrine of merger is a common law doctrine which expounds a philosophy of propriety in the chain of command vis-à-vis the justice system,*** *but it is not recognized as doctrine under the constitutional law or in any other statute.* ***According to different Law Lexicons the doctrine of merger arises only when there are two independent things and the greater one would swallow up or may extinct the lesser one by process of absorption. In case an appeal or revision is provided before a superior court against an order passed by any Court or Tribunal or any other authority and the superior court where appeal is preferred modifies, reverses or affirms the decision of lower fora then the order or decision passed by subordinate or lower forum is merged into the decision rendered by superior courts which will remain operative for enforcement in accordance with law. In order to apply this doctrine in letter and spirit, there must be a decision of a subordinate forum or Tribunal and against any such decision; there must be a right of appeal or revision provided under the relevant law. While deciding any such appeal or revision, the appellate forum must have affirmed, modified or reversed the order or judgment of the court below…*** [Emphasis added].

36. The concept of merger was discussed and explained by the Supreme Court in the case of *Sahabzadi Mahrunisa vs. Mst. Ghulam Surghran and another*, PLD 2016 SC 358 in the following passage while quoting *F.A. Khan vs. The Government of Pakistan*, PLD 1964 SC 520 in which the concept with reference of an appeal was discussed:

> *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*

Unverified

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 C.P.C.). 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 v. 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*

Uncertified

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 added].

37. In *Sardar Begum and others vs. Ch. Muhammad Saeed and another,* 2001 SCMR 1636 the suit for specific performance of an agreement was decreed by the trial court on 20-12-1980 against three sets of defendants of which one set was proceeded against ex-parte however date for deposit of balance sale consideration fixed was the same for all three sets of defendants. One of the defendants against whom decree was passed ex-parte filed an application for setting aside the ex-parte decree in which she also obtained a stay against the deposit of remaining price. The said application was dismissed and date for deposit of price was extended and such order became subject matter of revision and civil petition for leave to appeal before the Supreme Court of Pakistan which was ultimately decided on 11-3-1990. As such, the Supreme Court held that the execution petition filed on 28-3-1990 for decree dated 20-12-1980 was not barred by time on

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account of the principle of merger as the Supreme Court finally decided the matter regarding extension of time for the deposit of remaining consideration amount on 11-3-1990. Thus in this case, too, the rule of merger was applied in respect of an issue which was the subject matter of a challenge before a higher forum.

38. However, the Order dated 22-11-2022 passed by the Trial Court cannot be said to have merged with such Ex-parte Judgment and Decree dated 30-9-2011 as the doctrine of merger is only attracted when the order of a lower forum is challenged before a higher forum.

39. Another way of looking at it is that upon passing of a judgment and decree in appeal or revision whereby the higher forum affirms, modifies or reverses/sets aside the judgment of the lower forum the judgment and decree that remains in existence is the order of the higher forum[6]. On the other hand, the trial court while setting aside an ex-parte judgment and decree does not simultaneously pass a fresh judgment and decree capable of execution. The effect of an order setting aside the ex-parte judgment and decree is that no judgment and decree remains in the field. Thereafter, when the Trial Court passes a judgment and decree afresh such judgment and decree does not absorb within itself the earlier ex-parte judgment and decree nor are the two combined for the simple reason that the earlier ex-parte judgment and decree had already ceased to exist. Thus the fresh judgment and decree is wholly independent of the earlier ex-parte judgment and decree (even if in substance the outcome remains the same). In light thereof, I am of the opinion that the doctrine of merger will not apply.

Did a fresh period of limitation start by way of Order dated 22-11-2022?

40. The learned counsel for the Respondent/Decree-Holder submitted that even if the rule of merger is not applied to the Order dated 22-11-2022

[6] *Shahbzadi Mahrunisa vs. Mst. Ghulam Surghran and another,* PLD 2016 SC 358.

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for restoration of Ex-Parte Judgment and Decree dated 30-9-2011 the Respondent's right to apply for execution accrued yet again under Article 181 of the Limitation Act, 1908 on such date giving rise to a fresh period of limitation. On the other hand, the learned counsel for the Appellant/Judgment Debtor emphasized that restoration does not entail drawing up of a fresh decree sheet and no fresh decree was in fact drawn up by the Trial Court when passing order dated 22-11-2022 setting aside the Ex-Parte Judgment and Decree dated 30-9-2011. He therefore argued that limitation would be reckoned from the date of the passing of the Ex-parte Judgment and Decree dated 30-9-2011 by virtue of which the Respondent/Decree-Holder's execution petition filed on 16-2-2023 was time barred.

41. There is no merit in the argument made by the learned counsel for the Respondent/Judgment Debtor that his right to apply for execution accrued when the Order dated 22-11-2022 was passed. No provision of law has been cited by the learned counsel for the Respondent/Decree Holder in support of such proposition. The right to apply for execution accrued when the Ex-parte Judgment and Decree was passed in his favour on 30-9-2011 and the limitation period provided under Article 181 of the Limitation Act started to run which did not stop running upon filing of application for setting aside of the Ex-parte Judgment and Decree due to the absence of a stay order.

42. It is settled law that once the period of limitation expires, fresh period of limitation cannot be computed and even courts cannot create a right which a party loses due to its own fault including failure to initiate action within the prescribed limitation period[7]. It is equally well settled that in such case valuable rights accrue to the other side[8].

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[7] *United Bank Limited vs. Synthetic Leather/Industries and another*, 2013 MLD 148; *Haji Muhammad Yunis and others vs. Mst. Farukh Sultan and others*, 2022 SCMR 1282.
[8] *United Bank Limited (Supra).*

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43. The Order dated 12-01-2017 whereby the Appellant/Judgment Debtor's application for setting aside of the Ex-Parte Judgment and Decree was allowed was subject to payment of cost. Therefore, passing of the said order by itself did not result in the setting aside of the Ex-Parte Judgment and Decree dated 30-9-2011. The Ex-Parte Judgment and Decree would stand set aside only upon payment of such cost. However, such cost was never paid by the Appellant/Judgment Debtor. Non-fulfillment of the condition on which the Appellant/Judgment Debtor's application for setting aside of the Ex-Parte Judgment and Decree was allowed meant that the Ex-Parte Judgment and Decree dated 30-9-2011 continued to hold the field[9] as the final determination of the rights of the parties with regard to the matters in controversy in the suit filed by the Respondent/Decree Holder notwithstanding that institution of execution thereof may have become time barred.

44. The Trial Court erred in treating the suit pending despite failure of the Appellant/Judgment Debtor to pay cost and proceeding to record evidence. However, since the Trial Court had commenced the re-adjudication despite the Appellant/Judgment Debtor's failure to satisfy the conditional Order dated 12-01-2017, passing of the Order dated 22-11-2022 became necessary to record that the condition imposed vide the Order dated 12-01-2017 had not been satisfied and the result thereof[10].

45. As observed herein above, the result of failure to pay the cost was that the application for setting aside of the Ex-parte Judgment and Decree was not allowed and consequently the said Ex-parte Judgment and Decree dated 30-9-2011 remained in the field. Thus the question of restoring the same did not arise. Use of incorrect terminology will not change the effect of the Order dated 22-11-2022 when seen in its proper perspective. There is no question of any fresh limitation period accruing in favour of the

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[9] *Mahtab Hussain vs. Muhammad Aslam*, 2024 CLC 2038.
[10] *Kh. Muhammad Fazil vs. Mumtqz Munawar Khan Niazi*, 2024 SCMR 1059.

Respondent/Decree Holder upon passing of the Order dated 22-11-2022 which simply recorded, in effect, that the Ex-parte Judgment and Decree dated 30-9-2011 did not stand set aside on account of failure of the Appellant/Judgment Debtor's failure to pay cost in compliance of the Order dated 12-01-2017.

F.A.O. No. 155 of 2024:

46. Since I have already found that the Respondent/Decree Holder's execution petition filed on 16-2-2023 in respect of the Ex-parte Judgment and Decree dated 30-9-2011 was time barred, there is no merit in the instant F.A.O. whereby the Impugned Order has been assailed to the extent that the Appellant/Judgment Debtor's plea regarding mark-up was accepted.

Conclusion:

47. As a result of above discussion, F.A.O. No. 141 of 2024 is **allowed** with the result that the Objection Petition filed by the Appellant/Judgment Debtor is allowed and the Execution Petition filed by the Respondent/Decree Holder is dismissed as time barred and in light thereof F.A.O. No. 155 of 2024 is **dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on 4th day of February, 2025.

JUDGE

Tanveer Ahmed/*

Approved for Reporting
Blue Slip added.

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