

## FULL BENCH

Before D. K. Mahajan, Gopal Singh and Bal Raj Tuli, JJ.

KARTAR SINGH,—*Petitioner.*

*versus*

JAGAT SINGH AND OTHERS,—*Respondents.*

**Civil Revision No. 861 of 1969.**

March 10, 1971

Code of Civil Procedure (V of 1908)—Order 9—Rule 13—*Ex-parte* decree passed—Appeal against such decree decided after due service of the parties—Application for setting aside the *ex-parte* decree filed thereafter—Trial Court—Whether has jurisdiction to entertain such application—Appellate Court not adjudicating on the rights of the person applying for setting aside the *ex-parte* decree—Whether makes the application maintainable.

*Held*, that the doctrine of merger of the order or decree of an inferior Court in that of the superior Court in the exercise of its corrective jurisdiction is well-settled. Moment the superior Court exercises its appellate or revisional jurisdiction, the order of the inferior Court merges in the order of the superior Court. The only exception is where a party to the proceedings in the inferior Court is not before the superior Court. In such a case the doctrine of merger will not apply to the detriment of such a party. But when the matter is taken to the superior Court and the parties to the proceedings in an inferior Court are either represented or served in the superior Court, the order passed by the superior Court will lead to the merger of the order of the inferior Court into that of the superior Court. Hence, as soon as an *ex-parte* decree merges in the decree of appellate Court, the trial Court has no jurisdiction to entertain an application under Order 9 rule 13, Code of Civil Procedure for setting aside the decree. (Para 6).

*Held*, that it does not matter whether the appellate Court, while deciding an appeal against an *ex-parte* decree adjudicates on the rights and liabilities of the person who moves for the setting aside of the *ex-parte* decree against him, provided that that person has been served in the appellate Court and has opportunity to agitate his rights in the appellate Court. Once an *ex-parte* decree is merged in the appellate decree, the application of such a person for setting aside the *ex-parte* decree is not maintainable. (Para 8).

Case referred by the Hon'ble Mr. Justice Gurdev Singh to the Division Bench for deciding the important question of law on 3rd December, 1969.

Kartar Singh v. Jagat Singh. etc. (Mahajan J.)

*The Division Bench consisting of the Hon'ble Mr. Justice Prem Chand Pandit and the Hon'ble Mr. Justice S. S. Sandhawalia referred two important questions of law,—vide order dated 19th November, 1970 to the Full Bench for decision. The Full Bench consisting of the Hon'ble Mr. Justice D. K. Mahajan, the Hon'ble Mr. Justice Gopal Singh and the Hon'ble Mr. Justice Bal Raj Tuli decided the important questions of law which have been referred to them by the Division Bench.*

*Petition under Section 115 of the Code of Civil Procedure for revision of the order of Shri Raghbir Singh, District Judge, Gurdaspur dated 18th August, 1969 affirming that of Shri Gurdial Singh Sub Judge, Gurdaspur dated 17th July, 1969 dismissing the application with costs.*

H. L. SARIN, SENIOR ADVOCATE WITH A. L. BAHL, AND K. R. CHOWDHRI, ADVOCATES, for the petitioner.

R. N. NARULA AND A. L. BAHRI, ADVOCATES, for the respondents.

M. R. SHARMA, SENIOR DEPUTY ADVOCATE GENERAL, PUNJAB, for Respondent No. 2.

### ORDER

MAHAJAN, J.—This petition for revision came up for hearing before Gurdev Singh, J., on 2nd December, 1969. The learned Judge, in view of the conflict of authority, directed that the petition be heard by a larger Bench. The petition then came up for hearing before Pandit and Sandhawalia, JJ., on 19th November, 1970. The learned Judges formulated the following two questions of law:—

- (1) Whether the trial Court has jurisdiction to entertain and allow an application under Order 9 rule 13 of the Civil Procedure Code, for setting aside an *ex-parte* decree subsequent to the decision of an appeal preferred against such a decree after due service of the parties to the appeal;
- (2) Whether the answer to question No. (1) would be affected by the fact that the appellate Court has or has not, adjudicated on the rights and liabilities of the person who moves for the setting aside of the *ex-parte* decree against him?

and directed that the same be settled by a larger Bench. That is how the matter has been placed before us.

(2) At the time when the reference order was passed, the decision of the Supreme Court in *Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat* (1), though reported, was not brought to the notice of the Division Bench. In our opinion, this decision really concludes the matter. The narration of facts will bear this out.

(3) Jagat Singh is a refugee from West Pakistan. He was allotted land in village Kala Nangal in lieu of the land he left in Pakistan. Some of his land in Pakistan was under mortgage with Muslims. The Rehabilitation Department demanded payment of the mortgage money at the flat rate of Rs. 450 per standard acre for the area allotted in lieu of the mortgaged area. This amount was not paid, and his allotment was cancelled. After the cancellation of the allotment, some land was allotted to Surat Singh, Gurcharan Singh, Apar Singh, Ajit Singh and Sarup Singh sons of Udham Singh and the remaining land was allotted to Harnam Kaur widow of Havela Singh. The sons of Udham Singh sold the land which had been allotted to them to Bachan Singh. Harnam Kaur sold the land allotted to her to Kartar Singh. Jagat Singh filed a suit for possession of the land allotted to him on the allegation that the order of cancellation was illegal and void. In this suit, the sons of Udham Singh were impleaded as defendants 2 to 6, Harnam Kaur as defendant 8, Bachan Singh and Kartar Singh as defendants 7 and 9, respectively, and the Collector was impleaded as defendant No. 1. The service on the defendants was affected under Order 5, rule 20, Code of Civil Procedure and *ex-parte* proceedings were taken against them. The trial Court decreed the suit *ex-parte* against Kartar Singh and dismissed the suit against Bachan Singh. On the 27th July, 1968, Kartar Singh and Bachan Singh made an application under Order 9, rule 13, Code of Civil Procedure, for setting aside of the *ex-parte* decree. On the 7th August, 1968, Jagat Singh who was dissatisfied with the decision of the trial Court as to the dismissal of his suit against Bachan Singh, filed an appeal in the Court of the District Judge, Gurdaspur. This appeal was entrusted to the Additional District Judge, Gurdaspur. The transferors of Bachan Singh and Kartar Singh were served. Personal service was also effected on Bachan Singh and Kartar Singh. Bachan Singh and Harnam Kaur engaged Shri Wazir Chand, Advocate to represent them in the appeal. The Collector was also represented. Proceedings were taken *ex-parte* by the Additional District Judge

(1) A.I.R. 1970 S.C. 1.