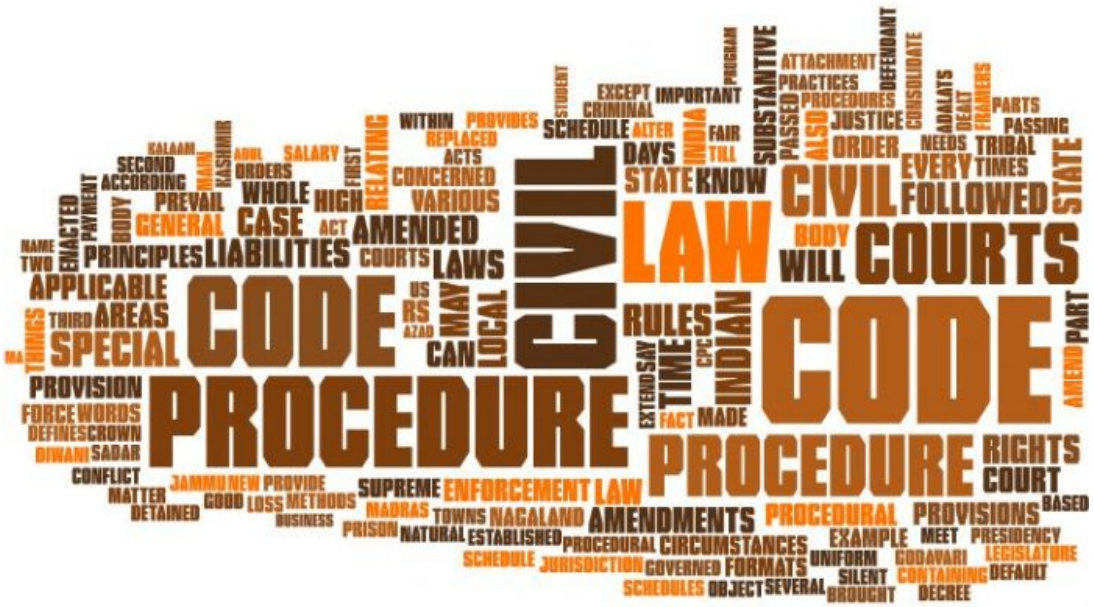
The doctrine of merger in Code of Civil Procedure, 1908

By **Sneha Mahawar** - September 27, 2021



This article is written by Bhuvan Malhotra. The article has been edited by Khushi Sharma (Trainee Associate, Blog iPleaders) and Vanshika Kapoor (Senior Managing Editor, Blog iPleaders.)"

Table of Contents

Introduction

The phrase Merger Doctrine or Doctrine of Merger is neither a doctrine of constitutional law nor a doctrine that is statutorily recognized. It is also not a doctrine of universal or unlimited application. The said doctrine may refer to one of the several doctrines for e.g. Merger Doctrine (civil procedure code), Merger Doctrine (family law), Merger Doctrine (Intellectual property rights), Merger Doctrine (Property law), etc. In family law, the doctrine means that after marriage, a woman's legal identity is merged with that of the husband. So, a woman could not testify against her husband any more than he could testify against himself, as her identity had merged with his and two were now considered as one legal identity. Similarly, in Intellectual Property Rights, the merger doctrine is

used to evaluate the 'originality' of any work that seeks copyright protection in India. The reason why the doctrine is called as such is that India follows the mid approach to the doctrine of 'Sweat of the Brow' (as followed in the UK) and 'Modicum of Creativity (as followed in the USA). Thus, the Indian approach to evaluate 'originality' is by 'merging' the two doctrines of these countries, hence the name Merger Doctrine.

This paper envisages limiting the discussion of the Merger Doctrine to the civil proceedings only. The paper intends to explain the meaning of the said doctrine in civil proceedings. Further, by way of various observations of the High Courts and Supreme Court, the paper tries to highlight the conditions for the applicability and inapplicability of the said doctrines in various cases. Lastly, the paper also discusses how the Indian Courts have engaged with the doctrine of merger and special leave petitions.

Meaning of Doctrine of Merger

The doctrine of Merger or the Merger doctrine in civil proceedings is a common law doctrine that stems from the idea of maintenance of the decorum of the hierarchy of courts and tribunals. The court in the case of Gojer Bros. (P) Ltd. v. Ratan Lal Singh, correctly summed up the meaning of the doctrine as "the doctrine is based on the simple reasoning that there cannot be, at the same time, more than one operative order governing the same subject matter". To put it simply, if there are two orders passed on the same subject matter, that is, one passed by a subordinate court like a tribunal and another passed by a superior court like the High Court, the operative part of the order by the subordinate court (tribunal in this instance) may be merged with the order of the High court.

Another instance where the Supreme Court summed up the meaning of the Doctrine of Merger was in the case of Kunhayammed v. the State of Kerala, wherein the court in paragraph 44 of the judgment held that-

"Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before the superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate 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 the law."

Not only does the above observation of the Supreme Court aptly summarizes the meaning of the doctrine but also lays down the conditions of where the doctrine of merger may be applied. For the doctrine of merger to be applicable, there must first be, a decision of a subordinate forum or court in existence; second, in such a decision, there must be a right of appeal or revision in existence which must be duly exercised. Subsequently, such appeal or revision that is brought in front of any superior court or forum, the decision of the subordinate court/forum must be affirmed/modified/reversed by the superior court. The result of such affirmation/modification/reversal of the decision of the subordinate court would mean that the previous order of the subordinate court would now merge with the decision of the superior forum and such merger of the decisions or orders would become the operative part which would be capable of being enforced.

Appeal, Review and Revision

As stated above in the case of Kunhayammed v. the State of Kerala, the doctrine of merger can only be applied to situations where there is a right to appeal/revision or review and such right must have been duly exercised, it becomes important to list how such appeals, revisions, and reviews are different from each other and how each of them can be duly exercised or preferred using Civil Procedure Code, 1908.

Appeal

The expression 'appeal' is not defined under the Civil Procedure Code, 1908. The court in the case of Nagendra Nath Dey v. Suresh Chandra Rey defined appeal as "any application by a party to an appellate court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary meaning of the term". There is a fundamental distinction between the right to file a suit and the right to file an appeal as the appeal is a creature of statute and the right to appeal is neither an inherent nor natural right, whereas, right to file a suit is an inherent right. There are two types of appeals that can be exercised by parties, that is, against a decree and against an order. The appeals against a decree can be preferred or exercised by any aggrieved party under Section 96 of the code. The test of such aggrieved person or party was defined in the case of AP Gandhi v HM Seervai, wherein the court held that "an aggrieved person is one who has a genuine grievance because an order has been made which prejudicially affects his interests pecuniary or otherwise. Generally speaking nothing can be said to adversely affect the right of a person unless the decree operates as a res-judicata against him." The two instances of situations where such appeal cannot be exercised by an aggrieved party can be found under Section 96(3) and Section 96(4) of the Code which states that there cannot be any appeal against consent decree (by virtue of Section 96(3)) and there cannot be any appeal against petty cases where the subject matter is less than ten thousand except on questions of law (by virtue of Section 96(4)). It is important to note that the appeal under Section 96 of the code is against a decree and not the judgment or the "finding of the judge". Whereas, orders on the other hand is defined under Section 2(14) under the Civil Procedure Code which means a formal expression of court, which is not a decree. The rules for appeals against orders can be located in Section 104 – 108 and Order XLIII of the code and such appealable orders are listed in Section 104 and Order XLIII R1 of the Code.

Review

Review is a judicial re-examination of the case by the same Court and the Judge which can be exercised through Section 114 of the Civil Procedure Code, 1908. A review may be preferred or exercised by an "aggrieved person" and such expression has a similar meaning to "aggrieved person" under appeal as mentioned above by the case of AP Gandhi v HM Seervai. The Court cannot review its order suo-motu, so the same has to be necessarily exercised or preferred by the aggrieved party. An application for a review of judgment may be made by virtue of Order 47 R1 on any of the following grounds; first, the discovery of a new and important matter of evidence; second, a Mistake or error apparent on the face of the record; third, any other sufficient reason. The term 'any other sufficient reason' has not been defined in the Code but means "a reason analogous to those specified in the rule" by virtue of the case of Anirban Tuleshwar

Sharma v. Anirban Pishak Sharma. Further, an review can lie when there is no appeal against a decree or an order by virtue of Section 114(a) of the code, and Order XLVII provides the procedure to prefer such appeals by the aggrieved party. Finally, a review lies when an appeal is possible but not preferred by virtue of section 114(b) of the codes, and such mere right to an appeal is no bar against a review. The constitution of India provides the power to review the Supreme Court's own decision by virtue of Article 137. One important thing to note however that is, an application of review should be in form of a Memorandum of Appeal.

Revision

Revisional jurisdiction is a discretionary remedy that should be exercised only in the interests of justice. The dictionary meaning of revision is the action of careful revisiting and critical examination with a view of correcting or improving, therefore Section 115 of the Civil Procedure Code allows the High Court to call for the records of a case decided by a Court subordinate to the High Court under three circumstances i.e. first, that the lower Court has exercised a jurisdiction not vested in law; second, failed to exercise a jurisdiction vested in law; and third, acted in the exercise of its jurisdiction illegally or with material irregularity. Such revisional jurisdiction may be applied by the High Court suo-motu in addition to the application by 'aggrieved person' and such expression ('aggrieved person') is similar to the "aggrieved person" abovementioned (under appeal) in the case of AP Gandhi v HM Seervai. The report of the Civil Justice Committee in the Law Commission mentions that revisional jurisdiction is to be exercised in the following circumstances i.e. (i) Rule nisi should not be issued except on very careful and strict scrutiny; (ii) Where no stay is granted, the record of the subordinate Court should not be called for; and even where the record is necessary, only copies should be required to be produced; (iii) Whenever stay is granted, every effort should be made to dispose of revision with two to three months. It is important to note that revisional jurisdiction may be applied against both error of fact and error of law, provided that 'aggrieved party' provide the final conclusion on the question of jurisdiction, but such revisional jurisdiction comes to play only when no appeal lies and such appeal includes both first and second appeal. Lastly, there is no recourse against an order for revision except maybe through an SLP which is why the article also mentions how the Indian Courts have dealt with such Special Leave Petitions with respect to the doctrine of merger.

The jurisprudence of Doctrine of Merger in Indian Courts

The relevant judgment of the Supreme Court which touches upon the topic of doctrine of merger is that of Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat , wherein the Supreme Court cited various previous judgments to come up with the necessary conditions for the doctrine to be applicable. Therefore, it is first necessary to cite the various observations of High Courts and Supreme Court upon this doctrine.

One of the earliest decisions that touch upon the said doctrine is that of CIT v. Tejaji Farasram Kharawalla, wherein the Bombay High Court held that when an appeal is provided from a decision of the tribunal and the appeal court after hearing the matter passes an order, the order of the appeal court ceases to exist and it is merged with the

order of the appeal court. The Bombay High Court also added that there might be instances wherein the appeal court merely confirms the order of the subordinate court or the trial court, even then, the order of the subordinate court would not remain enforceable. The reason that the doctrine stems from the idea of maintenance of the decorum of hierarchy of courts and tribunals, the order that will remain enforceable and operative, will be that of the superior court.

In the case of CIT v. Amritlal Bhogilal & Co, the Supreme Court in paragraph 10 of the judgment observed-

"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 that subsists and is operative and capable of enforcement."

Thus, the Supreme Court merely reiterated the observation of Bombay High Court in the case of CIT v. Tejaji Farasram Kharawalla and stated that the hierarchy of courts and tribunals is to be maintained when the decision is reversed by the superior court and even when the superior court merely affirms the decision of the subordinate court.

Based on these cases, the court in the case of Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, came up with three conditions that would serve as check-points to see when the doctrine of merger may be applicable. First, with regards to the jurisdiction, that is, the jurisdiction exercised by the party shall be revisional or appellate jurisdiction; second, such jurisdiction must have been exercised by the party after issuance of notices; third, such revisional or appellate jurisdiction exercised must have been followed by a full hearing in presence of the necessary parties concerned with the case.

Therefore, to sum up, the above arguments, if any judgment is passed by the Supreme Court, all the orders passed by the subordinate courts will be merged in the judgment delivered by the Supreme court and no party could approach any other court to review or recall such order as also held in the case of A.V. Papayya Sastry v. Govt. of A.P. further, there can be no distinction in the doctrine of merger applicable to an appellate court dismissing an appeal or the appellate reversing or modifying the judgment of the subordinate court as also held in the case of Gojer Bros. (P) Ltd. v. Ratan Lal Singh.

Inapplicability of the Doctrine of Merger

The doctrine of merger is not a doctrine of rigid or universal application as per the Supreme Court in the judgment of State of Madras v. Madurai Mills Co. Ltd. The court in paragraph 5 of the judgment of this case held that-

"it cannot be said that wherever there are two orders, one by the inferior tribunal and the other by a superior tribunal, passed in an appeal on revision, there is a fusion of

merger of two orders irrespective of the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

Therefore, we can construe from the above judgment that the doctrine would not be applicable to all the situations where there are two orders, that is, one by a subordinate court and the other by an appellate court.

The various circumstances under which the doctrine of merger would be inapplicable would include, first, instances where the scope of appeal is narrower than the scope of the original proceedings; second, instances where the power of the court itself, designated to hear such revision or appeal, is limited. Furthermore, the court in the case of A.V. Papayya Sastry v. Govt. of A.P, added another instance of a situation where the doctrine could be inapplicable. The court held that, where an order obtained by the successful party, was itself obtained by fraud, such order stood vitiated and not in consonance of the law. Subsequently, such illegal order was to be termed as "non-existent" and could not be merged.

Special Leave Petitions and Doctrine of Merger

The Constitution of India confers enormous powers on the Supreme Court as it allows bypassing the fixed hierarchy of appeals by virtue of Article 136, but such power that broadens the scope for invocation of the appellate jurisdiction of the Supreme Court is subject to the satisfaction and upon the discretion of the Supreme Court. Only when the Court is satisfied and hears the matter, the doctrine of the merger comes into question. There existed a lot of uncertainty regarding the application of the Doctrine of Merger in which the Supreme Court, without going into the merits of the case, dismissed the petitions. The case of V.M. Salgaocar & Bros. (P) Ltd. v. CIT brings some clarity as to the court in this case held that once the SLP is dismissed, one cannot construe that the court has expressed any opinion on the order through which the SLP was brought forth. In simpler terms, dismissal of the SLP without going into the merits of the case does not mean that the Supreme Court has expressed any opinion on the order of the subordinate court, which means, that the order of the subordinate court through which the appellate jurisdiction of Supreme Court was invoked, is to be construed as final and enforceable.

The abovementioned decision of Kunhayammed v. State of Kerala also holds importance in this regard. The court reiterated the abovementioned observations of the cases CIT v. Amritlal Bhogilal & Co and State of Madras v. Madurai Mills Co. Ltd and further added that the dismissal of the SLP, it being by a speaking or non-speaking order, does not substitute the order under challenge. The refusal of the court to dismiss the SLP only means that the Supreme Court was not inclined to exercise its discretion, in order to allow the appeal being filed to hear the matter.

Furthermore, the court added, if the order refusing the leave to appeal is a speaking order i.e. the order gives reason as to why the leave was not granted by the Supreme Court, such speaking orders will have two consequences. First, the statement of law in the order would be law as construed and contained under Article 141 of the Constitution.

Second, whatever is left in the speaking order i.e. except for the statement of law would only be used to bind the parties and the subordinate court like tribunals by way of judicial discipline as the Supreme Court is the apex court of the country. The rest of the statements i.e. except the law in the order does not merge with the order of the subordinate court and also it is also not to be construed that the order rejecting the SLP to be heard, cannot be construed as res judicata in the subsequent proceedings between the parties. Only when the Special leave has been granted by the court and the matter has been heard, the doctrine of merger would be applicable in the same manner i.e. whether the order may be merely affirmation or modification of previous order or reversal, the subordinate court's order would merge with the order of the Supreme Court and the Supreme Court's order would be operative and enforceable.

Conclusion

The Doctrine of Merger is a necessity for any legal machinery to work perfectly for two reasons. First, the doctrine helps in maintaining the judicial discipline in relation to maintain the hierarchy of the courts. Second, the doctrine helps in reaching the finality of any decision. The absence of such doctrine in any legal system especially in India would lead the legal system of the country into chaos as the parties would be cherry-picking the orders of various courts which suit them and would try to enforce them and subsequently adding endless appeals to the already overburdened judiciary. Therefore, the doctrine fills the vital gap of which order is to be termed as final out of all the successive orders passed by various courts.
