FULL BENCH.

1921
May, 14.

Before Mr. Justice Walsh, Mr. Justice Lindsay and Mr. Justice Sulaiman.

BHAIRON GHULAM AND OTHERS (DEFENDANTS) *v.* RAM AUTAR SINGH (PLAINTIFF) *

Civil Procedure Code (1908), *order XLI, rules* 1 *and* 3 ; *order XLII, rule* 1—*Rules of the High Court, chapter III, rule* 2—*Second appeal—Memorandum of appeal not accompanied by a copy of the judgment of the court of first instance—Court not competent to dispense with copy of judgment—Practice—Act No. IX of* 1908 *(Indian Limitation Act), section* 5.

Rule 2 of Chapter III of the rules of the High Court must be taken to have been made under the provisions of section 122 of the Code of Civil Procedure, 1908. Both that rule and rule 1 of order XLI of the Code of Civil Procedure, as revised by the High Court, requiring the filing of a copy of the first Court's judgment along with a memorandum of second appeal, are imperative. A memorandum of appeal from an appellate decree which is not accompanied by a copy of the judgment of the Court of first instance is not a valid memorandum, and the court to which it is presented has no alternative but to reject it or to return it to the appellant to be put in order.

The court to which such a memorandum of appeal is presented cannot dispense with the filing of a copy of the judgment of the court of first instance. *Chunni Lal Jethabhai* v. *Barot Dahyabhai Amulakh* (1) distinguished. *Narsingh Sahai* v. *Sheo Prasad* (2) referred to by SULAIMAN, J.

THIS was a reference to a Full Bench for the purpose of settling the law or practice of the Court applicable to the case of a memorandum of second appeal presented to the Court without being accompanied by a copy of the judgment of the court of first instance. The position is stated in the following order of reference :—

LINDSAY, J. :—These two cases, which are cases of second appeal up for admission, have been put up before me to-day and I have to consider what course should be taken in view of what I understand to be conflicting rulings of this Court on the matter to be decided. I may observe here that both these cases have been up, one before myself and the other before Mr. Justice RYVES. The hearing of them was postponed because it was understood that the matter requiring decision had been referred for consideration to a Full Bench. It now appears, however, that no such reference was made and that the matter remains as it was before.

* Civil Miscellaneous Application (Second Appeal) for admission.

(1) (1907) I. L. R., 32 Bom., 14. (2) (1917) I. L. R., 40 All., 1.

The short point is this. Under rule 2, chapter III, of the Rules of this Court no memorandum of appeal from an appellate decree shall be presented until accompanied by a copy of the judgment of the court of first instance. It frequently happens that when memoranda are presented the copy of the first court's judgment is wanting, and it seems to have been the practice in this Court to allow time for the filing of the copy of the first Court's judgment and then to deal with the question as if it was one of limitation arising under section 5 of the Limitation Act. A question then arises as to whether sufficient cause has been shown for extending the time by reason of the application made to obtain a copy of the judgment of the trial court.

It is argued before me that, in spite of the provisions of rule 2, chapter III, there is a proper presentation of the memorandum of second appeal when the memorandum is accompanied by a certified copy of the decree of the lower appellate court, and in support of this argument I am referred to the provisions of order XLI, rule 1.

It appears to me, however, that the proper order to be applied in cases liked this is order XLII. Order XLII, rule 1, lays down that the rules of order XLI shall apply "*so far as may be*" to appeals from appellate decrees. It is clear from this language that the application of the rules in order XLI to second appeals is qualified by the words "*so far as may be*," and if rule 2, chapter III, of our Rules of Court is a rule which has been validly made under the powers of the Court to make rules, it seems to me that, in dealing with cases like those now under consideration, the provisions of order XLI must be read along with what is contained in the rules which have been made by this Court, such as the rule contained in rule 2 of chapter III. It is clearly a futile thing to enact a rule of this kind and allow it to remain a dead letter. I am inclined to take the view that, unless rule 2 of chapter III is complied with, there is no proper presentation of the memorandum of appeal and in such cases, the proper order would be one under order XLI, rule 3; *i.e.*, an order rejecting the memorandum or returning it to the appellant for the purpose of its being put in order. I

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am informed that this view is not generally followed in this Court. I am told that it has been followed by some Judges but that other Judges have rejected it. Under the circumstances the only way of getting this matter satisfactorily settled is to refer it to a Bench, and I therefore direct that these cases be laid before the Hon'ble Chief Justice with a request that a Bench of three Judges may be constituted to decide the matter in dispute.

The matter came up for hearing before a Bench of three Judges.

Mr. *A. P. Dube*, for the appellants, Munshi *Balmakund* for the respondents, in *Bhairon Ghulam's* case.

Munshi *Baleshwari Prasad* for the appellant, in *Chandrabhan Singh's* case.

The respondent was not represented.

WALSH and LINDSAY, JJ.:—These two matters have been consolidated and heard together by a Full Bench in order to decide the legality and the scope of the rules which this High Court has made with reference to the necessity of filing with the memorandum of appeal in a second appeal, a copy of the first court's judgment.

The facts of the two cases do not materially differ. In *Bhairon Ghulam* v. *Ram Autar Singh*, the lower appellate court's judgment, against which it is sought to appeal, was dated the 16th of July, 1920. The memorandum of appeal was presented to this Court on the 25th day of October, 1920, the first day on which the Court was open after the long vacation and the last day prescribed by law for presenting or preferring the appeal. It was accompanied by a copy of the decree and of the lower court's judgment but by no copy of the first court's judgment. The appellant had been supplied with this as long ago as the 20th of August, 1920, but he did not file it until the 16th of December, 1920, when notice was issued to the other side to show cause why the appeal should not be admitted beyond time.

In *Chandrabhan Singh* v. *Chaudhri Lekhraj Singh* the date of the lower court's decree was the 1st of July, 1920. The memorandum of appeal was presented to this Court on the 25th day of October, 1920, being, as in the other case, the first day on

which the Court was open after the long vacation and the last day prescribed by law for presenting or preferring the appeal. It, also, was not accompanied by any copy of the first court's judgment, which was filed on the 6th of January, 1921. In this case also notice was issued to the other side to show cause why the appeal should not be admitted out of time.

In neither case was any ground shown, either by affidavit or otherwise, why any extension of time or consideration should be extended to the appellant which could be held to amount to "sufficient cause" within section 5 of the Limitation Act.

Both cases eventually came before Mr. Justice LINDSAY for admission and he, feeling a difficulty as to the uncertain practice said to prevail in this High Court, referred them to the Chief Justice, who has constituted this Bench to lay down a definite rule for future guidance.

The relevant rules and sections are as follows:—

Part I, chapter III, rule 2, of the Rules of Court made by the Allahabad High Court "under the powers in that behalf conferred upon it by Parliament, the Letters Patent and the Acts of the Indian Legislature." This rule was made in October, 1915.

Order XLII, revised rule 1, passed by the Allahabad High Court under section 122 of the Code of Civil Procedure, for regulating its own procedure, and that of courts subordinate to it. This rule was made in June, 1916.

Sections 121-128 of the Code of 1908, and order XLI, rules 1 and 3 (1), as revised by this High Court in 1916.

Order XLI, rule 1, prescribes the form in which every memorandum of appeal shall be preferred, and requires that it shall be accompanied by a copy of the decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded. It further prescribes the contents of such memorandum.

Order XLI, rule 3, originally provided that when a memorandum of appeal was not drawn up in the form prescribed therein it might be rejected, or returned for amendment by the appellant.

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These provisions contained the whole relevant law under the original Code of 1908, and represent the proper procedure in this Court up to 1915. It is clear that under these provisions, as they then stood, there was no obligation upon an appellant to file a copy of the first court's judgment.

The rule made in 1915, however, *viz.*, rule 2 of chapter III, runs as follows:—"No memorandum of appeal from an appellate decree . . . shall be presented unless accompanied by . . . a copy of the judgment of the court of first instance." If this rule is one made within the powers conferred upon the High Court, there is no escape from its terms. The presentation of a memorandum of appeal unaccompanied by a copy of the judgment of the court of first instance is expressly prohibited. The Court or Judge to whom it is tendered by way of presentation has by the terms of the rule no option but to refuse to accept it.

The proviso at the end of this rule which enables a Judge to grant time for filing or presenting a translation of such judgment when it is in the vernacular, excludes the suggestion that there was any intention to enable a Judge by that rule to grant time for the filing of the copy of the judgment itself. It was contended before us that the rule was *ultra vires:* that it was clearly inconsistent with the Code when it was passed, and that therefore it would be *ultra vires,* unless inconsistency with the Code were allowed by law. By the new section 122 of the Code of 1908 this High Court was empowered to make rules regulating its own procedure and the procedure of the Civil Courts subject to it, and by such rules, to alter any of the Rules in the First Schedule of the Code. That section authorized the alteration which was undoubtedly affected by rule 2 of chapter III, and rule 2 of chapter III must be taken to have been made under section 122 of the Code, because it purports to have been made under the Letters Patent and the Acts of the Indian Legislature, and there is nothing in the Allahabad Letters Patent which in any way authorizes or justifies it.

The next step was taken in 1916, when this High Court revised rule 1 of order XLII of the first schedule of the Code thenceforth providing that the rules of order XLI should apply,

so far as might be to, appellate decrees, subject to the following provision :—

"Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from, and (unless the court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the court of first instance." It may be observed with regard to the language of that rule that it is not so specific as rule 2 of chapter III. It re-enforces the obligation to accompany a memorandum of appeal with a copy of the judgment of the court of first instance, but it does not specifically prescribe at what stage the memorandum of appeal is to be so accompanied, and in this respect it resembles the rule which was adjudicated upon by the Bombay Full Bench to which we will refer hereafter. But this rule certainly does not cut down, nor does it purport to modify, nor is it in itself inconsistent with, the explicit provision of rule 2, chapter III. It was no doubt intended for the use of the lower courts when it was passed, and possibly attention was not paid to the terms of the existing provision applicable to this Court. If it had been, the probability is that the later rule wou'd have been assimilated to the earlier rule. We have, however, come to the conclusion that it means that the filing of the copy of the first court judgment shall accompany the memorandum of appeal at the moment of presentation in all appeals from an appellate court.

The result is that rule 2 of chapter III is a binding rule of practice in this Court; that it applies to the two cases now before us; that therefore the two cases before us were not presented to this Court in accordance with law and that no Judge had jurisdiction to accept them.

Order XLI, rule 3 (*i*), was also revised in 1916 by this High Court and provides *(inter alia)* that where the memorandum of appeal is not accompanied by a copy of the first court's judgment, it may be rejected, or returned to the appellant.

This provision clearly applies to the lower courts, and confirms the view that the time of presentation is the time contemplated by revised rule 1 of order XLII.

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The proper course for a Judge to whom an appeal from an appellate decree is tendered unaccompanied by a copy of the first court's judgment is to decline to allow it to be presented. No express provision is required to enable a Judge to reject it or to return it. Every court has inherent jurisdiction to refuse to accept applications or appeals presented to itself not in accordance with law.

We were pressed to say that this Court by the terms of revised rule 1, order XLII, has power to dispense with the judgment of the court of first instance. In our opinion that rule is not grammatically capable of that construction; but whether it be or not, a power of dispensation is totally different from a power to extend the time for doing an act. In our view a Judge of this Court cannot dispense with a copy of the first court's judgment, except possibly by an order made with the consent of parties for his own and everybody else's convenience, to which no body can object, for the purpose of the hearing. It is equally clear that he cannot extend the time for the filing of the judgment by allowing a memorandum of appeal, which is not properly accompanied, to be presented without it.

On the other hand, when a properly constituted appeal, including the first court judgment in those cases in which it is required, is presented out of time, there is nothing to prevent the appellant from seeking the aid of section 5 of the Limitation Act, if he can bring himself within the provisions of that section. We would only add that sufficient cause for the purpose of section 5 must be something more than the mere failure of the appellant to obtain and file a copy of the judgment. The onus is upon him to show that his failure has been due to some cause beyond his control, and notice of his application must be issued to the respondent, who has a right to be heard against the granting of an extension of time.

Nothing of the kind is shown in either of the cases before us and we have no alternative but to order that both the appeals be rejected as being out of time.

One word should be added with reference to the Bombay Full Bench case reported in I. L. R., 32 Bom., 14, which was relied upon by the appllants. That case is distinguishable

from the cases before us upon more than one ground. The Bombay High Court Rules contained no provision corresponding to rule 2 of chapter III. The case was decided before the Code of 1908, and the rules made under the then Code had to be consistent with that Code. Nor are we able to accept the view taken in one of the Bombay judgments that the question before us ought to be decided with reference to the Limitation Act, or affects in any way the operation of the Limitation Act. The intention of the Legislature with reference to the proper constitution of an appeal in an appellate court cannot be decided by reference to the language of the Limitation Act. When the Limitation Act refers to an appeal "presented" or "preferred," reference must be had to the Code and the rules of Court applicable to the preferring or presenting of such an appeal. The order of the Court must be that these cases must be returned to the appellants, and presentation refused.

SULAIMAN, J.:—I agree. When the old Code of Civil Procedure was in force the High Court had under section 652 power to "make rules *consistent with the Code* to regulate any matter connected with its own procedure." Such rules had to be consistent with the Code and if they were in conflict with it, they would be *ultra vires*. Section 122 of Act V of 1908, which to some extent corresponds to the old section 652, now confers greater powers on the High Courts, which can make rules regulating their own procedure "and may by such rules annul, alter or add to all or any of the rules in the first schedule." Once such rules have been duly made, approved and published they "have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the first schedule." (Vide section 127.) Such rules, however, have still not to be inconsistent with the provisions in the body of this Code; but a reference to section 121 makes it clear that the first schedule is not included in the "body" of the Code. High Courts have, therefore, power to annul, alter or add to all or any of the rules in the first schedule, and the legal effect of such annulment, alteration or addition will be to substitute the revised rules in place of those in the Code as originally passed.

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Now, in June, 1916, this Court, in exercise of the powers conferred on it by section 122 of the Code of Civil Procedure, materially altered order XLI, rule 3, as well as order XLI, rule 1, of the Code of Civil Procedure.

Order XLII, rule 1, as amended, runs as follows:—"The rules of order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision:—Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the court of first instance."

It is clear that the revised rule makes it compulsory that the memorandum of a second appeal shall be accompanied not only by copies of the judgment (unless dispensed with) and decree of the lower appellate court, but also that of the judgment of the court of first instance. I am not here concerned with the propriety of the change, I have simply to enforce the rule as I find it. Now it has never been doubted that the filing of a mere memorandum of appeal without a copy of the decree is no preferment of the appeal: *Gulab Devi* v. *Shankar Lal* (1), *Chamela Kuar* v. *Amir Khan* (2). Similarly, the filing of the memorandum of a First Appeal from Order without a copy of the formal order would not be filing the appeal: vide *Qasim Ali Khan* v. *Bhagwanta Kunwar* (3). In such cases the appeal cannot be said to have been filed at all. It is an incomplete document which does not constitute an appeal. It seems to me that the effect of the alteration of order XLII, rule 1, is to make the filing of a memorandum of Second Appeal without a copy of the first court's judgment just as much an incomplete memorandum as it would have been without a copy of the decree of the lower appellate court. In fact, as the amended rule stands at present, I find it impossible to say that the omission to file a copy of the first court's judgment stands on any different footing from the omission to file a copy of the decree appealed from. With however much reluctance it may be, I feel compelled to hold that, although the Court has power to dispense with

(1) Weekly Notes, 1892, p. 47. (2) (1893) I. L. R., 16 All., 77.

(3) (1917) I. L. R., 40 All., .

the copy of the judgment of the lower appellate court, it has no power to dispense with the judgment of the court of first instance. Whether it was due to inadvertence, or whether it was intentional, the expression "unless the court dispenses therewith" is placed within closed brackets in a way which makes it inapplicable to the copy of the first court's judgment. Whether an amendment of the rule is desirable or not is quite another matter. But the rule, as it stands at present, makes a memorandum of appeal without a copy of the first court's judgment an incomplete appeal, and the copy cannot even be dispensed with.

Order XLI, rule 3, as amended by this Court, runs as follows:—"Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in Rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the court or be amended then and there."

Reading the above rule along with the amended order XLII, rule 1, it will be clear that if the copy of the first court's judgment is not filed along with the memorandum of a second appeal the Judge "may reject it," though he is not bound to do so. If, however, the Judge does not reject it, but allows the copy of the first court's judgment to be filed subsequently, the memorandum will remain incomplete and the appeal will be deemed to have been filed only on the date on which the copy of the first court's judgment has been supplied. The mere fact that the Judge grants time for filing it later on cannot operate as an extension of time. If the copy is supplied within the period of limitation no difficulty arises. If, however, the copy is supplied beyond the period, the difficulty of limitation will remain just the same, and the appeal will be barred by time unless there are sufficient grounds for extending the period under section 5 of the Limitation Act and the time is actually extended under that section after notice to the opposite party.

Section 3 of the Limitation Act provides that every appeal "preferred" after the period of limitation prescribed therefor

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shall be dismissed although limitation has not been set up as a defence. The Limitation Act does not define what is meant by an appeal being "preferred," nor is any such definition to be found in the General Clauses Act. We, however, find the expression explained in order XLI, rule 1, of the Code of Civil Procedure. By amending order XLI, rule 1, this Court has altered the definition and prescribed when an appeal can be deemed to have been "preferred." A second appeal is now deemed to be preferred when a memorandum of appeal has been filed accompanied by a copy of the decree appealed from, a copy of the judgment (unless dispensed with) of the lower appellate court as well as a copy of the judgment of the first court. It is true that this Court has no power to alter or amend the Limitation Act, but it can alter its own procedure. Alteration in the method for preferring a second appeal is a mere matter of procedure, and this Court has power to prescribe a new method. Such a change does not interfere with the provisions of the Limitation Act at all. The appeal if not "preferred" within the time prescribed by that Act would still be barred by time. In this view of the case it is unnecessary for me to deal at length with the provisions of chapter III, rule 2, which have been exhaustively dealt with by my learned brothers with whose conclusions I concur generally.

I am, however, fully aware of one difficulty that may possibly arise. A person desirous of filing a second appeal may find that the whole of the time allowed for filing has been spent in obtaining a copy of the first court's judgment. As was held in the Full Bench case of *Narsingh Sahai* v. *Sheo Prasad* (1), he will at the same time not be entitled to deduct the time spent in obtaining the copy of the first court's judgment, for section 12 of the Limitation Act does not permit any such deduction and the High Court cannot make any rule which would have the effect of tampering with any section of the Limitation Act. But this is merely an argument that the law as it at present stands is not perfect and may seem to work hardship in exceptional cases. After all, an appellant will not be without a remedy, as in such special circumstances the

(1) (1917) I. L. R., 40 All., 1.

benefit of section 5 of the Limitation Act can always be invoked.

As to the Full Bench case of *Chunni Lal Jethabhai* v. *Barot Dahyabhai Amulakh* (1), I agree that it is distinguishable. The learned Judges who decided that case had to consider the effect of certain rules made by the Bombay High Court under section 662 of the old Civil Procedure Code, which required that the rules must be " consistent with " the Code, and being conscious of this limitation, they were of opinion that the rules were *ultra vires* for the purposes of the due presentation of a second appeal. The rules made by this Court are authorized by section 122 of the Code of Civil Procedure and need not necessarily be consistent with all the provisions of the first schedule. They do not, in my opinion, in any way modify any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act, and are therefore not *ultra vires*.

I also agree that in neither of these cases has any sufficient cause been made out for extending the period of limitation under section 5 of the Limitation Act. I, therefore, agree that both these appeals are barred by time and must be dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Wallach.

NATHI AND ANOTHER (PLAINTIFFS) *v.* TURSI AND ANOTHER (DEFENDANTS.) *

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Act No. IX of 1908 *(Indian Limitation Act), schedule* I, *article* 132—*Limitation—Bond payable by instalments—Stipulation empowering creditor to sue for whole amount on default of payment of interest—Terminus a quo.*

A mortgage bond provided a period for repayment, but also provided that if the borrower made default in the payment of any instalment of interest, the creditor could sue for the whole amount due. *Held* that limitation, under article 132 of the first schedule to the Indian Limitation Act, 1908, began to run from the date of the first default, that being the date when according to the terms of the bond the whole money became due.

Mata Tahal v. *Bhagwan Singh* (2) not followed.

* Second Appeal No. 499 of 1921 from a decree of Ganga Sahai, Subordinate Judge of Muttra, dated the 13th of December, 1920, confirming a decree of Banwari Lal, Munsif of Muttra, dated the 23rd of June, 1920.

(1) (1907) I. L. R., 32 Bom., 14. (2) (1921) 19 A. L. J., 406.