

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice
Rachhpal Singh

SURENDRA NARAIN SINGH (APPELLANT) v. LAL
BAHADUR SINGH AND OTHERS (RESPONDENTS)*

1933
August, 9

High Court Rules, chapter III, rule 2—Civil Procedure Code, order XLIII, rule 3—Appeal from order—"Formal order" not drawn up by lower court—Memorandum of appeal not accompanied by copy of formal order—Formal order subsequently prepared by lower court upon direction by High Court and copy then obtained and filed—Limitation.

Where no formal order was prepared by the lower court, from whose order an appeal was filed in the High Court, and the appellant filed with his memorandum of appeal a copy of the only order which existed on the record of the lower court, containing the grounds for the decision as well as the formal expression thereof, it was *held* that the appellant should be deemed to have substantially complied with the requirements of rule 2 of chapter III of the High Court Rules; such order should be taken to be both the judgment and the formal order. The fact that a formal order was, by direction of the High Court, subsequently prepared by the lower court and then a copy was obtained and filed by the appellant beyond the period of limitation for the appeal did not make the appeal time barred.

Order XLIII, rule 3, as added by the High Court to the Civil Procedure Code, does not cover many orders of an interlocutory character from which the law allows an appeal. No formal order need be prepared under this rule after every interlocutory order is passed, and it would be obviously undesirable to make it necessary to do so, but its absence creates a difficulty in administering rule 2 of chapter III of the High Court Rules, which lays down that no memorandum of appeal from an order shall be presented unless accompanied by a copy of the "order" appealed against, besides a copy of the judgment upon which such order is founded. The word "order" in this rule implies order as defined in section 2(14) of the Civil Procedure Code, i.e., formal order, which is analogous to a

First Appeal No. 120 of 1933, from an order of A. N. Shukla, Assistant Collector, 1st class of Jaunpur, dated the 10th of January, 1933. (Since converted into First Appeal No. 54 of 1933).

1933

SURENDRA
NARAIN
SINGH
v.
LAL
BAHADUR
SINGH

“decree”. This rule presupposes that a formal order is prepared and exists after every appealable order is pronounced; but this is by no means the case. Order XLIII, rule 3 of the Civil Procedure Code and rule 2 of chapter III of the High Court Rules are not in a line with each other.

This matter was referred to a Division Bench by a single Judge with the following referring order :

IQBAL AHMAD, J.:—It has been the settled practice of this Court to entertain appeals against orders without the memorandum of appeal being accompanied by a copy of the formal order. In some cases copy of the formal order was dispensed with and in others time was allowed to file a copy of the formal order. The formal order used to be received even if filed after the expiry of the period of limitation, and the appeal was always treated as within time if originally filed within the period of limitation. It appears to me that this practice is not in consonance with law. Let this matter be put before a Bench of two Judges at an early date.

Mr. B. Malik, for the appellants.

The matter was heard *ex parte*.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:—This case has been referred by a learned single Judge of this Court to a Division Bench in view of the importance of the question involved.

The appellant filed his appeal on the 5th of April, 1933, from the order of an Assistant Collector at Jaunpur passed in execution proceedings under the Tenancy Act. The last day of limitation was the 12th of April, 1933. With the memorandum of appeal he filed the order giving reasons for the decision of the case. No formal order was, however, filed. On the office report a learned Judge of this Court directed the appellant, on the 11th of April, 1933, to file within one week a copy of the formal order. The appellant applied for a copy of the formal order; but his application was returned with the remark that no formal order existed. On the case coming up before another learned Judge of this Court a direction was sent down to the Assistant Collector that a formal order be prepared. A formal order

was prepared on the 19th of May, 1933. The appellant made a fresh application on the 20th of May, 1933, for a copy of the formal order, which was delivered on the 30th of May, 1933, during the long vacation. The copy was filed in this Court on the 18th of July, 1933, that is, next day after the Court re-opened.

1933

SURENDRA
NARAIN
SINGH
v.
LAL
BAHADUR
SINGH

Two questions emerge from the above facts: (1) Whether the appeal can be said to have been presented on the 5th of April, 1933, in spite of the fact that the copy of the formal order was filed after the expiry of limitation; if this question is answered in the affirmative, no question of limitation can arise: (2) Assuming that the appeal cannot be considered to have been presented till the 18th of July, 1933, when the copy of the formal order was filed, whether the delay should be condoned in the circumstances of the case.

To clear the ground it may be stated at the outset that though the proceedings in which the order in question was passed were under the Agra Tenancy Act, yet all the relevant provisions of the Civil Procedure Code apply in the matter of preparation of a formal order and the presentation of the appeal. This is clear from section 264 of the Agra Tenancy Act, read with list I, schedule II of that Act.

Judgment is defined in section 2(9) of the Civil Procedure Code as meaning "the statement given by the Judge of the grounds of a decree or order". Section 2(14) of the Civil Procedure Code defines "order" as meaning "the formal expression of any decision of a civil court which is not a decree". It is clear that "order", as defined in the Code, is analogous to "decree" and does not imply what is popularly understood, namely the views expressed by a Judge on the merits of the case before him and his decision thereon. What is ordinarily called an "order" is, in fact, a "judgment" as defined in the Code, though a document may be so drawn up as to contain not only the reasons for the

1933

SURENDRA
NARAIN
SINGH
v.
LAL
BAHADUR
SINGH

decision, so as to fulfil the requirements of a "judgment", but also the "formal expression" of the decision of the court, so as to fulfil most of the requirements of an "order" as defined in section 2(14) of the Civil Procedure Code.

Order XLI, rule 1 of the Civil Procedure Code requires that a copy of the decree appealed from should accompany the memorandum of appeal. Order XLIII, rule 3, as amended by this Court, provides that "In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid." It should be noticed that this rule does not cover many orders of an interlocutory character from which the law allows an appeal. Following this provision, the subordinate courts prepare a formal order only when they dispose of (1) an appeal from order, (2) a miscellaneous case which is separately registered, e.g. a case under the Guardians and Wards Act, or (3) a suit by dismissing it for default. No formal order need be prepared under this rule after every interlocutory order is passed, and it will be obviously undesirable to make it necessary; but its absence creates a difficulty in administering rule 2 of chapter III of the Rules of this Court, which lays down that no memorandum of appeal from an order shall be presented unless accompanied by a copy of the "decree or order" appealed against, besides a copy of the judgment upon which such order is founded. The word "order" in this rule implies order as defined in the Civil Procedure Code, i.e. formal order. This rule presupposes that a formal order is prepared and exists after every appealable order is pronounced. As pointed out, this is by no means the case. This anomaly can be removed by bringing order XLIII, rule 3, and chapter III, rule 2 of the Rules of this Court in a line with each other.

There is now no room for the contention that disregard of the provisions of order XLI, rule 1, or chapter III, rule 2 of the Rules of this Court is an irregularity and does not affect the validity of the presentation of the appeal. The matter is concluded by two cases of this Court, one of which is a Full Bench decision. It was held in *Qasim Ali Khan v. Bhagwanta Kunwar* (1) that presentation of a memorandum of appeal from a decree, which is accompanied by the judgment but not by the decree, is no appeal in law. Similarly it was held in *Bharon Ghulam v. Ram Autar Singh* (2) that presentation of a memorandum of appeal not accompanied by a copy of the first court's judgment, as required by chapter III, rule 2, is no presentation of appeal. It should, however, be borne in mind that in both those cases the document which the appellant should have filed with his memorandum of appeal existed and he omitted to obtain a copy thereof and file it with the memorandum of appeal.

In the case before us the court did not have a separate formal order drawn up at all till long after the presentation of the appeal, and after it had been ordered by this Court. The order was of an interlocutory character to which order XLIII, rule 3, did not apply, and the preparation of a formal order was not imperative. The question is whether the appeal presented on the 5th of April, 1933, when admittedly there was only one document called "order", of which a copy was annexed to the memorandum of appeal, should be considered to be no appeal at all. Where a separate formal order has been drawn up and is in existence when the appeal was filed but the appellant omitted to obtain a copy and file it with the memorandum of appeal, there is justification for holding that there was no valid presentation of the appeal; but in a case like this, in which the only order on the record of proceedings contains not only the grounds on which the decision is

1933

 SURENDRA
NARAIN
SINGH
v.
LAL
BAHADUR
SINGH

(1) (1917) I.L.R., 40 All., 12. • (2) (1921) I.L.R., 43 All., 660.

1933

SURENDRA
NARAIN
SINGH

v.
LAL
BAHADUR
SINGH

based but contains also "the formal expression" and the decision itself, it should be taken to be of a dual character, being both the "judgment" and the "order", as defined in the Civil Procedure Code. The appellant having filed a copy of such an order with his memorandum of appeal should be considered to have substantially complied with rule 2, chapter III of the Rules of this Court. In general it will be found that the operative part of the judgment of the court contains everything which the formal order, if it is drawn up, should contain, except the memorandum of costs. It should, however, be observed that the memorandum of costs incurred in the court below is sometimes a necessary document for the purposes of the appeal, as the decree or the formal order of this Court has to take account of the costs incurred in the first court. But in the case of interlocutory orders, for which no separate and ascertainable costs are incurred, a memorandum of costs cannot be prepared. As indicated above, amendment of either order XLIII, rule 3 or of chapter III, rule 2 of the Rules of this Court is necessary. Before this is done, the only reasonable view that can be taken is that where no formal order was prepared and the appellant filed with his memorandum of appeal a copy of the only order which existed on the record of the lower court, he should be deemed to have substantially complied with the requirements of rule 2, chapter III of the Rules of this Court. Such order should be taken to be both the judgment and the formal order. Accordingly we hold that in this case the appeal was validly presented on the 5th April, 1933.

Even if we had held otherwise, the circumstances of the case are clearly such as to justify the application of section 5 of the Indian Limitation Act. The result is that we declare the appeal to have been filed within limitation.