

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

MANGREY (DECREE-HOLDER-APPELLANT) v. SUNDER
(JUDGEMENT-DEBTOR-RESPONDENT)*

1940
April, 22.

Civil Procedure Code (Act V of 1908), section 47, and Order 41, rule 1—Appeal against an order under section 47—Memorandum of appeal not accompanied by copy of decree, effect of.

An order under section 47, Civil Procedure Code, is by section 2(2), Civil Procedure Code, included in the definition of a decree and under order 41, rule 1, Civil Procedure Code it is imperative that a copy of the decree should accompany the memorandum of appeal. So an appeal against an order under section 47 not accompanied by a copy of the decree or formal order, which is filed beyond limitation, is incompetent. *Qasim Ali Khan v. Bhagwanta Kunwar* (1), relied on. *Khirode Sundari Debi v. Janendra Nath Pal Chaudhuri* (2), dissented from. *Santi Lal v. Raj Narain* (3), distinguished.

The appeal was originally heard by Hon'ble Mr. Justice RADHA KRISHNA who referred an important point of law for decision to a Bench under section 14(2) of the Oudh Courts Act. His order of reference was as under:

RADHA KRISHNA, J.:—One of the points argued in this appeal is that the requirements of order XLI, rule 1 of the Code of Civil Procedure are in the case of appeals from adjudication under section 47 complied with by filing a copy of the order itself with the memorandum of appeal and it is not necessary to file a copy of the formal order. The case in *Khirode Sundari Debi v. Janendra Nath Pal Chaudhuri* (2), seems to support the contention of the appellant. In *Qasim Ali Khan v. Bhagwanta Kunwar* (1), a different view seems to have been taken. In this Allahabad case the Calcutta case was distinguished on the ground that in that case no formal expression of the Court's decision was drawn up. There is no decision of this Court on the point.

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December, 13

*Execution of Decree Appeal No. 4 of 1937, against the order of Mr. Hari Kishan Kaul, Additional Civil Judge of Gonda, dated the 5th October, 1936.

(1) (1917) I.L.R., 40 All., 12.

(2) (1901) 6 C.W.N., 283.

(3) (1929) A.I.R., All., 858.

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I am told that the practice in this Court is to file appeals accompanied by a copy of the order only. On presentation time is allowed for filing a copy of the formal order in cases where a formal order has been prepared. In computing time for filing the appeal the date on which the formal order is filed is never taken into consideration.

The point involved in this appeal is of great importance. I, therefore, refer the appeal to a Bench of two Hon'ble Judges of this Court for decision under section 14 of the Oudh Courts Act.

Mr. *Mahabir Prasad Srivastava*, for the appellant.

Mr. *K. N. Tandon*, for the respondent.

ZIAUL HASAN and YORKE, JJ.:—This is a decree-holder's second appeal against an order of the learned Additional Civil Judge of Gonda who concurred with the learned Munsif in holding that the decree-holder's application for execution dated the 1st October, 1935, was time-barred. The learned Additional Civil Judge also held that the decree-holder's appeal to his court against the Munsif's order was barred by time.

The decree in question was for Rs.300 payable by six equal instalments. The first three instalments, of which the first was due on the 31st May, 1931, were due at intervals of six months, the fourth at an interval of a year after the third, the fifth at an interval of a year from the fourth and the sixth at an interval of a year from the fifth. In the application dated the 1st October, 1935, it was stated that three instalments had been realized by the decree-holder and the application was for recovery of the last three instalments, the first of which was due on the 8th June, 1933, and that the previous application for execution which was brought on the 14th August, 1931, was consigned to records on the 25th August, 1931, after realization of Rs.50 the amount of the third instalment.

The learned Munsif held that as the application in question had been brought more than three years from the date of the previous application for execution and

as mere certification of payment was not a step in aid of execution, the application was time-barred.

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The first question in appeal is whether the appeal against the order of the learned Munsif was or was not barred by time. The order of the learned Munsif upholding the objection of the judgment-debtor under section 47, Civil Procedure Code, and striking off the application for execution was passed on the 15th February, 1936. On the 28th February, 1936, the decree-holder applied for a copy of the order and the copy was ready on the 8th March, 1936. The appeal was filed on the 18th March, 1936. On the 19th March, the decree-holder was directed to file a certified copy of the formal order. He applied for a copy of the formal order of the 21st March, 1936, and the copy was ready on the 28th March, 1936. It was filed on the 14th April, 1936. Order 41, rule 1, Civil Procedure Code provides that—

“The memorandum 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.”

The decree in the present case was the formal order which was not filed along with the memorandum of appeal but was filed on the 14th April, 1936, several days beyond the period of limitation. It is conceded that even if the time which the office of the Munsif took in preparing a copy of the formal order be added to the time prescribed for an appeal, the entire period will not go beyond the 4th April, 1936. The learned counsel for the appellant places reliance on the Calcutta case of *Khirode Sundari Debi v. Janendra Nath Pal Chaudhuri* (1), in which it was held that an order determining any question referred to in section 244 of the Code of Civil Procedure (present section 47) is a decree under section 2 of the Code of Civil Procedure and that therefore when an appeal is preferred against

(1) (1901) 6 C.W.N., 283.

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such an order it is sufficient to attach to the memorandum of appeal a copy of the order itself. This case no doubt supports the contention put forward on behalf of the appellant, but in the case of *Qasim Ali Khan v. Bhagwanta Kunwar* (1), in which also an appeal had been filed against an order under section 47 of the Code of Civil Procedure it was held that no valid appeal could be filed which was not accompanied by a copy of the formal order or decree. The case of *Khirode Sundari Debi v. Janendra Nath Pal Chaudhuri* (2), was referred to in this case but was dissented from. We are in entire agreement, if we may say so with respect, with the reasoning of Mr. Justice TUDBALL, one of the Judges who constituted the Bench in the case of *Qasim Ali Khan v. Bhagwanta Kunwar* (1). Referring to the case of *Khirode Sundari Debi v. Janendra Nath Pal Chaudhuri* (2), the learned Judge says:

“It was held that ‘the order itself is the decree and no other decree is necessary’. I find it impossible to agree that the order itself is the decree and no other decree is necessary. The Code defines a judgment as the statement given by the Judge of the grounds of a decree or order. The ‘decree’ is the formal expression of an adjudication which conclusively determines the rights of the parties. It is this formal adjudication (and not the judgment) which determines the questions between the parties. The word ‘decree’ includes the ‘determination of a question within section 47’. To my mind it is quite clear that the determination of such questions is in the ‘formal’ expression of the Court’s adjudication on the points. The judgment gives merely the grounds for the decision. In the case of ‘orders’ also the Code clearly distinguishes between the judgment, i.e. the grounds of the order and the ‘order’ itself which is the formal expression of the decision. An Indian ‘judgment’ is not to be confused with an English judgment. The latter corresponds to the formal decree or order passed in the case. The decision of a question within section 47 would be an ‘order’ and not a decree were it not specially laid down (for the purposes of appeal) that it should be deemed to be a decree.”

(1) (1917) I.L.R., 40 All., 12.

(2) (1901) 6 C.W.N., 283.

The learned counsel for the appellant has also referred us to the case of *Santi Lal v. Raj Narain* (1) in which it was held that the filing of the formal order outside the limitation period for the filing of an appeal does not bring the appeal itself outside limitation and that it is sufficient if the order is filed before the hearing. In this case, however, the appeal was against an order passed in insolvency proceedings. The case of an order under section 47, Civil Procedure Code, is entirely different inasmuch as such an order is by section 2(2), Civil Procedure Code, included in the definition of a decree and we have already pointed out that under order 41, rule 1, Civil Procedure Code, it is imperative that a copy of the decree should accompany the memorandum of appeal. As in the present case the appeal was not accompanied by a copy of the decree which was filed beyond limitation, the appeal was incompetent.

The result is that the order of the learned Munsif dismissing the appellant's application for execution as time barred has become final, and it is not necessary to go into the merits of that order.

The appeal is therefore dismissed with costs.

Appeal dismissed.

(1) (1929) A.I.R., All., 858.

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