

APPELLATE CIVIL.*Before Wort and Varma, JJ.*

RAMDHARI AHIR

1937.

October, 27.

v.

KHEDU AHIR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XLI, rule 1 and Order XLIII, rule 1—Order rejecting memorandum of appeal as not properly drawn up, whether appealable.

Where the Judge, being of opinion that the memorandum of appeal presented before him was argumentative and not in accordance with the provisions of Order XLI, rule 1, of the Code of Civil Procedure, called upon the appellant to remove the defect and on his failure to do so rejected the same, held, that the order was not appealable as it did not finally dispose of the rights of the parties. It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal is appealable.

Zamindar of Tuni v. Bennayya(1), *Ayyanna v. Naga-bhooshanam*(2) and *Gulab Rai v. Mangli Lal*(3), referred to.

The facts of the case material to this report are set out in the judgment of Wort, J.

K. N. Lal, for the appellant.

Phulan Prasad Varma, for the respondents.

WORT, J.—In the first place I do not think we are entitled to place any interpretation on the order of the learned Judge in the Court below other than that which it will bear on the face of it. The order is—

“the memorandum of appeal is rejected.”

This followed a previous order made about two weeks before, i.e., on the 16th of January, 1937, in which the learned Judge expressed the view that the memorandum of appeal was not in accordance with Order XLI,

*Appeal from Appellate Order no. 102 of 1937, from an order of S. K. Das, Esq., i.c.s., District Judge of Saran, dated the 1st of February, 1937.

(1) (1898) I. L. R. 22 Mad. 155.

(2) (1892) I. L. R. 16 Mad. 285

(3) (1884) I. L. R. 7 All. 42.

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rule 1, of the Code of Civil Procedure and consequent order was made requesting the appellants to comply with Order XLI, rule 1. Then on the 1st of February the order came to be made against which this appeal is directed; the order is in these terms:

WORT, J. "No compliance. The memorandum of appeal is rejected."

On the first question whether an appeal lies to this Court two cases of the Madras High Court have been relied upon. The first is the case of *Zamindar of Tuni v. Bennayya*⁽¹⁾ and the other is an earlier decision in *Ayyanna v. Nagabhooshanam*⁽²⁾. In the latter case there were some irregularities so far as the vakalatnamas of two Vakils were concerned, and on the appeal being rejected (for so it appears to be from the words of the judgment in the case), the objection was taken that no appeal lay and the case of *Gulab Rai v. Mangli Lal*⁽³⁾ was relied on for rebutting that contention, the reason being that an order rejecting the plaint was treated under section 2 of the Code of Civil Procedure as a decree and the learned Judges were therefore of the opinion that the order rejecting an appeal must also be treated as a decree. If the two cases of the Madras High Court are supposed to support the universal proposition that the rejecting of a memorandum of appeal is appealable, I respectfully disagree. Order XLIII, rule 1, of the Code of Civil Procedure provides for appeals in certain circumstances; clauses (t) and (u) of that Order and rule-making provision for appeals in cases coming under Order XLI, rules 19, 21 and 23. Now, if the legislature in its wisdom had made provisions as regards those Orders and rules, why did it not make provision for appeals regarding Order XLI, rules 1 to 3? No such provision is made and therefore it is necessary to fall back upon section 2 of the Code. Again it might be asked if the legislature has provided for the rejection of a plaint and appeal

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arising therefrom why did it not provide for the rejection of the memorandum of appeal? It seems to me that the reason is obvious because unless the Court either summarily or otherwise adjudicates upon the merits (in the word 'merits' I would include the question of limitation), it cannot be said that the dispute between the parties has been finally disposed of.

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WORT, J.

In this case there is a rejection of the memorandum of appeal. We are not concerned, in the particular circumstances of the case, whether the appellants are out of time and they therefore are unable to file another memorandum of appeal, as the fact remains that the mere rejection of the notice of appeal for whatever reason does not preclude the appellants from filing a memorandum which complies with the rules of the Civil Procedure Code. For that reason I would hold that it is impossible to come to the conclusion that as a universal proposition an order rejecting a memorandum of appeal is appealable. I would add that only in those cases in which it finally disposes of the disputes between the parties would it be appealable.

Now, apart from that technical point, I think the case itself has no merits. The appellants could have complied with the order of the Judge. The Judge was of opinion that the Memorandum did not comply with Order XLI, rule 1, because it was argumentative—and we have read the notice of appeal and find it is so—and it seems to me in those circumstances that the appellants have no grievance. They could by the 1st of February, 1937, have complied with the order of the Judge in which event the trouble which they have brought upon themselves would not have arisen.

For both reasons in my judgment the appeal fails and it must be dismissed with costs.

VARMA, J.—I agree.

J. K.

Appeal dismissed.