

FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Justice Sir Alan Brouday and Mr. Justice Tek Chand.

MUSSAMMAT SABAN (DEFENDANT) Appellant
versus

1929

April 16.

SHAHABAL AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2481 of 1928.

Civil Procedure Code, Act V of 1908, Order XLI, Rule 1—Appeal—documents required to be filed with.

Held, that under Order XLI, Rule 1, of the Civil Procedure Code, a memorandum of appeal need only be accompanied by a copy of the decree and (unless the Appellate Court dispenses therewith) a copy of the *final* judgment only, and that it is not necessary for the appellant to file with it a copy of an intermediate order disposing of a preliminary issue arising in the case.

Morton v. Woodfall (1), *Lakhmi Das v. Ishar Das* (2), *Dhani Ram v. Mst. Goman* (3), *Amar Nath v. Kishen Chand* (4), *Mussammatt Jaswant Kaur v. Gajan Singh* (5), and *Ishar Das-Dharam Chand v. Buta Mal-Durga Das* (6), referred to.

Shaikh Abdullah v. Behari Lal (7), *Labha Singh v. Basant Singh* (8), *Mussammatt Fazl-un-Nissa v. Didar Hus-sain* (9), *Bhivani Cotton Spinning and Weaving Co., Ltd. v. Bishen Sahai-Bhagwan Das* (10), *Nanhe Mal-Panna Mal v. Piare Lal-Debi Sahai* (11), and *Joti Ram v. Harbakhsh Singh* (12), disapproved.

Second appeal from the decree of Rai Sahib Lala Ghanshyam Das, District Judge, Gujranwala, dated the 15th September 1928, affirming that of Sheikh Abdul Haq, Subordinate Judge, 1st class, Gujranwala, dated the 2nd June 1928, granting plaintiffs a declaratory decree.

(1) 1927 I. L. R. 8 (Lah.) 257.

(7) 1926 A. I. R. (Lah.) 638.

(2) 1922 A. I. R. (Lah.) 93

(8) 1927 A. I. R. (Lah.) 449.

(3) 1927 A. I. R. (Lah.) 640.

(9) 1927 A. I. R. (Lah.) 451.

(4) 1927 A. I. R. (Lah.) 629.

(10) 1928 A. I. R. (Lah.) 45.

(5) 1928 A. I. R. (Lah.) 601.

(11) 1928 A. I. R. (Lah.) 46.

(6) 1929 A. I. R. (Lah.) 42.

(12) 1928 A. I. R. (Lah.) 60.

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MUHAMMAD TUFAIL and QABUL CHAND, for Appellant.

MEHR CHAND and BADRI NATH, for Respondents.

The orders of Sir Shadi Lal, C. J. and Mr. Justice Skemp, dated 14th January 1929, referring the case to a Full Bench :---

SHADI LAL C.J.

SIR SHADI LAL C.J.—On the 20th of April, 1927, the plaintiffs brought an action for a declaratory decree, alleging that they were already in possession of the property in respect of which they sought the declaration. This allegation was denied by the defendant, with the result that a preliminary issue was framed as to whether the suit for a declaration was competent. This issue was decided by the trial Judge in favour of the plaintiff on the 19th of October, 1927. The learned Judge, thereafter, proceeded to try the remaining issues in the case; and, on the 25th of May, 1928, he gave judgment in favour of the plaintiffs.

Against the decree, which followed upon the judgment, the defendant preferred an appeal to the District Judge, who dismissed it on the short ground that the memorandum of appeal was not accompanied by a copy of the order made by the trial Court on the 19th of October, 1927, disposing of the preliminary issue; and that there was, therefore, no proper presentation of the appeal. The learned counsel for the defendant-appellant impeaches the correctness of the judgment of the District Judge, and contends that a copy of the preliminary order was not essential to a valid presentation of the appeal, more especially when his client was prepared to abandon the ground of appeal challenging the decision of the Court of first instance on the preliminary issue.

Order XLI, rule 1, of the Civil Procedure Code, requires that the memorandum of appeal 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 is urged that the decree was founded upon the judgment delivered on the 25th of May, 1928, and a copy of that judgment was admittedly filed with the memorandum of appeal. It was, therefore, not necessary to annex a copy of the interlocutory order dealing with the question of whether the suit for a declaration was or was not competent. There is a considerable divergence of judicial opinion in this Court as to whether it is incumbent upon the appellant to file with his memorandum of appeal, not only a copy of the final judgment, but also a copy of an order disposing of a preliminary issue; and, in view of the importance of the matter, I consider that it should be authoritatively decided by a Full Bench.

I would accordingly refer to a Full Bench the following questions:—

- (1) Whether a memorandum of appeal should be accompanied, not only by a copy of the final judgment, but also by a copy of an order disposing of a preliminary issue arising in the case; and
- (2) Whether the omission to file a copy of the preliminary order entails the dismissal of the whole of the appeal, or merely prevents the appellant from impeaching the decision on the issue dealt with by that order.

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JUDGMENT OF THE FULL BENCH.

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TEK CHAND J.—The suit, which has given rise to this reference, was instituted by the plaintiffs-respondents for a declaration that the mutation of the land of a deceased childless collateral of theirs, sanctioned by the revenue authorities in favour of his predeceased son's widow, was null and void and ineffectual as against them. The defendant raised a preliminary objection that the suit for the declaration prayed for did not lie as the plaintiffs were not in possession of the land in dispute. The trial Court framed a preliminary issue on this point and by an intermediate order, dated the 19th of October, 1927, decided it in favour of the plaintiffs. It then proceeded to try the suit on the merits and on the 25th of May, 1928, gave judgment for the plaintiffs. From the decree, which followed upon this judgment, the defendant preferred an appeal to the District Judge. The memorandum of appeal was accompanied by copies of the decree appealed from and the judgment dated the 25th of May, 1928, but a copy of the intermediate order dated the 19th of October, 1927, was not attached with it. In ground No. 5 of the memorandum, however, the appellant challenged the finding of the trial Court that the plaintiffs-respondents were in possession and a declaratory suit was maintainable. When the appeal came up for hearing it was objected on behalf of the plaintiffs-respondents that the appeal had not been properly presented, as under Order XLI, rule 1, Civil Procedure Code, it was necessary to file a copy of the order of the 19th October, 1927, along with the memorandum of appeal. The learned District Judge, following *Nanke Mal-Panna Mal v. Piara Lal-Debi Sahai* (1), upheld this objection and dismissed the appeal.

(1) 1928 A. I. R. (Lah.) 46.

On second appeal the soundness of this view was questioned, and as there was a serious conflict of judicial opinion on the point in this Court, the learned Judges of the Division Bench have referred the following questions for decision by the Full Bench :—

- (1) Whether a memorandum of appeal should be accompanied not only by a copy of the final judgment, but also by a copy of an order disposing of a preliminary issue arising in the case; and
- (2) Whether the omission to file a copy of the preliminary order entails the dismissal of the whole of the appeal, or merely prevents the appellant from impeaching the decision on the issue dealt with by that order.

The provision of the Code of Civil Procedure governing this matter is to be found in Order XLI, rule 1, which lays down that the memorandum of appeal 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 is contended by the learned counsel for the appellant that the copy of the judgment required to be filed under this Rule is the copy of the final judgment which contains the ultimate decision on the claim put forward in the plaint and that it is not obligatory on the appellant to file copies of intermediate orders passed by the Court in the course of the trial, disposing of preliminary objections raised by the defendants or deciding issues of fact or law involved in the suit. It is noteworthy that though Order XLI, rule 1, and the corresponding section 541 of the Codes of 1877 and 1882 (which were identical in terms) have been in force for over fifty years, not a

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single case is to be found in the authorised or unauthorised reports of cases decided in any other province in India in which an appeal has been thrown out simply because the memorandum was not accompanied by copies of intermediate orders of the kind above referred to. It is also significant that all the Punjab cases on which the respondents rely were decided subsequent to June 1926. It is a matter of common knowledge that in this province also, the practice before 1926 was to annex with the memorandum of appeal, a copy of the final judgment only. The earliest case on record in which the point was raised is *Lakhmi Das v. Ishar Das* (1), but there the objection was overruled and the appeal held to have been properly constituted. The previous practice appears to have continued until June 1926, when in *Bhiwani Cotton Spinning and Weaving Co., Ltd. v. Firm Bishen Sahai-Bhagwan Das* (2), a contrary view was taken for the first time, and the failure to file a copy of the intermediate order was held fatal to the maintainability of the appeal. Since then a considerable volume of case law has grown up on this point in this Court. In the following five cases a liberal interpretation was put on Order XLI, rule 1, and the objection overruled :—

(i) *Morton v. Woodfall* (3).

(ii) *Dhani Ram v. Mussammat Goman* (4).

(iii) *Amar Nath v. Kishen Chand* (5).

(iv) *Mussammat Jaswant Kaur v. Gajan Singh*
(6).

(v) *Ishar Das-Dharam Chand v. Buta Mal-Durga Das* (7).

(1) 1922 A. I. R. (Lah.) 93.

(4) 1927 A. I. R. (Lah.) 640.

(2) 1928 A. I. R. (Lah.) 45

(5) 1927 A. I. R. (Lah.) 629.

(3) (1927) I. L. R. 8 Lah. 257.

(6) 1928 A. I. R. (Lah.) 601.

(7) 1929 A. I. R. (Lah.) 42.

while in the following five cases the objection was upheld :—

- (vi) *Shaikh Abdullah v. Behari Lal* (1).
 (vii) *Labha Singh v. Basant Singh* (2).
 (viii) *Mussammat Fazal-un-Nissa v. Didar Hus-*
sain (3).
 (ix) *Firm Nanhe Mal-Panna Mal v. Firm Piare*
Lal-Debi Sahai (4).
 (x) *Joti Dam v. Harbakhsh Singh* (5).

The learned counsel for the appellant has challenged the correctness of the latter set of rulings (Nos. vi to x) and has pointed out that it is not possible to reconcile the reasoning on which they are based. I do not, however, think it necessary to discuss these cases in detail, as the common factor in all of them is that they purport to apply (if I may venture to say so) too literally the definition of " judgment " as given in section 2 (9), Civil Procedure Code, to Order XLI, rule 1. In that section it is provided that, unless there is anything repugnant in the subject or context, " judgment " means the statement given by the judge of the grounds of a decree or order. It is argued that if the issues arising in a suit are decided piece-meal by separate orders, all these orders taken together constitute the " judgment " on which the decree is founded, and copies of all of them must be annexed to the memorandum of appeal. The learned counsel for the respondents was, however, constrained to admit that if this argument is pushed to its logical consequences, it will lead to startling results, e.g., an appeal would be liable to dismissal for failure to file with it a copy of an intermediate order deciding an

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issue relating to verification of the plaint, misjoinder or non-joinder of parties, refusal to stay the suit under section 10, valuation, jurisdiction, etc., even though, in some cases, these matters might have been settled once and for all in the trial Court and be of no practical importance for the determination of the appeal.

I think the true meaning of "judgment" in Order XLI, rule 1, can be ascertained by referring to Order XX, rule 7, where it is provided that the decree shall bear date the day on which the "judgment" was pronounced and when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign it. There can be no manner of doubt that the word "judgment" in this Rule means the final judgment only, otherwise in cases in which different issues have been decided on different dates the decree shall have to bear all those dates, a position which is too absurd to be seriously put forward.

Rule 4 (2) of Order XX, lays down that a judgment of a Court, other than a Court of Small Causes, shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. This clearly contemplates that there will be but one "judgment" in a suit, and that it ought to be a self-contained document. If, however, a Court in any particular case decides the issues piece-meal and at the close of the proceedings writes a judgment which does not contain a concise statement of the case nor does it summarize its findings on some of the issues, already recorded in orders passed during the course of the trial, the judgment is strictly speaking defective. But, all the same, it purports to be the "judgment" in the case, and contains the deci-

sion of the Court which has put an end to the action by declaring that the plaintiff was or was not entitled to the remedy for which he had sued. It is the judicial pronouncement on which the decree is founded, and if a copy of this document has been annexed to the memorandum of appeal the requirements of Order XLI, rule 1, are in my opinion, fulfilled and the appeal must be taken to have been properly presented.

After a careful consideration of the arguments addressed to us by both counsel and the rulings cited I have no doubt that the word "judgment" in Order XLI, rule 1, means the statement of the final adjudication of the rights of the parties in the action and does not include orders whereby some preliminary issue, point or plea was determined, or some step taken or other question settled in the progress of the cause.

My answer to the first question, therefore, is that under Order XLI, rule 1, a memorandum of appeal should be accompanied by the decree and (unless the appellate Court dispenses therewith) by the copy of the final judgment only, and that it is not necessary for the appellant to file with it a copy of an order disposing of a preliminary issue arising in the case.

On this view, the second question does not arise and it is not necessary to discuss it.

SIR SHADI LAL C.J.—I concur.

SHADI LAL C.J.

SIR ALAN BROADWAY J.—I concur.

BROADWAY J.

N. F. E.

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