

ALLAHABAD HIGH COURT

Shahzadi Begam

Vs.

Alakh Nath

(Sulaiman, C.J.)

07.03.1935

JUDGMENT

Sulaiman, C.J.

1. Three questions have been referred to this Full Bench, for an expression of opinion by a Division Bench before which a Letters Patent appeal from an order of a Single Judge of this Court dismissing an application under Section 5, Limitation Act, came up for hearing. On 2nd May 1932, the appellant filed an application in this Court before, a Single Judge for leave to appeal in forma pauperism and that application, as required by Order 44, Rule 1 was accompanied by a memorandum of appeal containing the grounds of objections and also a prayer for the appeal being allowed. No court-fee was, of course, at that time paid on the memorandum of appeal. Both the application and the memorandum of appeal were received by the learned Judge and registered as a Miscellaneous Case, and were later on put up again before him on 9th May 1932 with an office report that the application was beyond time. On that date the applicant was not present in the Court room and her application for leave to appeal was rejected. No separate order was passed on the memorandum of appeal treating it as being in itself a separate appeal. On 23rd May 1932, an application was filed on her behalf by a counsel purporting to be under Section 5, Limitation Act, accompanied by an affidavit and praying that the delay in the filing of the "appeal" be condoned. This application was dismissed by the learned Judge on 13th February 1933, after notice to the opposite party had been given. The learned Judge came to the conclusion that at that time there was properly speaking no appeal before the Court at all, and that therefore lie could not extend the time. It is from this order that a Letters Patent appeal has been preferred.

2. The learned Counsel for the applicant states that the application for extension of time was really for extension of time for leave to appeal and not for extension of time for the filing of the appeal, although inadvertently the word "appeal" instead of "application" was used in it. The first question which has been referred to us by the Division Bench is as to whether an appeal lies under Clause 10, Letters Patent, from the order passed by a Single Judge under Section 5, Limitation Act, refusing to extend the time for filing an appeal.

3. An appeal would lie if the order in question were "judgment" within the meaning of CLIO, Letters Patent. It has been held in numerous cases that as the Letters Patent were drafted long

before 'even the earlier Code of 1882 was passed, the word "judgment" used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word "judgment" does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court. In several cases the word has been given a narrower and more restrictive meaning. In *Ghasi Ram v. Mt. Nuraj Begam (F.B.)*, it was held that an order re(1875) 1 All. 31mitting issues to a Subordinate Court was not a judgment. In the case of *Banoo Bibi v. Mehdi Husain*¹ it was laid down that an order refusing leave to appeal in forma pauperis was not a judgment and was not appealable under the Letters Patent. It was incidentally remarked in that case that an order which is not made appealable if passed by a lower Court would not be a judgment within the meaning of the Letters Patent. But that was a rough rule of interpretation and cannot be considered to be an exact definition of judgment. In the case of *Muhammad Naimullah Khan v. Ihsanullah Khan*² it was laid down that an order directing the amendment of a decree passed by a learned Judge of this Court was not a judgment which would be appealable under the Letters Patent. Similarly in the case of *Mansab Ali v. Nihal Chand*³ it was held that an order dismissing an appeal for default of appearance was not a judgment and could not be appealed against.

4. In the case of *R. Wall v. J.E. Howard*⁴ it was held that no appeal under the Letters Patent would lie from an order of a Single Judge refusing an application under the Companies Act, for extension of time for serving notice of an appeal under that Act, inasmuch as such an order would not be a judgment within the meaning of Clause 10. In that case several cases were referred to showing that the word "judgment" had been interpreted in a narrower sense. In the case of *Piare Lal v. Madan Lal*⁵ it was held that no appeal lay from an order refusing to set aside a sale under Order 21, Rule 90. On the other hand, in the case of *Karu Mal v. Ram Nath*⁶ an appeal from an order refusing to extend time under Section 5, Limitation Act, was actually entertained, but the judgment does not indicate that any objection was taken on behalf of the respondent that the appeal did not lie, for there is certainly no reference to any such point in the judgment. It also does not appear that the earlier case of *R. Wall v. J.E. Howard*⁷ was cited before the Bench or considered. The case therefore is no clear authority for the proposition that an appeal lies. It only decided the point that where a client bona fide accepted the advice of a counsel as to the proper procedure to adopt in the course of litigation and was misled by that advice, there was sufficient cause for the delay.

5. In the case of *Sadiq Ali v. Anwar Ali*⁸ it was held that a Letters Patent appeal would lie from an order of a Single Judge rejecting an application to set aside the abatement of an appeal. In that case one respondent had died on 13th June 1920, and an application was made on 4th January 1921, to set aside the abatement. The Bench took it for granted that the appeal abated six months after the date of the death of the respondent and that the application for setting aside the abatement was made within the time prescribed by law for such an application. Proceeding on these assumptions, it considered that an appeal lay, because the order refusing to set aside the abatement was a judgment within the meaning of Clause 10, Letters Patent. In the course of the judgment the Bench relied on the case of *Tuljaram Row v. Alagappa Chettiar*⁹ and quoted with approval the remark of the learned Chief Justice of the Madras High Court that the test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and

¹(1889) 11 All. 375

³(1893) 15 All. 359

⁵1917 All. 325

²(1892) 14 All. 226

⁴(1895) 17 All.438

⁶(1906) 28 All. 414

⁷(1895) 17 All. 438

⁸1923 All. 44

⁹(1912) 35 Mad. 1

whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause.

6. The Amending Limitation Act, under which the period for the application for setting aside the abatement was reduced to three months had come into force on 1st January 1921, but this circumstance was apparently overlooked at the time. Therefore that case is distinguishable as the Bench had proceeded on the assumption that the application for the setting aside of the abatement was in time, and it is therefore not necessary for us to examine the correctness of that decision. We would like to point out that the test laid down by the learned Chief Justice of the Madras High Court is put 'in too wide a language and cannot be accepted as laying down the correct criterion. This is now particularly so, as their Lordships of the Privy Council In a later case of *Sevak Jeranchod Bhogi Lal v. Dakore Temple Committee*¹⁰ referring to the Letters Patent of the Bombay High Court remarked:

The term judgment in. the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

7. Of course, their Lordships did not mean to lay down that no appeal would lie under Clause 39, Bombay High Court Letters Patent, from a decree or final order. That has been made clear by a Full Bench of this Court in the case of *Sital Din v. Anant Ram*¹¹ but their Lordships certainly intended to make it clear that the word "judgment" used in the, Letters Patent is not to "be taken in its widest scope. No doubt the Bombay High Court in the case of *Ramchandra Gangadhar v. Mahadev Moreshwar*¹² followed in *Nagindas Moti lal v. Nilaji*¹³ has taken a view in favor of the appellant, but a contrary view was expressed earlier by a Full Bench of the Calcutta High Court in the case of *Gobind Lal Das v. Shiba Das Chatterjee*¹⁴ from which the Bombay High Court dissented. That Full Bench decision although to some extent doubted in the case of *Brojo Gopal Roy v. Amar Chandra*¹⁵ has not been overruled by that High Court.

8. It seems to us that when an appeal is filed, which is prima facie beyond time and along with it an application is made for extension of time under Section 5, Limitation Act there are two matters before the Court. The appeal on the face of it is barred by time and would have to be dismissed unless time were extended. The application has to be considered on its merits and has to be allowed or disallowed. The application must therefore be considered in the first instance, and if it is allowed, the delay is condoned and the defect of limitation which would otherwise be in the appeal is cured. The appeal would then be admitted by a separate order. If, on the other hand, the time is not extended, then the result is that the application for extension of time under Section 5 is dismissed, but that does not involve an automatic dismissal of the appeal itself although undoubtedly the appeal would in the long run have also to be dismissed by a separate order. It may be that an application for extension of time under Section 5 is in some cases cognizable by a Single Judge, while an appeal, although barred by time is cognizable by a Division Bench, in which event the Single Judge would merely dismiss the application for

¹⁰1925 P.C. 155, at p. 558

¹²1917 Bom. 14

¹⁴(1906) 33 Cal 1323

¹¹1933 All. 262

¹³1924 Bom. 399

¹⁵1929 Cal. 214

extension of time leaving the appeal to be dismissed formally by a Bench of two Judges. The two

matters therefore are undoubtedly distinct and separate, and it is impossible to say that the order passed on one application, (necessarily involves the dismissal of the appeal itself.

9. The present case however has arisen out of an application for leave to appeal which was barred by time. The learned Counsel for the respondent urges before us that there was, in fact, no appeal filed at all, but only an application, and the memorandum of appeal which accompanied it was an appendix or an annexure to it and was not any separate document which could be entertained independently of the application and that accordingly since the application itself was dismissed, this second document fell through and no document which can be treated as an appeal is now in existence. This is the view which appears to have appealed to the learned Judge of this Court who dismissed the application on 13th February 1933.

10. There is a distinction drawn between; the institution of a suit by a pauper and the filing of an appeal by a person who is unable to pay the fee required for the memorandum of appeal. Under Order 33 there is only one application, which, is required to be filed and if that application is allowed, then under Rule 8, it is to be numbered and registered and has to be deemed the plaint in the suit and the suit is then to proceed in all other respects as a suit instituted in the ordinary manner. On the other hand, if the application filed by the plaintiff is dismissed, there is no other document left before the Court which can be proceeded with. On the other hand in Order 44, there is a provision that a person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal may present an application accompanied by a memorandum of appeal and may be allowed to appeal as a pauper, etc. Thus two documents, have to be filed one is the application for leave to appeal as a pauper and the other is the memorandum of appeal itself. But Order 44, Rule 1, does not require that the applicant should file copies of the decree and the judgment, which are necessary for ordinary appeals under Order 41, Rule 1, though an appellant, as in the present case may file them also.

11. It is noteworthy that Order 22, Rule 9 which deals with the procedure for setting aside abatement's provides that if it is proved that the person claiming to be the legal representative was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement and dismissal upon such terms as to costs or otherwise as it thinks fit, and it is provided that provisions of Section 5, Limitation Act, would apply to applications for the setting aside of the abatement. On the other hand, Section 5, Limitation Act, provides that an application may be admitted after the period of limitation prescribed therefore, when the applicant satisfies the Court that he had sufficient cause for not preferring the appeal within the period fixed. Thus there is a distinction in Section 5 and even where sufficient cause is shown, the Court has a discretion in not allowing the application to be filed beyond time, although, of course, such, discretion has to be exercised judicially and reasonably. But the extension of time is a matter of concession or the indulgence to the applicant who has come late and cannot be claimed as of a right. The reason obviously seems to be that in a case of limitation the person ought to be knowing the period prescribed by law for preferring an appeal and he should take sufficient care and precaution to see that through no accident that period expires; whereas in cases of abatement's, a person may be entirely unaware of the death of his opponent, in which case if he proves to the satisfaction of the Court that he was prevented by sufficient cause from continuing the suit, the Court has no discretion, but to set aside the abatement or dismissal.

12. It follows accordingly that where the Court has some discretion in the matter and allows an appeal or application to be filed beyond time as a matter of concession on being satisfied that

there is sufficient cause for the delay, it is not really deciding the rights of the parties nor adjudicating upon their rights and liabilities. The order is in the form of an interlocutory order in a pending matter and the disposal of this matter does not automatically put an end to the appeal itself, which is to be dismissed subsequently. If we were to accept the contention urged on behalf of the appellant that every order passed by a Single Judge which puts an end to or terminates the proceeding or which has by implication the necessary effect resulting in such a termination is a judgment, the result would be that appeals would be permissible from dismissal for default, dismissal for want of prosecution, dismissal on non-payment of costs of printing, translation, etc., or on failure to furnish security. To hold this would be going against several decisions of this Court. We are therefore of opinion that the order of the learned Single Judge dismissing an application under Section 5, Limitation Act, and refusing to extend time is not a judgment within the meaning of Clause 10, Letters Patent, and accordingly no appeal lies from that order.

13. The second question referred to us is whether in spite of an order rejecting the application for leave to appeal in forma pauperis, an appeal is deemed to be still pending so long as it is not rejected for being insufficiently stamped or is dismissed on the ground of limitation. In the present case it so happened that the applicant filed not only the memorandum of appeal along with his application for leave to appeal, but also filed certified copies of the decree and the judgment. It was therefore possible to treat his memorandum of appeal as an appeal preferred, but without payment of proper court-fees. Before 1908, the view which prevailed in this Court as a result of the Full Bench decision in the case of *Bal Karan Rai v. Govind Nath Tiwari*¹⁶ was that when a document which is insufficiently stamped is filed, it is a wholly invalid document, which cannot be treated as an appeal at all, and accordingly as the court-fee had not been paid, it is not any memorandum of appeal which can be considered. On the other hand, some of the other High Courts took a contrary view and held that it was open to the Court to rectify the defect. Accordingly in the new Code Section 149 was added under which express provision has now been made conferring power on a Court where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, to exercise its discretion at any stage, and allow the person, by whom such fee is payable to pay the whole or part as the case may be of such court-fee, and upon such payment the document in respect of which such fee is payable is to have the same force and effect as if such fee had been paid in the first instance. This enactment undoubtedly has the effect of superseding the view expressed in the Full Bench case of this Court. The document therefore which does not bear the full court-fee, is not necessarily; a mere nullity, and waste paper, which cannot be looked at and dealt with at all. Thus although the document is defective, its defect can be cured if the Court exercises its discretion in favor of the person from whom fee is payable; and once the fee has been allowed to be paid, the document has the same effect as if the fee had been paid at the

¹⁶(1890) 12 All. 129

time when the document was filed. In view of this addition in the Code, a Bench of this Court in *Muhammad Farzand Ali v. Rahat Ali*¹⁷ laid down that the rejection of an application under Order 44, Rule 1, Civil Procedure Code for leave to appeal as a pauper is not the rejection of the appeal itself and it is therefore no ground for rejecting a subsequent application for permission to pay the full court-fee on the appeal. This case has not so far been dissented from by any Other Division Bench, and we are of the opinion that it laid down the correct law, if it be assumed that in that case the appellant had filed copies of the decree and the judgment along with the memorandum of appeal. If however copies of decree and judgment are not filed at all, then

the position is different and will be discussed under the next head.

14. So far as the deficiency in the amount of court-fee paid is concerned, the position seems to be this. The learned Judge before whom it is sought to be presented may decline to receive the appeal altogether on the ground that it is insufficiently stamped. He would be perfectly justified in doing so in view of the provisions of Section 6, Court-fees Act, under which no document of any kind chargeable in the first or second schedule of the Court-fees Act, shall be filed, accepted or recorded in any Court of Justice or shall be received or furnished by any public officer unless in respect of such document the court-fee has been paid in full. It is therefore open to a Single Judge to decline to receive the document which is insufficiently stamped on the ground that he cannot receive it. I But where the document has been received and has been accepted as having been properly presented, a Single Judge should not reject the document later on, on the ground of insufficiency of court-fees, unless the matter were within the jurisdiction of a Single Judge. If a Division Bench alone can reject the appeal on the ground of insufficiency of court-fees, then the matter should be laid before such, a Division Bench.

15. The third question is whether a Single Judge has jurisdiction to reject a memorandum of appeal on the ground of deficiency in the amount of court-fees paid, or dismiss it on the ground of limitation, when the memorandum of appeal is not separately filed, but merely accompanies the application for leave to appeal in forma pauperis. The answer in the first instance depends on an interpretation of the words "a motion for the admission of an application" in Chap. 1, Rule 1, Sub-rule (12) of the Rules of this Court. The learned advocate for the respondent relies on these words and, contends that a motion to admit an application is distinct from the application itself and that inasmuch as such a motion is cognizable by a Single Judge, the latter (has jurisdiction to disallow the motion which means that he has jurisdiction to dismiss the application itself at the very outset. On the other hand, the learned Counsel for the appellant relies on Sub-rule (10), Rule 1 and urges that an application under Order 44, Rule 1, Civil Procedure Code, for permission to appeal in forma pauperis can be entertained by a Single Judge, only when the appeal would be within his jurisdiction and not otherwise, and that, therefore the learned Judge should not have dismissed this application.

16. There is no doubt that there is a distinction between the two expressions "motion to admit an application" and "an application" in Rule 1 of our Court. What the rule intends is that, even though the application itself may be cognizable by two Judges and that therefore it could not be dismissed unless it was put up and considered by a Bench of two

¹⁷1918 All. 194

Judges, it may be admitted by a Single Judge sitting alone. A motion to admit such an application can be made before a Single Judge and he can admit it; but this does not imply that he can also reject the application. If he is of opinion that the applicant has made put a prima facie case, and the application is fit to be admitted, he may admit it, But if on the Other hand, he is doubtful and does not consider that the application should be admitted, he has no power to reject it, but should order it to be put up before a Bench of two Judges, which would then finally consider whether the application should be admitted or rejected. Sub-rule 10 restricts the jurisdiction of a Single Judge to dispose of an application under Order 44, Rule 1, Civil Procedure Code, for permission to appeal in forma pauperis, to only such cases in which the appeal itself would be within his jurisdiction and does not authorize a Single Judge to dismiss an application for leave to appeal in forma pauperis, for instance, first appeal, which can be heard

and disposed of by a Bench of two Judges only. We are therefore of the opinion that the present matter was one which was exclusively cognizable by a Division Bench, and the application for leave to appeal in forma pauperis could not have been dismissed by a Single Judge sitting alone, although it could have been admitted by him. We are therefore of opinion that a Single Judge would have no jurisdiction to dismiss an application for leave to appeal on the ground that it is barred by limitation, if the valuation of the appeal is such that is beyond his pecuniary jurisdiction.

17. Where however copies of the decree and the judgment are not filed, it is impossible to regard the memorandum of appeal as constituting a complete appeal in itself. In such an event no appeal has really been preferred, but only an application for leave to appeal has been made. If that application is granted, then there are no further re-qualities, and the applicant would not be called upon to furnish copies of the decree and the judgment. But if the application is rejected, the whole matter falls through, and there is no longer any appeal pending before the Court. An appeal can only be preferred from a decree, and when the decree is not filed, no appeal can be considered to be pending. The memorandum of appeal in such a case must be considered as a mere appendix to the application and the rejection of the application puts an end to the whole proceeding. These are our answers to the three questions referred to us.

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