Hari Har Prasad Singh vs Beni Chand on 27 September, 1950

Equivalent citations: AIR1951ALL79, AIR 1951 ALLAHABAD 79

JUDGMENT

P.L. Bhargava, J.

1. The question, which has been referred to the Full Bench, is as follows:

> "Whether a memorandum of appeal, which is found to be defective for want of proper court-fee and is, therefore, not admitted in view of Section 4, Court-fees Act, and it is ultimately rejected on that ground, can be treated as an appeal when the Court has refused to admit or register it as an appeal."

2. The facts relevant to the question under consideration are these : On 19-3-1937, Shri Hari Har Prasad Singh, the decree-holder-appellant, obtained a money decree for Rs. 9,440 together with costs and future interest against Seth Beni Chand, who is the respondent in this appeal, from the Court of the Civil Judge of Banda. The judgment-debtor presented to this Court a memorandum of appeal against the said decree. The memorandum of appeal was insufficiently stamped, a court-fee of Rs. 10 only was paid, although a much larger amount of court-fee was payable. The deficiency in court-fee was not made good in spite of time having been repeatedly allowed for that purpose. The memorandum of appeal was eventually "rejected" by a learned Judge of this Court on 2-3-1938. The first application for execution of the decree was made on 8-7-1940 more than three years after the date of the decree but within three years from the date of the order rejecting the memorandum of appeal. The decree was sought to be executed by arrest of the judgment-debtor. The judgment-debtor sought relief as an agriculturist; but his prayer was rejected, he being unable to show that he was an agriculturist. The decree-holder was then asked to deposit necessary costs for the arrest of the judgment-debtor; but he failed to do so. Consequently, the application for execution was struck off on 19-9-1940. The decree was put in execution, for the second time, on 12-2-1943. On this occasion, the judgment-debtor raised an objection that the application for execution was not maintainable in so far as the first application, dated 8-7-1940, was barred by limitation, not having been filed within three years from the date of the decree, i. e., 19-3-1937, under Article 182, Limitation Act (IX [9] of 1908). In reply the decree-holder contended that, as there had been an appeal, the first application was well within time from the order of this Court, dated 2-3-1938, rejecting that appeal, in view of the provisions of Article 182 (2) of the Act. This contention was met by the plea that there was no "appeal" or "order of the Appellate Court" on any appeal, within the meaning of these terms, in the sense in which they have been used in Article 182 (2) of the Act."

3. Article 182, Limitation Act, prescribed for the execution of a decree, like the one in the present case, a period of three years from the date of the decree, or, where there has been an appeal, the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal. Therefore the

point, relevant to the question under consideration, is whether "there has been an appeal" against the decree sought to be executed.

4. Learned counsel for the appellant has referred to Section 96, Civil P. C., and argued that the section expressly gives a right of appeal "from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

and the right is not circumscribed by any limitation; and that, in view of the provisions contained in Rule 1 of Order 41 of the Code,, when a memorandum of appeal--whether stamped, unstamped, or insufficiently stamped--drawn up in the manner prescribed, duly signed and accompanied by a copy of the decree appealed from and of the judgment on which it is founded, is properly presented an appeal is preferred. According to his contention anything which" is put before an appellate Court praying for relief by way of appeal is an appeal.

5. Section 96, Civil P. C., no doubt, gives a right of appeal; but the appeal has to be preferred in the manner provided by law, for the time being in force;--a presentation of any and everything containing a prayer for relief by way of appeal, will not amount to an appeal. Rule 1 of Order 41 of the Code prescribes the "form of appeal;" and the provision in the rule that "every appeal shall be preferred in the form of memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf,"

> lays down the mode of preferring an appeal it cannot be interpreted to mean that the presentation of such a memorandum "amounts to an appeal.

6. The Code of Civil Procedure draws a distinction between a memorandum of appeal and an appeal. Sub-rule (1) of Rule 3 of Order 41 of the Code, as amended by this Court, provides:

> "Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in Rule 1 (i), it may be rejected, or where the memorandum of appeal is not drawn op in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

In case the memorandum of appeal is drawn up in the manner prescribed, and it is not rejected under the rule quoted above, it is admitted. Rule 9 of Order 41, which relates to "Registry of memorandum of appeal," lays down :

> "Where a memorandum of appeal is admitted the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose."

That book is called the "Register of Appeals."

7. We do not find any mention of the memorandum of appeal in the rules after Rule 9 of Order 41, Civil P. C. Rule 10 speaks of security for costs of appeal; Rule 11 empowers the Appellate Court to dismiss an appeal, without sending notice to lower Court; Rules 12 and 13 provide for the fixation of a day for hearing of the appeal and the issue of a notice of the same to the Court from whose decree the appeal is preferred; Rules 14 and 15 refer to the service of notice of the appeal; and Rule 16 and the following rules relate to procedure on hearing of appeal, judgment and decree in appeal.

8. The distinction between a memorandum of appeal has also been recognised by the Court-fees Act. Article 1 of Schedule I of the Act mentions a memorandum of appeal (not an appeal) as a document chargeable with fees. Under Section 4 of the Act :

> "No document of any of the kinds specified in the 'first or second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited, or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction, or in the exercise of its extraordinary original criminal jurisdiction, or in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary civil Jurisdiction of the Court) of one or more Judges of the said Court, or of a division Court; or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence or in the exercise of its jurisdiction as a Court of reference or revision, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document."

A memorandum of appeal may be drawn up in the manner prescribed by Rules 1 and 2, Civil P. C., and if it is so drawn up it will be in proper form so far as the provisions of the Code are concerned. But, there is the Court-fees Act, which imposes a duty upon the appellant to pay in respect of the memorandum of appeal the fees prescribed under Schedule I of the Act. If a memorandum of appeal is not drawn up in the manner prescribed by the Code it may be rejected under the provisions of the Code, but if it does not bear the proper fee payable in respect thereof, in view of the provision of Section 4 of the Act, it shall not be received by the High Court nor shall it be filed, exhibited or recorded in any case coming before any High Court. If Section 4 of the Act had stood by itself, an unstamped or insufficiently stamped memorandum of appeal, chargeable with fees, could not have been received by the High Court for any purpose. An exception to the general rule, contained in Section 4 of the Act, has however, been provided in Section 149 of the Code, which lays down :

> "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, the Court may, in its discretion, at any stage, 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 fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

In view of this provision, when an unstamped or an insufficiently stamped memorandum of appeal is presented before a High Court, the same may be received and retained by the Court for the time being and the appellant may, in the discretion of the Court, be allowed to pay the whole or part of such court-fee at a later date, and upon such payment the memorandum of appeal shall have the same force and effect as if such fee had been paid in the first instance; that is to say, it would be treated as a duly stamped memorandum of appeal, which could be received, filed, exhibited and recorded in Court. There is nothing in Section 149 of the Code which overrides the provisions of Section 4, Court-fees Act, it merely postpones the operation of that section for the time being. If the whole or part of the requisite court-fee is not paid within the time allowed by the Court, Section 149 of the Code ceases to have effect, and the Court is precluded from filing or recording an unstamped or insufficiently stamped memorandum of appeal in Court. The receipt of the memorandum of appeal for the purposes of allowing time will be of no further consequence, and the memorandum of appeal will have to be returned.

9. In a recent Full Bench decision, in a miscellaneous matter: Wajid Ali v. Mt. Isar Bano, delivered on 26-9-1950 : (A. I. R. (38) 1951 ALL. 64 F.B.) it has been observed by this Court:

> "Both the Code of Civil Procedure and the Court-fees Act deal with matters relating to procedure -- one deals with the procedure to be followed when a suit or other proceeding is instituted, and the other deals with the amount of court-fee payable on documents presented in a suit or proceeding. They are in pari materia and it is a well recognised principle of interpretation that statutes in pari materia ought to be read as parts of one whole and as supplementing each other.
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> Section 149, Civil P. C. has, therefore, to be read as a proviso to Section 4, Court-fees Act, in order to avoid contradiction between the two sections. As a result of reading the two sections together in this light, the law may be stated thus :
>
> (1) Ordinarily a document insufficiently stamped is not to be received, filed, exhibited or recorded in a Court. (2) When, however, an insufficiently stamped document is presented to the Court, the Court has to decide whether it will exercise its discretion in allowing time to the party presenting the document to make good the deficiency. (3) If it decides, that time should not be granted, it will return the document as insufficiently stamped. (4) If it decides that time should be granted, it will give time to the party to make good the deficiency, and in order to enable the party to make good the deficiency within the time allowed, the Court will tentatively for that limited purpose receive the document. (5) If the deficiency is made good within the time fixed, the document is to be deemed to have been presented and received on the date on which it was originally filed. (6) If the deficiency is not so made good, the document is to be returned as insufficiently stamped by virtue of Section 4 of the Act."

An argument advanced on behalf of the appellant may be noticed here. It has been pointed out that neither the Code of Civil Procedure nor the Court-fees Act provides for the rejection of a

memorandum of appeal for non-payment of whole or part of court-fee payable thereon; but, in face of the mandatory provisions of Section 4 of the Act, no such provision could be made in the Code or in the Act itself. In view of Section 4 of the Act, the proper order to make in a case where an unstamped or insufficiently stamped memorandum of appeal is presented, and the appellant fails to pay the requisite court-fee even after being allowed an opportunity to do so, will be to direct the return of the memorandum of appeal for presentation according to law. An order "rejecting" the same, strictly speaking, may not be wrong ; but it may be misleading and create confusion, as in the present case.

10. In this connection a further argument was put forward on behalf of the appellant. It was contended that, in the present case, the memorandum of appeal having been received, Section 4, Court-fees Act, was no longer applicable ; and that as the memorandum of appeal was not rejected under Rule 3 of Order 41, Civil P. C., it must be taken to have been admitted. There is no force in these contentions. As pointed above Section 4 of the Act has to be read along with Section 149 of the Code; and these provisions read together clearly show that, with a view to enable the Court to allow time for payment of requisite court-fee under Section 149, the High Court may receive the unstamped or insufficiently stamped memorandum of appeal. Unless the memorandum of appeal is received and retained for that purpose the Court cannot allow time for payment of court-fee, if it considers necessary or proper to do so. Consequently, the reception of the memorandum of appeal for a specific purpose does not mean that the Court has received the same also for the purpose of filing or recording it in Court, which would be in direct contravention of the provisions of Section 4 of the Act. As an unstamped or insufficiently stamped memorandum of appeal could not be received for being filed or recorded in Court, it could not have been admitted. There is no automatic admission of a memorandum of appeal if it is received for allowing time under Section 149. In the present case the memorandum of appeal was in fact, rejected; hence it cannot be deemed to have been admitted.

11. The memorandum of appeal, which was presented by the respondent in the case before us, was dealt with under Rule 9 of the Rules of this Court. It was presented to the Registrar of the Court, who called for an office report. The Stamp Reporter submitted a report saying that there was a deficiency of Rs. 572-8-0. The report was accepted by the Registrar, who made am order that the memorandum of appeal be laid before the Court. It was laid before a single Judge, who allowed time to make up the deficiency and eventually rejected-the same as it was insufficiently stamped. The order rejecting the memorandum of appeal was obviously made-under Section 4, Court-fees Act, which was undoubtedly applicable. If the appeal had been admitted it must have been registered; and if it had been registered it would have been cognisable by a Bench, and a single Judge could not have made any order thereon. The fact that a single Judge made an order rejecting the memorandum of appeal, as being insufficiently stamped, goes to show that it was never admitted.

12. Consequently, even if a memorandum of appeal is drawn up in the manner laid down in the Code of Civil Procedure, it cannot be received by any High Court for being filed or recorded in any case coming before such Court if it is unstamped or insufficiently stamped; and unless the memorandum of appeal is filed or recorded in Court it cannot be said that an appeal has been preferred to the Court.

13. On behalf of the appellant reliance has been placed upon a decision of this Court reported in Rup Singh v. Mukhraj Singh, 7 ALL. 887 : (1885 A. W. N. 260). In that case an application for execution of a decree, dated 8-7-1879 was filed on 23-12-1882. An appeal from the decree under execution was presented by the judgment-debtors to the High Court ; but the appeal was rejected on 11-6-1880, in consequence of the failure of the appellants to pay additional court-fees declared by the High Court to be leviable. The execution Court was of opinion that the decree-holder was entitled to claim limitation from 11-6-1880, the date of the order of the High Court rejecting the appeal. The Court treated an order rejecting a memorandum of appeal for deficient payment of court-fee on the same footing as an order rejecting a plaint as insufficiently stamped, which amounted to a decree; and held the application for execution to be within time. On appeal the following order was passed by this Court:

> "The order made in this case by the Judge of this Court, exercising jurisdiction in respect of the registering of appeals which are challenged on the ground of deficient payment of the court-fees required by law, is equivalent to a decree, and, therefore, the decree-holder has rightly been held to be within time in making his present application, which, is not more than three years from the date of that order."

14. It appears from the report that, in that ease, the memorandum of appeal was rejected for deficient payment of court-fee, by a Judge of this Court in exercise of jurisdiction of the Court in respect of the registering of appeals; and, for the reasons already stated, an order rejecting an insufficiently stamped memorandum of appeal, which amounted to refusal to receive the same, in view of the provisions of Section 4, Court-fees Act, could not be treated as equivalent to a decree. Learned counsel for the appellant attempted to support the view, taken in the case under consideration, with reference to the provisions of Order 7, Rule 11 read with Section 107(2), Civil P. C. His argument was that, under the said provisions, an appellate Court (including the High Court) "shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted thereon;"

> and that under Order 7, Rule 11 (c) a Court of original jurisdiction has the power to reject a plaint and an order to that effect amounts to a decree; consequently, by virtue of Section 107(2) an order made by the appellate Court rejecting a memorandum of appeal will be equivalent to a decree. The provisions of Order 7, Rule 11 (c) of the Code are inapplicable to the appellate jurisdiction of the High Court notwithstanding the provisions of Section 107(2) of the Code.

15. The question whether the provisions contained in Section 54, Civil P. C. 1882, corresponding to the provisions of Order 7, Rule 11 of the present Code of Civil Procedure, applied to the High Court in the exercise of its ordinary original civil, extraordinary original civil or appellate jurisdiction was considered by a Full Bench of this Court in Balkaran Rai v. Gobind Nath, 12 ALL. 129 : (1890 A. W. N. 39 F. B.) and it was held that Clauses (a) and (b) of Section 54, which were declared by Section 638 to be inapplicable to the original and civil jurisdiction of the High Court, were also inapplicable to its appellate jurisdiction notwithstanding the provisions of Section 582. The old Sections 638 and 582 correspond to Order 49, Rule 3 and Section 107 respectively of the present Code of Civil

Procedure. This view has been recently affirmed by a Full Bench in the miscellaneous matter, Wajid Ali v. Mt. Isar Bano, (A. I. R. (38) 1951 ALL. 64 F. B.) to which reference has already been made above.

16. In this connection another argument was advanced on the basis of Clause 10 of the Letters Patent. Learned counsel for the appellant contended that the order of the learned single Judge rejecting the memorandum of appeal was appealable under the said clause. The order made in the present case by the learned Judge rejecting the memorandum of appeal was, however, not appealable under that clause, as it was not a "judgment." In Ml. Shahzadi Begum v. Alakh Nath, 1935 A. L. J. 681 : (A. I. R. (22) 1935 ALL. 620 F. B.) an order of a single Judge dismissing an application under Section 5, Limitation Act, and refusing to extend time was not considered a "judgment" within the meaning of the said clause ; and it was held that no appeal lay from the order under that clause.

17. There is no analogy between the rejection of a plaint and the rejection of a memorandum of appeal; and the order rejecting or refusing to receive a memorandum of appeal, in view of the provisions of Section 4, Court-fees Act, cannot be treated as a decree. In Rup Singh's case, (7 ALL. 887:1885 A. W. N. 260) the implications of Section 4, Court-fees Act, were not considered at all; and, on the assumption that the memorandum of appeal was rejected before its admission, it must be held that it does not lay down correct law.

18. Before dealing with the next case, relied upon by the appellant's learned counsel, reference may be made to an earlier decision of this Court in Dianatullah Beg v. Wajid Ali Shah, 6 ALL. 438 : (1884 A. W. N. 153). There a decree was obtained on 8-9-1880, and the judgment-debtor had preferred an appeal to the High Court from that decree. The memorandum of appeal was insufficiently stamped ; and it was consequently rejected. The application for execution was made on 8-1-1884, and it was resisted on the ground that it was made more than three years after the decree and as such it was barred by limitation. In answer to this objection it was contended that the order of the High Court rejecting "the application for appeal" was a "final decree or order of the appellate Court", within the meaning of Article 179 (2), Schedule II, Limitation Act; that consequently the period of limitation should be computed from the date of that order; and that, therefore, the application for execution was within time. The Court of first instance overruled the objection of the judgment-debtor, who then appealed to the High Court. In appeal it was contended on behalf of the appellant that the application for appeal having been rejected no appeal was in fact filed at all; that the order rejecting the application was not a decree or order of the kind contemplated in Article 179 (2), Schedule II, Limitation Act, from which the period of limitation should be calculated, and that such order did not fall within the definitions of "decree" and "order" in Section 2, Civil P. C. The following order was passed by this Court:

> "We find that the application for appeal was presented to the High Court by the plaintiff, but not admitted, on the ground of deficiency of the court-fees. We cannot hold that there has under such circumstances, been an appeal or a final decree or order of an appellate Court within the meaning of Article 179 (2), Limitation Act, so as to give a period from which limitation for execution of the decree can run. The

> application was barred by limitation. We reverse the order and dismiss the application for execution with costs."

19. The next case relied upon by learned counsel for the appellant is Nagendra Nath De v. Suresh Chandra De, 60 Cal. 1 : (A. I. R. (19) 1932 P. C. 165). In that case in 1920 an appeal in irregular form and insufficiently stamped was admitted and heard in due course. At the hearing of the appeal an objection was taken to the form of the appeal. The appellant asked for leave to amend the appeal, but the leave was refused. In the result the appeal was dismissed both on the ground of irregularity and upon the merits and the dismissal was embodied in a decree of the High Court. While considering the effect of this appeal on the question of limitation under Article 182, Limitation Act, their Lordships of the Privy Council observed :

> "There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it."

The appeal having been entertained, admitted and decided different considerations were bound to arise ; and the observations of their Lordships of the Privy Council in that case must be read with reference to the particular facts of that case.

20. The appellant's learned counsel also relied upon Thandavaroya v. Arumugha, A.I.R. (32) 1945 Mad. 261 : (1945-1 M. L. J. 421) where an appeal was filed in a case where no appeal lay and the question arose whether an order dismissing such an appeal would give a fresh starting point for limitation under Article 182 (2), Limitation Act. It was held that under Article 182(2) the only essentials were that there must be an appeal and an order of the appellate Court and that, even if the appeal was incompetent on the ground that no appeal lay, an order passed in that appeal would give a fresh starting point for limitation. In that case, the memorandum of appeal was in proper form and duly stamped; and it had been admitted and registered as an appeal.

21. Learned counsel also cited Ram Kumar v. Chaube Rudra Dutt, 1950 A.L.J. 565: (A.I.R. (38) 1951 ALL. 493), Husain Asghar Ali v. Ramditta Mal, 60 Cal. 662: (A.I R. (20) 1933 P. C. 68), Kunwar Bahadur Singh v. Sheo Shankar, A.I.R. (37) 1950 ALL. 327, Abdulla Asghar Ali v. Ganesh Das, 1933 A. L. J. 239: (A. I. R. (20) 1933 P. C. 68) and Mohammad Naqi v. Alauddin Ahmad, A.I.R. (28) 1941 Pat. 213 : (20 Pat. 513). In Ram Kumar v. Chaube Rudra Dutt, 1950 A. L. J. 565 : (A. I. R. (38) 1951 ALL. 493) this Court considered a case of dismissal of an appeal for want of prosecution; the order of dismissal was held to be a judicial order, disposing of the appeal and, as such, a 'final order' within the meaning of the term used in Article 182 (2), Limitation Act. There the memorandum of appeal had been admitted and registered as an appeal. In Husain Asghar Ali v. Ramditta Mal, 60 Cal. 662: (A.I.R. (20) 1933 P. C. 68) it was held that the order directing the abatement of appeal was a judicial decision finally disposing of the appeal; and the limitation for the purposes of an execution application was to be computed from the date of that order. Here, again, the order of abatement was

passed after the memorandum of appeal had been admitted and registered. The case reported in Kunwar Bahadur Singh v. Sheo Shankar, A.I.R. (37) 1950 ALL. 327, was a case where an application for setting aside an ex parte decree was dismissed and appeal against that order was also dismissed. Limitation was computed from the date of the ex parte decree and not from the decree of the appellate Court, the reason being that the appeal in Article 182 (2), Limitation Act, means an appeal from the decree sought to be executed and no other appeal. Their Lordships of the Privy Council in Abdulla Asghar Ali v. Ganesh Das, 1933 A. L. J. 239: (A.I.R. (20) 1933 P. C. 68) observed that when an order is judicially made by an appellate Court, which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182 (2), Limitation Act. In Mahomed Naqi v. Alauddin Ahmad, A.I.R. (28) 1941 Pat. 213: (20 Pat. 513) the appeal had been admitted and then it was dismissed for nonpayment of process-fees. The cases where a judicial order rejecting an appeal (as distinct from a memorandum of appeal) is passed stand on a different footing; consequently, the above-mentioned cases cannot help the appellant.

22. Learned counsel for the respondent has relied upon a decision of the Madras High Court reported in Bayya Reddi v. Gopal Rao, 57 Mad. 741 : (A. I. R. (21) 1934 Mad. 303). In that case a decree was made by the trial Court on 5-9-1922. The decree was confirmed on appeal by the appellate Court on 20-4-1925. There was a second appeal to the High Court; but it was filed four days beyond time. An application for condoning the delay in presenting the appeal was filed along with the memorandum of appeal. That application was rejected on 5-3-1926. An application was made on 6-9-1928, for the execution of the decree passed on first appeal on 20-4-1925. The application was resisted on the ground that it was barred by limitation. In reply the decree-holder contended that the application was not so barred as it was filed within three years from 5-3-1926, the date when the High Court rejected the second appeal. The application for execution was rejected as barred by limitation.

23. When the limitation for preferring an appeal has expired and an application is made under Section 5, Limitation Act, for condonation of delay, the Court has first to decide the application and, if the application is rejected, the memorandum of appeal is not admitted, and in the case just cited it was held that there is no appeal when the Court has refused to receive the memorandum of its file as barred by limitation. This case, therefore, supports the contention put forward on behalf of the respondent.

24. In Abdul Majid v. Jawahar Lal, 36 ALL. 350 : (A. I. R. (1) 1914 P. C. 66) it was held that an order of His Majesty in Council dismissing an appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from; that it merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him; and that, therefore, he was in the same position as if he had not appealed at all. In the same manner when the appellant failed to make good the deficiency in court-fee and the memorandum of appeal was rejected--rejected in the sense that it could not be received in view of the provisions of Section 4, Court-fees Act --the position was that no appeal had been preferred.

25. There is a decision of the Calcutta High Court in Prodyot Coomar Tagore v. Mathura Kanta Das, A. I. R. (25) 1938 Cal. 533 : (178 I. C. 62) in which it was held that where a memorandum of appeal, though presented to the appellate Court, is neither registered nor numbered as an appeal on account of deficient court-fee and on non-payment of requisite court-fee within the time allowed the memorandum of appeal is rejected, the order has not the effect of a decree and it does not deal judicially with the appeal at all which has not yet come into existence. It amounts merely to this that the appellant has not complied with the conditions under which alone he is competent to file an appeal; and, therefore, the position is exactly the same as if no appeal had been filed. It was further held that the order did not give a fresh start for limitation.

26. In Brijbhukhan v. Tota Ram, 50 ALL. 980 : (A. I. R. (16) 1929 ALL. 75) Sulaiman J. as he then was, observed :

> "The High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter that the amount of court-fee paid is insufficient; otherwise the provisions of Section 4, Court-fees Act would be evaded indirectly. Section 149, Civil P. C., no doubt, gives a Court power to allow deficiency to be made good in its discretion, but the concession cannot be claimed as of right. If the appeal is admitted by inadvertence, time may be allowed for making up the deficiency."

27. In the present case, in view of the provisions of Section 4, Court-fees Act, the insufficiently stamped memorandum of appeal could not be received, filed or recorded in this Court; but, in view of the provisions of Section 149, Civil P. C., it was received and retained for purposes of allowing time for making up deficiency in court-fee by a single Judge. It may be remarked in passing that the appeal itself could not be heard or disposed of by a single Judge--it was cognisable by a Bench of two Judges. The memorandum of appeal was retained and time was granted for payment of deficiency in court-fee from time to time. When the deficiency in court-fee was not made good, the memorandum of appeal was 'rejected'. The word 'rejected' was used in the sense that it could not be received by the Court being insufficiently stamped. The proper order to be made in such cases is to direct the return of the memorandum of appeal. The memorandum of appeal was, therefore, never admitted; and as it was never admitted the appeal was never registered.

28. It follows, therefore, that a memorandum of appeal which is found to be defective for want of proper court-fee and is not admitted in view of Section 4, Court-fees Act and it is returned or even "rejected" on that ground, cannot be treated as an appeal when the Court has refused to admit or register it as an appeal. In such a case it must be held that there has been no appeal from the decree sought to be executed. Consequently, I would answer the question referred to the Full Bench in the negative.

Wanchoo, J.

29. I have read the judgment of my brother, Bhargava, and agree with his conclusions. I may not, however, be taken to have expressed any opinion on the effect the rejection of memorandum of

appeal under Order 41, Rule 3, Civil P. C., will have.

Agarwala, J.

30. I agree with the conclusion reached by my brother Bhargava. The point for decision is whether it can be said that there "has been an appeal" upon which "a final decree or order of the appellate Court" has been passed when the memorandum of appeal before being registered as an appeal has been rejected or returned as insufficiently stamped.

31. When an insufficiently stamped memorandum of appeal is presented in the High Court, the High Court is not bound to receive the document. Under Section 4, Court-fees Act it can return it then and there without passing any order. No law requires the High Court to pass an order on such a document. But under Section 149, Civil P. C., the High Court may, in its discretion, which discretion has to be exercised upon sufficient grounds, grant time to the proposed appellant to make good the deficiency in court-fee and thus make the document receivable by the Court. If the party concerned makes good the deficiency, the document has to be received, though it may thereafter have to be rejected on other grounds, e. g., under Order 41, Rule 3. If the deficiency is not made good, the document remains as it was before time was given, an unreceivable document, and has, therefore, to be returned to She party concerned on the ground that it is not receivable and cannot be filed in Court.

32. The phrase "where there has been an appeal" to my mind, necessarily implies that the Court has received the memorandum of appeal. The Court does not receive it because it is not empowered to do so so long as the document is insufficiently stamped and the deficiency has been brought to the notice of the Court.

33. Where, therefore, a document is not received by the Court either initially or subsequently when after time having been granted, the deficiency in court-fee is not made good and the document is returned, there has been no appeal and there has been no final order upon such an appeal.

34. The observations of Sir Dinshaw Mulla in Nagendra Nath De v. Suresh Chandra De, 60 Cal. 1 : (A.I.R. (19) 1932 P.C. 165) that "an application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term and that it is no less an appeal because it is irregular or incompetent"

> must be read in conjunction with the fact that the appeal in that case had been admitted and was heard in due course and a decree was made upon it.

35. There is a clear distinction between a case in which a memorandum of appeal has been returned before it is admitted or registered and a case in which the memorandum of appeal though insufficiently stamped has been by mistake or by inadvertence registered and admitted and then rejected under Section 28, Court-fees Act. In the latter case there has been an appeal with a final order thereupon. In the former case there has been neither an appeal nor a final order thereupon. I express no opinion upon the question whether in a case in which a memorandum of appeal is

rejected under Order 41, Rule 3, it can be said that there has been an appeal and a final order thereon, or not.

36. By the Court --The question referred to the Pull Bench is answered in the negative. Let the papers along with the opinion of the Full Bench be now laid before the Bench concerned.