

weight. This aspect is completely absent in defendants' mark. Any purchasers having even a vague recollection of plaintiff marks will not be deceived by the defendant's marks so as to be led to believe that those are the same as the trade-marks of the plaintiff. So far as the plaintiff's mark containing the word elephant is concerned, there is, as already stated, no evidence at all to prove that plaintiff's trade mark is really the word-mark". It cannot, therefore, be held that the use by the defendants of the word "Hathi" as part of the mark of the defendants—Jagjit Hathi—is likely to deceive or cause confusion in the trade. In this view of the matter, there is no merit in this appeal and the same must fail and is accordingly dismissed with costs.

S. B. CAPOOR, J.—I agree.

K. S.

*APPELLATE CIVIL*

*Before S. B. Capoor and R. S. Narula, JJ.*

BRIJ MOHAN AND ANOTHER,—*Appellants*

*versus*

MOHAN LAL AND OTHERS,—*Respondents*

**Regular First Appeal No. 56 of 1959**

November 14, 1968

*Code of Civil Procedure (Act V of 1908)—Order 41 Rule 1—Provisions of—Whether mandatory—Appeal without decree-sheet—Whether can be filed—Trial Court not framing decree-sheet for some default of appellant—Appellant filing appeal without decree-sheet—Such appeal—Whether competent.*

*Held*, that Order 41 Rule 1 of the Code of Civil Procedure requires that every memorandum of appeal has to be accompanied by a copy of the decree-appealed from. If a decree-sheet has been framed, but no application for its certified copy has been made within limitation and an appeal is filed without the requisite copy of the decree, such an appeal must be dismissed as incompetent. The requirement of Order 41 Rule 1 is mandatory and in the absence of a copy of the decree, the filling of the appeal is incomplete, defence and incompetent. Certain exceptions have, however, been carved out on the general rule of the incompetency of an appeal which is not accompanied by a certified copy of the decree appealed against in order to avoid hardship to litigants in certain special circumstances. Where the trial Court does not frame a formal

## Brij Mohan, etc v. Mohan Lal, etc. (Narula, J.)

decree and in spite of the fact that the time is granted by the High Court and the appellant moves the trial Court for framing a decree, the trial Court fails to do so, and the High Court also does not order the trial Court to frame the decree the appeal is maintainable without the decree. The trial Court, however, cannot be accused of not framing the decree when the appellant does not pay up the court-fee on the amount decree in his favour on payment of which alone he can claim the preparation of the decree-sheet. In such a situation it is not possible for the appellate Court to direct the trial Court to frame a decree as it will be contrary to the provisions of section 11 of the Court Fees Act which as amended requires that no decree-sheet shall be drawn up in a suit for accounts unless the deficiency in court-fee is made up. The appeal in such circumstances is not competent without a decree-sheet. ( Paras 5 and 6)

*First appeal from the judgment of the Court of Shri Baldev Raj Guliani, Subordinate Judge First Class, Sirsa, dated 27th June, 1958, passing a decree for Rs. 8,400 in, favour of the plaintiffs.*

C. M. 477-C of 1959.—*Application under section 5 of the Indian Limitation Act praying that time be extended under section 5 of Indian Limitation Act and the appeal be treated as within time.*

BHAGIRTH DASS, ADVOCATE WITH B. K. JHINGAN, S. K. HIRAJEE, AND PARKASH CHAND JAIN, ADVOCATES, for the Appellants.

R. S. MITTAL AND S. C. SIBAL, ADVOCATES, for the Respondents.

## JUDGMENT.

**NARULA, J.**—This order will dispose of Regular First Appeal 56 of 1950, and Civil Miscellaneous 477-C of 1950. The facts relevant for disposing of this appeal and application are brief and may first be narrated.

(2) Mohan Lal, Tara Chand and Kundan Lal, three of the partners of Messrs Ganesh Trading Company of Delhi filed a suit on January 15, 1957, for dissolution of the said partnership and for rendition of accounts. During the pendency of the suit, counsel for the parties made statements before the trial Court to the effect that Babu Tulsi Ram pleader should receive the account books, check them, hear the parties and then appear in Court and give a statement regarding the shares of the parties and about the amounts which are due from any one of them to the other, and that the suit may be decided in accordance with the statement that might be given by him. Babu Tulsi Ram made a statement on the above mentioned matters on June 27, 1958, and the trial Court proceeded to pronounce

judgment in accordance therewith on the same day. According to the said statement a decree for Rs. 8,400 was passed in favour of the plaintiffs, out of which Rs. 4,040, were payable by Gaja Nand and Radha Kishan defendants Nos. 3 and 4, and a sum of Rs. 4,360, was to be paid by Brij Mohan and Sham Murari defendants Nos., 1 and 2. In addition, a decree for Rs. 4,570, was passed in favour of Brij Mohan and Sham Murari defendants Nos. 1 and 2 against Sheo Parshad and Hanuman Dass defendants Nos., 5 and 7. In the judgment of the learned Subordinate Judge First Class, Sirsa. it was directed that the decree-sheet would be prepared when the deficiency in the court-fee is made good, i.e., when the parties would pay their respective shares of court fee. It is the common case of both sides that deficiency in court-fee was not made up by either of the parties till the filing of the present appeal and that no decree-sheet had been drawn by the trial Court in pursuance of its judgment referred to above. Not satisfied with that part of the judgment of the trial Court which directed the passing of a decree for Rs. 4,360, against them in favour of the plaintiffs, Brij Mohan and Sham Murari defendants Nos., 1 and 2 wanted to prefer an appeal against the same. An application was, therefore, made by them for a certified copy of the judgment of the trial Court on July, 1, 1958. The copy was prepared and supplied to them on July 3, 1958. The time requisite for obtaining the copy of the judgment was, therefore, only three days. As the decree passed by the trial Court was for more than Rs. 5,000, an appeal against the same could have been filed in this Court by the 28th of September, 1958, i.e., within 93 days after taking into account the normal period of 90 days plus three days requisite for obtaining the copy. But no such appeal was filed here. The appellants, however, filed an appeal in the Court of the District Judge, Hissar, on July 30, 1958. The appeal was returned to them by the Court of the District Judge on December, 8, 1958, on the ground that it lay only to the High Court. Thereupon it was refiled in this Court on December 9, 1958, i.e., 72 days after the expiry of the period of limitation. The appeal was accompanied by Civil Miscellaneous 477-C of 1959 under section 5 of the Limitation Act, wherein it was stated that the decree-sheet had not been prepared by the trial Court till then, that the appeal had been filed in the Court of the District Judge, Hissar, due to *bona fide* mistake as the question of forum of appeal was not free from doubt, and that the delay in preferring the appeal to this Court was not intentional. Extension of time for filing an appeal to this Court under section 5, of the Limitation Act was prayed for on the abovesaid ground.

Brij Mohan, etc v. Mohan Lal, etc. (Narula, J.)

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(3) On December, 10, 1958, the appeal was returned by the Registry of this Court with various objections out of which one was that the copy of the decree-sheet of the trial Court had not been filed. The appeal was refiled on December, 11, 1958, with an endorsement regarding compliance having been made in respect of some other objection without saying anything about the matter in dispute. The appeal was again returned by the order of the Registry, dated December 11, 1958, as no reply had been given by the appellants to the remaining objections originally raised by the office. The appeal was then refiled on January, 15, 1959 with an endorsement in the following words :

“Decree sheet has not been prepared by the trial Court. Hence no copy of decree sheet has been filed.”

The memorandum of appeal was again returned on January 17, 1959 with the following remarks :—

“If no decree-sheet is prepared then the order amounts to decree, and as such should be stamped as decree-shee.”

Compliance was made with the above direction by paying additional court-fee payable on a decree-sheet on the judgment itself, and the appeal was filed again on February 17, 1959. Thereafter the appeal came up before the Motion Bench (G. D. Khosla, J.), on March 9, 1959, along with the application under section 5 of the Limitation Act. The order passed by the learned Judge at that stage on the appeal and the application was to the following effect :—

“Admitted D.B., Subject to all just exceptions re: limitation.  
Print record.”

Thereafter the appellants did not take any steps either for paying the court-fee in the trial Court or for getting the decree-sheet drawn from the Court of the learned Subordinate Judge. Nor did they state that they made any application for obtaining a certified copy of the decree.

(4) When this appeal reached for hearing today in the circumstances detailed above, Mr. R. S. Mittal, learned counsel for the plaintiff-respondents took up two preliminary objections to the maintainability of this appeal. He firstly contended that there is no proper and competent appeal before this Court as the appeal lies

only against a decree and under Order 41 Rule 1 of the Code of Civil Procedure the memorandum of appeal must be accompanied by a certified copy of the decree. His second objection is to the effect that if we hold the appeal to be competent, there is no valid ground for condoning the delay in filing the appeal in this Court, and that we should, therefore, dismiss Civil Miscellaneous 477-C of 1959, and consequently dismiss the appeal as barred by time. In the view we are taking of the first objection raised by the learned counsel, the second objection does not at all arise and need not, therefore, detain us at all.

(5) Order 41 rule 1 of the Code of Civil Procedure requires that every memorandum of appeal has to be accompanied by a copy of the decree- appealed from. It is settled law that if a decree-sheet has been framed, but no application for its certified copy has been made within limitation and an appeal is filed without the requisite copy of the decree, such an appeal must be dismissed as incompetent. Certain exceptions have, however, been carved out on the general rule of the incompetency of an appeal which is not accompanied by a certified copy of the decree appealed against in order to avoid hardship to litigants in certain special circumstances. Mr. R. S. Mittal, learned counsel for the plaintiff-respondents invited our attention to the judgment of the Supreme Court in *Phool Chand and another v. Gopal Lal*, (1) wherein it was held that the requirement of Order 41 Rule 1 is mandatory and in the absence of a copy of the decree, the filing of the appeal would be incomplete, defective and incompetent. There may still be circumstances where appeal may be competent even though a copy of the decree may not have been filed along with the memorandum of appeal. The case in which their Lordships of the Supreme Court held the appeal to be competent without the requisite copy of the decree was where the trial Court did not frame a formal decree when it varied the shares and in spite of the fact that the time was granted by the High Court and the appellant had moved the trial Court for framing a fresh decree, the trial Court had failed to do so, and the High Court also did not order the trial Court to frame the decree. That kind of a case was held to be an exceptional one and the appeal was held to be maintainable without a decree in such a case. Admittedly the present case does not fall within the purview of the illustration given by the Supreme Court in the case of *Phool Chand and another* (supra), (1). Counsel for the appellants has

(1) A.I.R. 1967 S.C. 1470.

Brij Mohan, etc v. Mohan Lal, etc. (Narula, J.)

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on the other hand placed reliance on the earlier decision of the Supreme Court in *Jagat Dhish Bhargava v. Jawahar Lal Bhargava and others*, (2). Their Lordships of the Supreme Court divided cases of appeals filed without being accompanied by the requisite copy of the decree into various categories. The first category is of cases where at the time of preferring the appeal a decree-sheet has already been drawn up by the trial Court, but the appellant has not applied for its copy within the prescribed period of limitation. In that eventuality, held the Supreme Court, it would be a clear case where the appeal would be incompetent and a penalty of dismissal thereof would be justified. The second class of cases referred to in the case of *Jagat Dhish Bhargava* (supra), (2), is the one where a decree has in fact not been drawn up by the trial Court when the appeal is presented before the appellate Court, but an application had been made by the appellant for a certified copy of the decree within time. In such cases, it was held, all that can be said against the appeal is that it is premature since a decree had not been drawn up, and it is the decree against which an appeal lies. Their Lordships observed that if the office of the High Court examines the appeal carefully and discovers the defect, the appeal in the second category referred to above may be returned to the appellant for presentation with a certified copy of the decree after it is obtained. It is the common case of the parties before us that the present appeal does not fall in any of the abovesaid two categories. Whereas the appellants claim that it falls in the third category, it has been strenuously contended by the learned counsel for the plaintiff-respondents that it does not fall in that category either. The third category is of cases like the one which was before the Supreme Court in the case of *Jagat Dhish Bhargava*, (2), where the appeal has passed through the stage of admission "through oversight of the office." The Supreme Court held that in such cases, the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. Their Lordships further observed that in such cases it would be the duty of the High Court to direct the subordinate Court to draw up the decree forthwith without any delay. The Supreme Court dealt with still another class of cases with which we are not concerned in this appeal. That relates to appeals against decrees which have been drawn up and for a copy of which decree an application

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(2) A.I.R. 1961 S.C. 832.

has been made by the appellant after the decree was drawn up and the appeal is returned by the office of the appellate Court as being defective. Their Lordships observed that in such a case when the decree is filed by the appellant, the question of limitation may be examined on merits.

(6) As already stated, Mr. B. K. Jhigan, learned counsel for the appellants, submitted that this case falls squarely within the third category referred to in the judgment of the Supreme Court, and that we should, therefore, give a direction to the trial Court to frame the requisite decree and in the meantime adjourn the appeal for being completed after the requisite certified copy is produced by the appellants. We regret we are unable to agree with this contention. Two conditions precedent for bringing this case within the third category of appeals referred to in the judgment of the Supreme Court in the case of *Jagat Dhish Bhargava* (2) are wholly wanting in the present case. In order to entitle a defaulting appellant to the relief claimed by the present appellants, it is firstly necessary that non-framing of the decree-sheet by the trial Court should not be due to the fault of the appellant himself. The trial Court cannot be accused of not framing the decree when the appellants herein did not pay up the court-fee on the amount decreed in their favour on payment of which alone they could claim the preparation of the decree-sheet. In this situation we cannot possibly be expected to direct the trial Court to frame a decree as it would be contrary to the provisions of section 11 of the Court Fees Act which as amended requires that no decree-sheet shall be drawn up in a suit for accounts unless the deficiency in court-fee is made up. Secondly the indulgence claimed by the appellant in the present case is misconceived because they did not even now state that they ever applied for a certified copy of the decree and that any such application of the appellants is still pending. As two of the conditions precedent for placing the case in the third category of the appeals referred to in the judgment of the Supreme Court are wholly missing in the present case, and the appeal was not admitted without noticing the defect on account of any oversight of the office, but the defect was pointed out to the appellants who insisted on preferring the appeal without having the decree-sheet drawn up, and have just sat at home for practically nine years after the admission of the appeal subject to all just exceptions, to allow any indulgence to the appellants in a case like this would, in our opinion, amount to placing premium on neglect of the duties of a litigant enjoined on him by law, and on his showing total

(2) A.I.R. 1961 S.C. 832.

Kanshi Ram *v.* Shmt. Bhagwan Kaur (Mehar Chand, C.J.)

disregard for the mandatory provisions of Order 41, Rule 1 of the Code. We, therefore, uphold the preliminary objections raised by Mr. Mittal and hold that there is no competent appeal before us. The question of condoning delay or extending time for filing such an appeal does not arise. Counsel for the appellants himself conceded that Civil Miscellaneous 477-C of 1959 had been filed on account of some misapprehension, and is certainly not maintainable in the circumstances detailed above. Civil Miscellaneous 477-C of 1959 is, therefore, dismissed.

(7) So far as Regular First appeal 56 of 1959 is concerned, it cannot be dismissed as it is only an appeal which can be dismissed and not a purported appeal. Since we have held that the appeal is incomplete and incompetent, we can only reject the same. If and when the appellants get the decree-sheet of the trial Court drawn up after taking necessary and requisite steps, and then choose to prefer an appeal in a competent Court, if so advised, the question of limitation for filing such an appeal would be gone into and dealt with on merits.

(8) For the foregoing reasons we dismiss Civil Miscellaneous 477-C of 1959, and reject the memorandum of appeal of R.F.A. 56 of 1959, and direct that the court-fee paid by the defendant-appellants on the said memorandum of appeal shall be refunded to them in accordance with law. In the circumstances of the case, the parties are left to bear their own costs of the entire proceedings in this Court.

S. B. CAPOOR, J.—I agree.

R. N. M.

REVISIONAL CIVIL

*Before Mehar Singh, C.J.*

KANSHI RAM,—Petitioner

*versus*

SHMT. BHAGWAN KAUR,—Respondent

**C. R. 596 of 1967.**

November 19, 1968

*Civil Procedure Code (V of 1908)—Order 5 Rule 20—Limitation Act (XXXVI of 1963)—Article 123—Explanation to Article 123—Whether abrogates Order 5 rule 20(2)—Party served by substituted service—Ex-parte decree passed—Such party—Whether has to prove absence of due service.*