APPELLATE CIVIL

Before Man Mohan Singh Gujral, J.

MAM RAJ AND OTHERS,—*Appellants.*

versus.

DARSHAN SINGH *alias RANJIT SINGH* AND OTHERS,—*Respondents.*

Second Appeal From the Order No. 25 of 1971

September 14, 1971.

Code of Civil Procedure (Act V of 1908)—Order 41, rules 1 and 3—High Court Rules and Orders, Volume V—Chapter 1, Part A(a), rule 2(a)—Memorandum of Appeal not drawn on the printed form as provided in rule 2(a) and if so drawn, all the columns of the form not filled—Whether can be rejected under Order 41, rule 3—Memorandum of Appeal returned to the appellant for being amended within the time fixed by the Court and the amendment not made within fixed time—Whether can be rejected under rule 3—Such rejection—Whether can take place after the appeal is admitted.

Held, that rule 1 of Order 41 of the Code of Civil Procedure, 1908 provides that every appeal has to be preferred in the form of memorandum. Sub-rule (2) of this Rule provides as to what such a memorandum is to contain. In this rule, there is no reference to the printed form which has been prescribed by the High Court Rules and Orders, Volume V, or to the form mentioned in Appendix G at number 1 of the Code but reference is only to the manner in which the memorandum is to be drawn up. The expression used is "in the form of a memorandum" and not "on the printed form" or, "the prescribed form", of the memorandum. Rule 3 of this Order provides that the memorandum of appeal is to be rejected if it is not drawn up in the manner hereinbefore prescribed. The expression "hereinbefore prescribed" refers to rule 1 of Order 41 including sub-rule (2) thereof. The memorandum, therefore, cannot be rejected under rule 3 of Order 41 of the Code for its failure to have been drawn up on the printed form as is provided in the High Court Rules and Orders, Volume V, because that is not envisaged by the rule. It also cannot be rejected under this rule for the failure of the appellant to fill in all the columns of the printed form.

Held, that although it is not specifically stated in rule 3 of Order 41 whether if the memorandum of appeal is returned to the appellant for being amended within a time to be fixed by the Court and if the amendment is not made within the time fixed, the appeal can then be rejected, but this power would naturally flow from this rule. If the memorandum of appeal

can be rejected in the first instance in the event of its not being drawn up in the prescribed manner it can certainly be rejected if the amendment is not made within the time to be fixed by the Court. But the memorandum will not entail the liability of rejection where the appeal has been admitted and the memorandum of appeal on being presented had not been rejected. The appeal will have to be set down for regular hearing. Hence an appeal having been filed within time and having been admitted to a regular hearing cannot be dismissed at the stage of regular hearing on the ground that the appellant had failed to remove the defects in the opening sheet of the appeal within the time allowed by the Deputy Registrar.

Second Appeal from the order of the court of Shri Raghbir Singh Gupta, Additional District Judge, Ambala, dated 25th November, 1970, reversing that of Shri I. P. Vasishth, Sub-Judge II Class, Jagadhri, dated 28th October, 1968 accepting these three appeals and setting aside the decree passed in these three appeals and remanding the cases to the learned trial court for fresh trial and allowing the appellants sufficient opportunity for producing the certified copy of Naksa Haqdar and the certified copies of Farad Jamabandis for the aforesaid period. After that has been done these three cases shall be decided afresh and the vendees shall also be entitled to adduce further evidence in the matter of refuting the appellants and leaving the parties to bear their own costs.

Manmohan Singh Liberhan, Advocate, *for the appellants.*

Mr. R. N. Mittal, Advocate, *for the respondents.*

Judgment

GUJRAL, *J.*—(1) Naib Singh alias Sipedar was owner of considerable land. In respect of part of his land he made a sale in favour of Mam Raj, Singh Ram and Sunder sons of Shadi Ram by a registered sale-deed dated 4th June, 1957. By another sale-deed dated 4th July, 1957 he sold some other land to Mani Ram and Kona. About a month later he effected another sale in favour of Shadi Ram through a registered sale-deed dated 12th July, 1955. Nasib Singh's sons filed three different suits challenging these sales on the allegations that the land was ancestral, that the parties were governed by custom which prohibited the sale of land without necessity and that the sales having been made without consideration and necessity were void and of no effect abainst their rights. The trial of the three suits was consolidated and the following issues were framed:—

(1) Are the plaintiffs sons of the vendor?

(2) Are the lands in suit ancestral qua the plaintiffs?

(3) Do the plaintiffs and the vendor follow custom in matters of alienations and if so, what that custom is?

(4) Were the sales made for consideration and for legal necessity?

(5) Have these claims been brought within the prescribed period of limitation?

(6) Have these claims been brought in collusion with the vendor and if so, to what effect?

The learned trial Court found issue No. 1 in plaintiffs' favour but under issue No. 2 it was held that the land was not ancestral qua the plaintiffs. Though it was found that the parties were governed by custom which prohibited the alienation of ancestral land without necessity it was held that the sales involved were for necessity and consideration. The remaining two issues were found in favour of the plaintiffs but in view of the findings on issues Nos. 2 and 4 the plaintiffs' suits were dismissed. This gave rise to three appeals which were disposed of by the impugned order of the learned Additional District Judge dated 25th November, 1970. By this order all the three appeals were accepted. The judgments and decrees were set aside and the three cases were remanded for fresh trial after allowing opportunity to the plaintiffs to produce certain documents and to the defendants to lead evidence in rebuttal. It is against this judgment that the vendees have filed three separate appeals being S.A.O. Nos. 25, 26 and 29 of 1971. This judgment will dispose of all the three appeals.

(2) The principal argument raised on behalf of the appellants is that even if the appellate court had found that the trial Court had erred in shutting out certain evidence which the plaintiffs wanted to lead and there was justification for allowing that evidence, there was no occasion for sending the cases back for fresh decision on all the issues. In this respect it was pointed out that the evidence sought to be produced by the plaintiffs only related to issue No. 2 which deals with the ancestral nature of the property. It is urged that the decision of this issue would have no effect on the findings given by the trial Court on the other issues and there was therefore no occasion for sending the cases back for a fresh decision.

(3) There appears to be considerable merit in this argument. Finding on issue No. 2 has no bearing on the decision of the other issues and even if this issue is found in favour of the plaintiffs they would be non-suited in view of the findings on issue No. 4 unless these findings are set aside by the appellate Court. Having regard to the circumstances of the case it was more appropriate and just to direct the trial Court to retry issue No. 2, after allowing the plaintiffs to produce additional evidence and the defendants to rebut that evidence, even if the learned lower appellate Court had felt that the trial of issue No. 2 was not proper.

(4) On behalf of the respondents a preliminary objection was raised, namely, that the appeals were time-barred. The basis of the argument is that though the appeals were filed within time but as the objections raised by the office were not removed within the time allowed by the Deputy Registrar, the appeals be held to have been filed beyond the period of limitation. Support for this argument is sought from *Buta Singh* vs. *Chand alias Chanda Singh*, (1) wherein the following observations appear :—

> "Where an appeal was filed within limitation the Court of the District Judge wrongly as it had no pecuniary jurisdiction but on return was refiled in the High Court but the opening sheet of the form of appeal was left blank. Form was completed after about 6 weeks of refilling after objection was taken by High Court office and no explanation was given.
>
> Where an application is under section 5 alone, as is the case here, the only assistance that can be derived from the principle behind section 14 is that the period spent in good faith in a wrong forum may be taken to be sufficient cause for the duration of that period for not filing the appeal, but the whole of the period cannot be calculated and excluded in computing the period of limitation for filing an appeal exactly to the same extent and in the same manner as under section 14 because that section does not directly apply.

(1) 1970 P.L.R. 803.

Sub-rule (1) of rule 3 of Order 41 of the Code of Civil Procedure provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader. The form of memorandum of appeal, according to this rule, is provided in Appendix G. No. 1 and there is reference to the same in rule 2(a) in section (a) of Chapter 1-A of Volume V of the Rules and Orders of this Court, which says that if a printed form is prescribed for a memorandum of appeal, the appeal shall be made on that form. Rule 5 in the same section says that the Deputy Registrar may return for amendment within a time to be fixed by him any memorandum of appeal for the reason specified in Order 41 Rule 3 of the Code of Civil Procedure and rule 3 deals with rejection or amendment of a memorandum of appeal for non-compliance with the earlier two rules, which include sub-rule (a) of rule 1 of the same Order. So, according to these rules, the Deputy Registrar had the power to return the memorandum of appeal, in the case of each appeal of the defendant, in not filing the appeal, with the form of memorandum of appeal duly and properly filed, and filing it blank. Certain information, which obviously is otherwise essential is provided for in the printed form for memorandum of appeal, and as the form was left blank the information was not available. So, this is not a case in which the appeals were returned to the defendant on May 2, 1969, not in accordance with the rules, the fact of the matter being that the return was very much in accordance with the rules. Now the endorsements on the appeals show that the objections were first raised on May 2, 1969, and refiling was directed within a week, but it was not done until June 9, 1969, when the essential objection with regard to filling the form of memorandum of appeal had not been complied with. So they were returned again on June 11, and it was not until June 21, 1969, that this part of the objections was complied with. To the period between May 2 and June 21, 1969, by no manner of looking at it can section 14 of the Limitation Act be applied, and for this period no sufficient cause for not filing the appeals has been shown."

(5) Before considering the point raised above, it would be necessary to notice a few facts. All the three appeals were filed

on 18th January, 1971, and were within limitation. In S.A.Os Nos. 25 and 26 the appeals were returned on 21st January, 1971, for refiling after removing certain objections while in S.A.O. No. 29 it was returned on 20th January, 1971. One of the objections in all the three cases was that the opening sheet was not complete. All the appeals were refiled on 22nd February, 1971. The appeals were again returned on 24th February, 1971 for the reason amongst others that the law under which the appeals were competent had not been stated in the opening sheet. These appeals were refiled on 14th April, 1971 even though a week's time had been allowed for refiling. Again, S.A.O. No. 29 of 1971 was returned on 15th April, 1971 and was refiled on 21st April, 1971.

(6) From the above it would appear that the opening sheets in all the three appeals were only complete on 14th April, 1971. Even though two opportunities had been given, on both the occasions the appeals were refiled long after the period of one week which had been allowed for this purpose. The effect of this delay in refiling the appeals is, therefore, to be ascertained. Can it be said that the appeals would be deemed to have been filed on 14th April, 1971 when the defect relating to the opening sheets was finally removed or on 18th January, 1971? In case it is found that the appeals were properly filed on 18th January, 1971, can these appeals be dismissed now for failure of the appellants to remove the defect in the opening sheets within the period allowed to them by the Deputy Registrar?

(7) While considering the above question reference will first have to be made to the decision in *Buta Singh's* case (supra) on which reliance has been mainly placed by the learned counsel for the respondents. From the facts of that case it would appear that the appeals were admittedly time-barred when they were filed in the High Court and the question to be determined was whether there was sufficient cause for condoning the delay under section 5 of the Limitation Act read with section 14 of that Act. It was in this context that it was held that section 14 of the Limitation Act was not attracted and sufficient cause was not shown for filing the appeals late. No doubt, in *Buta Singh's* case part of the delay had occurred as a result of late compliance of the Order of the Deputy Registrar by which the memorandum of appeal had been returned. This delay was taken into consideration while coming to the conclusion that sufficient cause had not been shown for not filing the

appeal within time. The question that the appeal should be deemed to have been filed on the date when the defect in the memorandum of appeal was removed was neither raised nor decided in that case. This authority, therefore, does not lend much support to the argument raised on behalf of the respondents. In *Nagendra Nath Dev and another* v. *Suresh Chandra Dev and others,* (2) it was observed that there is no definition of appeal in the Civil Procedure Code but there is 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. Leaving this aspect apart, a plain reading of rules 1 and 3 of Order 41 and rule 2(a) read with rule 5 of Chapter I of Part A(a) of High Court Rules and Orders, Volume V, would clearly bring out that in such a situation the appeals could not be deemed to have been filed on 14th April, 1971 and cannot be dismised as time-barred though the memoranda of appeals could have been rejected under rule 3 when these were presented. At this stage reference may be made to these rules which are as under:—

"ORDER XLI

Appeals from Original Decrees—

1. *Form of appeal. What to accompany memorandum.*—(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum 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.

(2) *Contents of memorandum.*—The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

3. *Rejection or amendment of memorandum.*—(1) Where the memorandum of appeal is not drawn up in the

(2) A.I.R. 1932 P.C. 165,

manner hereinbefore prescribed, it may be rejected, or 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.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

Rules and Orders of the Punjab High Court

VOLUME V

Chapter 1

Part-A.—(a)

4. (a) Every memorandum of appeal, and every application shall be in the English language and shall be typed in double spacing on water marked plain paper, unless a printed form is prescribed for the purpose by the High Court. It shall be headed "In the High Court of Punjab at ————————(place)" and signed by the appellant or applicant or by an Advocate entitled as of right to practise in the High Court on his behalf. The original typed copy and not the carbon copy shall be filed in this court. In case any document is required to be filed in duplicate, the duplicate copy shall be the first carbon copy. No memorandum or application or copy thereof will be entertained unless it is legible.

5. The Deputy Registrar may return for amendment within a time to be fixed by him any memorandum of appeal for the reason specified in Order XLI, Rule 3 of the Code of Civil Procedure."

Rule 1 of Order 41 provides that every appeal has to be preferred in the form of a memorandum. Sub-rule (2) of this rule further states as to what should be stated in the memorandum. In this

rule there is no reference to the printed form which has been prescribed by the High Court Rules and Orders or to the form mentioned in Appendix G at No. 1 but reference is only to the manner in which the memorandum is to be drawn up. The expression used is "in the form of a memorandum" and not, "on the printed form", or, "the prescribed form", of the memorandum. Sub-rule (2) of rule 1 of Order 41 makes it clear as to what the memorandum is to contain. Again in rule 3 it is provided that the memorandum of appeal is to be rejected if it is not drawn up in the manner hereinbefore prescribed. The expression "hereinbefore prescribed" refers to rule 1 of Order 41 including sub-rule (2). To take an example, if the memorandum does not set forth concisely under distinct heads grounds of objection to the decree but is drawn up in argumentative or narrative form, it could be rejected as not having been drawn up in the manner hereinbefore prescribed. The memorandum, however, cannot be rejected under rule 3 for its failure to have been drawn up on the printed form as is provided in rule 2(a) of the High Court Rules and Orders, Volume V, Chapter 1, Part A(a) when that is not envisaged by rule 3. Even rule 5 of the High Court Rules and Orders referred to above only refers to the reasons specified in rule 3 of Order 41 and not to the reasons mentioned in rule 2(a) of these Rules.

(8) Taking this view of the matter, I find that the memoranda of appeals could not have been rejected under rule 3 for the failure of the appellants to fill all the columns of the printed forms mentioned in rule 2(a) of the High Court Rules and Orders, Volume V, Chapter 1, Part A(a).

(9) Even if it be accepted that failure to fill the printed form as provided in rule 2(a) of High Court Rules and Orders Volume V, Chapter 1, Part A(a) within time would entail the liability that the memorandum could be rejected under rule 3 of Order 41, it would not advance the respondents' case. This rule would not come into play once the appeals had been admitted and the memoranda on being presented had not been rejected. Though it is not specifically stated in rule 3 of Order 41 whether if the memorandum of appeal is returned to the appellant for being amended within a time to be fixed by the Court and if the amendment is not made within the time fixed, the appeal can then be rejected, but this power would naturally flow from this rule. If the memorandum of appeal can be

rejected in the first instance in the event of its not being drawn up in the prescribed manner it can certainly be rejected if the amendment is not made within the time to be fixed by the Court. In any case, if the memorandum has not been rejected under rule 3, it cannot be rejected after the appeal has been admitted and will have to be set down for regular hearing. I seek support for this view from *Chintapatla Venkatanarasimha Ramchandra Rao and others* (3). In that case a party failed to complete the memorandum of appeal even though it was returned to him thrice and sufficient time was allowed to him each time to re-present it in a complete form. The principal argument raised on behalf of the appellant was that it was not open to the Court to reject or dismiss the memorandum of appeal. Support for this argument was sought by the appellant's counsel from the case of *Naginder Nath Dey* (2) to which reference has already been made. The Privy Council's case was distinguished on the ground that in that case the appeal had been admitted and was heard as such, while in the case before the Madras High Court the appeal had not been admitted. Reference in *Chintapatla's* case was also to Bidhu *Bhusan Bakshi* v. *Kalachand Roy* (4) in which it has been held that an appeal cannot be held to have come properly before a Court until it has been registered. While accepting the view in *Bidhu Bhusan Bakshi's* case, it was observed that the memorandum of appeal under notice not having been registered was not to be regarded as an appeal which was before the Court but was only to be considered as a memorandum of appeal that had been presented to the Court. Repelling the contention of the appellant's counsel that if the memorandum of appeal could not be rejected under rule 3 of Order 41, it could not be rejected at all, it was observed—

> "As I have already said, this case has to be regarded as one of appeal that has not yet been admitted and not as one of an appeal that is before the Court as such. Before an appeal is admitted it has to be completed. This is a matter so obvious that no rule is necessary for it, and I can find nothing in the Privy Council case already referred to that runs at all to the contrary."

(3) A.I.R. 1933 Mad. 358.
(4) A.I.R. 1927 Cal. 775.

In the end it was observed that the memorandum of appeal was not complete and no further time could be given for putting it in the proper form and was consequently rejected. The ratio of the Madras case is that if an appeal has not been admitted, the memorandum can be rejected under Order 41, Rule 3, or for the reason that it has not been completed within the time allowed by way of concession. From this it would necessarily follow that in case the appeal has been admitted the memorandum cannot be rejected either under rule 3 of Order 41 or under any other provision, as time-barred.

(10) On behalf of the appellants reference was also made to *Qarum and others* v. *Dewa Singh and another* (5), wherein the memorandum of appeal in a letters patent appeal was filed without Court fee and on grant of leave Court fee stamp was fixed on the memorandum of appeal and the appeal was then admitted. It was held that the delay, if any, in filing the appeal should be deemed to have been condoned. On this analogy it was urged that the appeals having been admitted, the delay in refiling the memoranda of appeals within time be held to have been condoned by the admitting Bench. Support for this argument was also sought from *Raghunandan Sahay and others* v. *Ram Sunder Prasad* (6), wherein it was held that if a Court accepts deficit Court-fee after the time fixed for its payment and the plaint is registered it may be inferred that the Court condones the delay and grants extension, for if it wanted the Court could have rejected the plaint under Order 7, rule 11. Reference was also made to *G. I. P. Railway Co.* v. *Radhakisan Jaikishan and another* (7). In that case, the memorandum of appeal stated that the copy of judgment would be given afterwards. The appeal was admitted on presentation. It was held that it must be taken that the Court dispensed with the copy of the judgment.

(11) Lastly it was contended on behalf of the appellants that there was no evidence on the record to show that the appeals were returned to the appellants' counsel on the day the objection was recorded by the Office and it could not, therefore, be said that

(5) A.I.R. 1934 Lah. 701.
(6) A.I.R, 1925 Patna 299.
(7) A.I.R. 1926 Nagpur 57.

on both the occasions the appeals were refiled after the period of one week allowed for removing the objection. There is considerable merit in this argument. On the memoranda of appeals it is not mentioned as to on what dates the appeals were returned for correction to the appellants or their counsel, and this being the position, there is no occasion for holding that the appeals were refiled after more than a week of their being returned for removing the defects.

(12) For the reasons stated above, I find no merit in the preliminary objection raised on behalf of the respondents. The result is that the appeals are allowed and the case is remanded under Order 41, rule 25 instead of rule 23-A with the direction that the trial Court will allow the parties opportunity to lead evidence on issue No. 2 and after deciding this issue return the evidence together with the finding to the appellate Court for decision of the appeals. The report should be submitted within three months. The parties are directed through their counsel to appear in the trial Court on 11th October, 1971.

B. S. G.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and H. R. Sodhi, JJ.

JAGAR SINGH,—*Petitioner.*

versus

SUPERINTENDING CANAL OFFICER AND OTHERS.—*Respondents.*

Civil Writ No. 1350 of 1971

September 15, 1971.

Northern India Canal and Drainage Act (VIII of 1873)—Section 30-FF—Types of water-courses contemplated by the section—Stated—Digging of an unauthorised water-course over another person's land without his permission—Such person dismantling the watercourse—Section 30-FF—Whether attracted.