

FIRST APPEAL UNDER CPC - A CRITICAL ANALYSIS

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ABSTRACT

This article basically focuses on appeal from authentic decrees made under Section 96 of the Code of Civil Procedure. The First a part of the Project Report deals with creation as to what is meant by using enchantment and especially enchantment from authentic decrees. The second Part of the Project Report offers with the character and scope of the Section. The third part of the Project Report offers with the leading case laws on right to enchantment and Doctrine of Merger and lastly, the conclusion of the article. The expression attraction has no longer been described inside the Code of Civil Procedure 1908. It is a software or petition to enchantment higher Court for are attention of the decision of enchantment decrease courtroom.1 It is attraction proceeding for evaluation to be finished by means of attraction higher authority of enchantment selection given with the aid of enchantment decrease one.2 An appeal is attraction creature of statute and proper to enchantment is neither an inherent nor herbal right. Accordingly, any order exceeded in match before very last judgment and decree, if it impacts closing judgment and decree, its correctness can be puzzled in attraction against decree in any other case no longer. To illustrate orders surpassed on temporary injunction software do now not affect the closing judgment and decree consequently there may be absolute confidence of tough their correctness within the enchantment against decree. However, order exceeded on application in search of modification

in the pleading may also affect the closing judgment and decree for this reason if it isn't immediately challenged then its correctness may be wondered in appeal in opposition to the decree.

KEY WORDS:

Appeal, Parties, Courts, Evidence, procedure etc,

INTRODUCTION

Appeal has now not been described in Civil Procedure Code. It is, in truth, that criticism, that's made to a few superior court docket against selection of subordinate courtroom. Basic item of enchantment is to check soundness of decision of lower court docket. Appeal may be filed towards unique decree, or against decree handed in enchantment.

Any person who feels aggrieved via any decree or order of the court may also opt for an enchantment in the advanced court if the enchantment is furnished in opposition to that decree or order. A right to attraction is not a herbal or inherent proper. An enchantment is a creature of the statute and there may be no proper of attraction except it's far given without a doubt and in specific phrases. It is a vested right and accrues to the litigant and exists as on and from the date the lies start. The expression "Appeal" has no longer been described inside the code, however it is able to be described as the judicial examination of the selection of an inferior court. It manner elimination of a motive from an not so good as a superior court for the cause of trying out the stability of the decision of the inferior courtroom. It is as a consequence a treatment furnished by law for getting the decree passed by means of the lower court is unsound and wrong.

AIM

The proper to appeal need to, at this juncture, be compared and prominent from a right to report a suit. As said, the right to enchantment is a statutory right and this sort of proper ought to have the express authority of a regulation.

APPEAL WITH THE AID OF SOME OF THE PARTIES³

Order 41 Rule 4 offers as under

"One of numerous plaintiff or defendants may also reap reversal of entire decree where it proceeds on ground common to all. - Where there are greater plaintiffs or greater defendants than one in a suit, and the decree appealed from proceeds on any floor not unusual to all the plaintiffs or to all of the defendants, anyone of the plaintiffs or of the defendants might also enchantment from the whole decree, and thereupon the Appellate Court may additionally opposite or range the decree in favor of all of the plaintiffs or defendants, as the case may be."

Even if other plaintiffs or defendants because the case may be, aren't made preform respondents it'll not make any difference. Similarly even though other plaintiffs or respondents as the case may be are made preform respondents and some of them die and substitution application isn't always filed, enchantment will now not abate vide *B. S. Ruia v. S. N. Ruia*⁴.

ADMISSION OF APPEAL

Under Order 41 R. 11 C.P.C. Appeal is heard in admission. Prior to 2002 Amendment of C.P.C. Records of the Court below will be referred to as for earlier than such hearing. However, after 1.7.2002 whilst applicable Amendment of 1999 became enforced such electricity is not there. First Appeal under Section 96 C.P.C. Shall usually be admitted and now not disregarded in limine vide *Union of India v. K. V. Lakshman*⁵.

DISMISSAL IN DEFAULT OF APPEAL EX-PARTE HEARING AND RESTORATION

Before 1976-77 Amendment of Order 41 Rule 17 C.P.C. There has been battle of opinion amongst unique High Courts regarding strength of the courtroom in case the appellant does no longer appear and only respondent seems⁶, there has in no way been any doubt that in such scenario appeal can be disregarded in default, however, the difference of opinion was as to whether or not in such situation appeal can be brushed off on merit or not. Allahabad High Court

³ "SAP Appeal | Financial Aid." <http://financialaid.ucmerced.edu>. Accessed 11 Jun. 2018.

⁴ AIR 2004 SC 2546

⁵ AIR 2016 SC 3139

⁶ "S.B. Civil Misc. Appeal ... vs Ram Lal & Ors on 8 December, 2015." 8 Dec. 2015, <https://indiankanoon.org/>. Accessed 11 Jun. 2018.

become of the opinion that appeal couldn't be disregarded on merit in such situation. In 1976-77 approving the view of Allahabad High Court and of a few other High Courts the subsequent clarification has been brought to Order 41 Rule 17:

"Explanation. -Nothing on this sub-rule shall be construed as empowering the Court to brush aside the appeal on the deserves."

Accordingly, inside the absence of appellant both appeal can be adjourned or it could be brushed off in default, but it can't be brushed off on merit. If it's far dismissed on advantage in the absence of appellant still order could be handled to be dismissal in default and if the appellant shows precise motive for his absence, order will must be set aside vide Harbans Prasad Jaiswal, *infra*.

Under the equal rule it's miles furnished under Sub Rule 2 as follows: -

“(2) Hearing appeal ex parte-Where the appellant appears and the respondent does not appear the enchantment will be heard ex parte,”

If enchantment is authorized after hearing the appellant ex-parte in absence of respondent, then the respondent under order 41 Rule 21 may apply for rehearing of enchantment after putting apart of ex-parte decree of enchantment. If respondent shows desirable ground for his absence, then the judgment despite the fact that on benefit needs to be set aside and appeal has to be readmitted and heard afresh. However, in such rehearing software merit of the ex-parte judgment cannot be visible. If respondent wants to venture ex parte judgment, allowing the enchantment, he can best practice for evaluate vide *Harbans Pershad Jaiswal v. Urmila Devi Jaiswal*⁷13.

REMAND TO BE PREVENTED

Under Order 41 Rule 23 and 23A matter can be remanded through the appellate court docket (under Rule 25 additionally remand is made). However, underneath Rule 24 it is provided as under:

⁷ AIR 2014 SC 3032.

⁸⁹24. Where evidence on record sufficient,

Appellate Court may additionally determine case ultimately. - Where the evidence upon the file is enough to allow the Appellate Court to pronounce judgment, the Appellate Court can also, after resettling the troubles, if essential, in the end decide the match, notwithstanding that the judgment of the Court from whose decree the appeal is favored has proceeded totally upon some ground apart from that on which Appellate Court proceeds."

Similarly, below Section 107 Appellate Court has been given equal powers as of the trial Court.

In the subsequent authorities it's been furnished that as a long way as possible remand should be avoided:

G.C. Kapoor v. Nand Kumar Bhasin ¹⁰(In this situation release software of the landlord below Section 21 of U.P. Rent Control Act become brushed off by using prescribed authority, appeal changed into dismissed with the aid of the District Judge and writ petition changed into additionally disregarded through the High Court. The Supreme Court set apart all the 3 judgments and in preference to remanding the problem allowed the discharge application via itself.)

three. *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple*, ¹¹(towards the end of para 10 it became held that even though remand become proper but as the in shape have been instituted 25 years before (in 1978) hence it become avoided)

CROSS OBJECTION: WHETHER NECESSARY:

Order 41 Rule 22 (1) and 33 are quoted below-22. Upon hearing respondent may additionally object to decree as though he had favored separate appeal.-¹² (1) Any respondent, even though he may not have appealed from any a part of the decree, might not simplest help the decree however

⁸ "6.7 Appellate Practice | Federal Practice Manual for Legal Aid Attorneys."
<http://www.federalpracticemanual.org/ch/section7>. Accessed 11 Jun. 2018.

⁹ "How to appeal your Satisfactory Academic Progress determination." <https://go.spcollege.edu/saeal>. Accessed 11 Jun. 2018.

¹⁰ AIR 2002 SC 200

¹¹ AIR 2003 SC 4548

¹² "2017-18 FAC SAP ." <https://www.urbana.edu/sites/default/files/ur/forms/2017-facsap-sap-appeal-form.pdf>. Accessed 11 Jun. 2018.

may additionally state that the locating in opposition to him in the Court under in appreciate of any difficulty ought to have been in his favor; and might also take any pass-objection to the decree which he could have taken by using way of enchantment, furnished he has filed such objection in the Appellate Court inside one month from the date of provider on him or his pleader of observe of the day fixed for listening to the enchantment, or within such in addition time as the Appellate Court may also see match to allow.

Explanation. - A respondent aggrieved by using a locating of the Court in the judgment on which the decree appealed towards is based may, underneath this rule, record go-objection in appreciate of the decree in thus far as it's far based on that finding, however that via cause of the selection of the Court on another finding that's sufficient for the decision of the in shape, the decree, is, thoroughly or in component, in favor of that respondent.

33. Power of Court of appeal.- The Appellate Court shall have electricity to bypass any decree and make any order which need to had been passed or made and to skip or make such in addition or different decree or order because the case may additionally require, and this strength may be exercised by means of the Court notwithstanding that the appeal is as to element most effective of the decree and can be exercised in favor of all or any of the respondents or parties, even though such respondents or parties won't have filed any appeal or objection and might in which there were decrees in move- suits or in which two or more decrees are exceeded in one suit, be exercised in admire of all or any of the decrees, although an appeal may not have been filed against such decrees.

The Appellate Court shall no longer make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is desired has not noted or refused to make such order.” Cross objection is necessary most effective if a few direction has been issued towards the respondent or respondent desires to task the finding on the premise of which element alleviation has been granted to the plaintiff otherwise even without go objection, locating towards him can be challenged in appeal by way of the respondent.

In *S. Nazeer Ahmad v. State Bank of Mysore*¹³ (para 7) match changed into dismissed as barred by way of time but the problem of bar of O. 2 Rule 2 C.P.C. Became decided in favor of plaintiff. Plaintiff filed appeal. It became held that the defendant respondent in the enchantment should argue that the issue of bar of Order 2, Rule 2 turned into wrongly decided in favor of plaintiff appellant with the aid of the trial Court, without filing any move objection.

However in *Laxman T. Kankate v. T. H. Dhatriak*¹⁴ in a healthy for unique performance of settlement on the market, relief of unique performance changed into disallowed and suit was decreed for return of earnest cash. In appeal through plaintiff, respondent defendant sought to argue that the locating of the trial courtroom that the agreement become true was misguided and ought to be set apart. It changed into held that it could not be performed inside the absence of pass objection.

ADDITIONAL EVIDENCE

Order 41 Rule 27 is quoted under:

“27. Production of extra evidence in Appellate Court. - (1) The parties to an appeal shall no longer be entitled to supply additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to confess proof which have to were admitted, or

(aa) the party looking for to produce additional proof, establishes that notwithstanding the exercising of due diligence, such proof was now not inside his information or couldn't, after the exercising of due diligence, be produced by means of him at the time while the decree appealed in opposition to was passed, or

(b) the Appellate Court calls for any file to be produced or any witness to be tested to enable it to pronounce judgment, or for any other enormous purpose, the Appellate Court may additionally allow such proof or record to be produced, or witness to be tested.

¹³ AIR, 2007 SC 989

¹⁴ AIR 2010 SC 3025

(2) Wherever additional evidence is authorized to be produced through an Appellate Court, the Court shall report the motive for its admission.

In *Union of India v. Ibrahim Uddin*¹⁵, scope of order 41 Rule 27 has been discussed in detail and it has additionally been held that software for additional evidence shall be taken into consideration along with hearing of appeal.

¹⁶¹⁷In *Union of India v. K.V. Lakshman*¹⁸

It has been held that the High Court in First Appeal wrongly rejected the application and it must have taken on file additional evidence sought to be adduced by appellant as inter alia it turned into Union of India deserving greater indulgence in such procedural matter and documents sought to be adduced were public files.

HOW TO WRITE JUDGMENT AND DISCUSS EVIDENCE?

Order 41 Rule 31 is quoted under:

"31. Contents, date and signature of judgment. - The judgment of the Appellate Court will be in writing and shall contain-

- (a) the points for consideration;
- (b) the choice thereon;
- (c) the motives for the decision; and
- (d) in which the decree appealed from is reversed or varied, the relaxation to which the appellant is entitled,

(e) and shall on the time that it is so mentioned be signed and dated by the

Judge or through the Judges concurring therein."

¹⁵ 2012 (8) SCC 148

¹⁶ "order 41 rule 27 appellate court | India Judgments | Law | CaseMine."
<https://www.casemine.com/search/in?q=order+41+rule+27+appellt>. Accessed 11 Jun. 2018.

¹⁷ "Removal Order Appeals - à www.cisr-irb.gc.ca." 1 Jan. 2009, http://www.irb-cisr.gc.ca/Eng/BoaCom/referments/RoaAmr_e.pdf. Accessed 11 Jun. 2018.

¹⁸ AIR 2016 SC 3139

This is an area which requires unique care and interest. Sometimes judges, even High Court judges, forget about the requisite requirements. In the following cases Supreme Court set aside the judgments of different High Courts surpassed in appeals under section 96 CPC given that Evidence had now not been reassessed and points for determination have been not framed. The topics had been remanded to do the requisite.

In *M/s United Engineers & Contractors v. Secretary to Govt. Of A.P.*¹⁹, High Court at the same time as identifying First Appeal united states of america96 CPC only mentioned records and problems and came as a substitute abruptly to the ultimate end. The Supreme Court set apart the judgment and remanded the problem. It turned into observed in para 9 as follows:

²⁰²¹“9. This Court has considered the scope of Order 41 Rule 31 Code of Civil Procedure in *H. Siddiqui (dead) by means of L.Rs. V. A. Ramalingam*²² and held as underneath:

“18. The said provisions provide recommendations for the Appellate courtroom as to how the courtroom has to proceed and decide the case. The provisions have to be study in any such way as to require that the numerous details cited therein should be considered. Thus, it should be obtrusive from the judgment of the Appellate court that the court has nicely appreciated the statistics/ proof, implemented its mind and determined the case thinking about the material on document. It might quantity to big compliance of the stated provisions if the Appellate court's judgment is based on the unbiased evaluation of the relevant proof on all important issue of the matter and the findings of the Appellate court docket are properly based and pretty convincing. It is mandatory for the Appellate courtroom to independently examine the proof of the events and consider the applicable factors which get up for adjudication and the bearing of the proof on the ones factors. Being the final courtroom of fact, the primary

Appellate courtroom need to now not file mere popular expression of concurrence with the trial court docket judgment rather it must provide reasons for its decision on each factor independently to that of the trial courtroom. Thus, the complete evidence should be considered

¹⁹ AIR 2013 SC 2239

²⁰ "Navies and Soft Power - US Naval War College Digital Commons." <http://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1041&contet-papers>. Accessed 11 Jun. 2018.

²¹ "M/S.Larsen And Toubro Ltd vs 1. State Of Andhra Pradesh Rep. By" 14 Sep. 2015, <https://indiankanoon.org/doc//>. Accessed 11 Jun. 2018.

²² , AIR 2011 SC 1492

and mentioned in element. Such exercise must be finished after formulating the points for attention in terms of the stated provisions and the court must proceed in adherence to the requirements of the said statutory provisions.

In *Shasidrar v. A.U. Mathad*²³ also same issue became said after relating to seven earlier judgments of Supreme Court. Paras 24 and 25 are quoted underneath:

“24. We can also keep in mind it apposite to country being a well settled precept of law that during a match filed by using a' co-share, coparcener, co- owner or joint owner, as the case may be, for partition and separate ownership of his/ her proportion qua others, it is important for the Court to examine, within the first instance, the nature and individual of the residences in in shape which include who changed into the unique proprietor of the fit properties, how and via which source he/ she obtained such houses, whether it was his/ her self-obtained belongings or ancestral assets, or joint property or coparcenary property in his/ her hand and, if so, who're/ had been the coparceners or joint proprietors with him/her as the case may be. Secondly, how the devolution of his/her interest within the property passed off consequent upon his/ her dying on surviving participants of the family and in what percentage, whether or not he/she died intestate or left behind any testamentary succession in want of any family member or outsider to inherit his/ her proportion in homes and in that case, its impact. Thirdly whether or not the residences in in shape are capable of being partitioned efficiently and in that case, in what manner? Lastly, whether all residences are blanketed in the suit and all co-sharers, coparceners, co- proprietors or joint-owners, as the case may be, are made events to the suit? These issues, being material for proper disposal of the partition suit, must be responded by means of the Court on the idea of family tree, inter se family members of family individuals, evidence adduced and the ideas of law relevant to the case.”²⁴

25. Being the first appellate Court, it was, therefore, the duty of the High Court to determine the first appeal retaining in view the scope and powers conferred on it under Section 96 read with Order 41, Rule 31 of the Code mentioned above. It became unfortunately now not carried out, thereby, accordance with regulation. "

²³ AIR 2015 SC 1139

²⁴ "Hindu Law" through Mulla seventeenth Edition, Chapter XVI Partition and Reunion - Mitakshara Law pages 493-547

In *U.P. S.R. T.C. V. Mamta* ²⁵High Court had decided appeal under section 173 of Motor Vehicles Act in a cryptic way. It neither set out the records, nor took note of grounds of enchantment nor favored evidence. The judgment of the High Court did now not comprise concise statement of points for determination, decision thereupon and motives therefor. The Supreme Court set aside the judgment and remanded the problem for selection of appeal in accordance with order 41 Rule 31 CPC. Para 24 is quoted underneath-

"24. An appeal under Section 173 of M. V. Act is largely in the nature of first appeal alike segment 96 of the Code and, therefore, the High Court is equally under prison obligation to determine all troubles springing up inside the case both on facts and law after appreciating the entire proof. ²⁶

ALL THE POINTS OUGHT TO BE DETERMINED

In a First Appeal underneath Section 96 C.P.C. High Court decided handiest the difficulty of limitation and after holding the suit to be barred by means of hassle, disregarded the appeal without deciding benefit of the case. Supreme Court in *Madina Begam v. Shiv Murti Prasad Pandey* ²⁷(paras 24 to 26) after setting reliance upon *Vinod Kumar v. Gangadhar* ²⁸ wherein reference had been made to massive quantity of selections, held that what the High Court had executed was impermissible and it ought to have determined all of the issues/ points concerned. The Supreme Court after reversing the judgment of the High Court on question of trouble needed to remand the problem to the High Court for decision of appeal on different factors, which would no longer have been required if High Court had determined all the points.

CONCLUSION

To conclude that appeal is a substantive right, and it is a matter inter parties. The question as to whether the appeal is competent or not can only be decided by the court hearing the appeal. Appeal may be filed against original or appellate decree passed by a court subordinate to High

²⁵ AIR 2016 SC 948

²⁶ National Insurance Company Ltd.V. Naresh Kumar & Ors. (2000) 10 SCC 198

²⁷ AIR 2016 SC 3554

²⁸ 2015 (1) SCC 391

Court. Appeal only lies against a decree and not against Judgment. The right of appeal is a creation of statute. Appeal person aggrieved by appeal decree is not entitled as or right to appeal from decree. The right to appeal must be given by statute. Section 9 confers on appeal litigant, independently of any statute, appeal right to institute appeal suit of civil nature in appeal court of law. So he has appeal right to apply for execution of appeal decree passed in his favor, but he has no right to appeal from appeal decree or order made against him, unless the right is clearly conferred by statute. Section 96 of the Code gives appeal right to litigant to appeal from an original decree. Section 100 gives him appeal right to appeal from an appellate decree in certain cases. Section 109 gives him right to appeal to the Supreme Court in certain cases. Section 104 gives him right to appeal from orders as distinguished from decrees.

²⁹SUGGESTION

As soon as judgment is pronounced against party, right to appeal arises. Right to appeal doesn't arise when adverse decision is given, but on the day suit is instituted i.e. proceedings commenced, right to appeal get conferred. Thus, it can be said the Right to appeal is appeal substantive right vested in parties from the date suit instituted.

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²⁹ "T. Ravi Vs. B. Chinna Narasimha | Latest Supreme Court Judgments" 21 Mar. 2017, <http://www.advocatekhoj.com/library/judgments/an>. Accessed 11 Jun. 2018.

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