
(2010) 09 UK CK 0031

In the Uttarakhand High Court

Case No : C.M.W.P. No. 2798 of 2001 and Old No. 21057 of 1998

Dewan Chandra Giri and Others

APPELLANT

Vs

IInd Addl. District Judge and Others

RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 3

Citation : (2011) 112 RD 364 : (2011) 2 UC 1070

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—Heard Shri Bharat Bhushan, the learned Counsel for the Petitioners and Shri M.C. Pande, the learned Counsel for the Respondents.

2. The counter claim of the Defendant was decreed, against which, the Plaintiff preferred a first appeal which was admitted. The certified copy of the decree was not filed along with the appeal. Subsequently, a certified copy of the decree was filed alongwith an application praying that, the same may be taken on record. The said application was allowed by an order dated 24th February, 1998 on payment of cost. The Defendant, being aggrieved, has filed the present writ petition.

3. The sole contention of the learned Counsel for the Petitioner is, that the appeal preferred under Order XLI, Rule 1 was initially required to be accompanied by a certified copy of the decree without which the appeal was not maintainable and that the subsequent filing of the decree after the period of limitation could not cure the initial defect.

1. For proper appreciation. Order XLI, Rule 1 of the CPC as existed prior to the amendment on 1st July, 2002, is quoted hereunder:

"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 his 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:

[Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same Appellant or by different Appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.]

4. A perusal of the aforesaid indicates that the memorandum of appeal shall be accompanied by a copy of the decree appealed from unless the appellate Court dispenses therewith of the judgment on which it is founded. The Supreme Court in *Jagat Dhish Bhargava v. Jawahar Lal Bhargava and Ors.*,¹ has held that the provision of Order XLI, Rule 1 is mandatory, but further held that where the appeal was duly entertained without the production of a certified copy of the decree and the memorandum of appeal was rejected or returned as provided under Order XLI, Rule 3, then, subsequently, the appeal could not be dismissed on the ground that the memorandum of appeal did not accompany the certified copy of the decree. The Supreme Court further held that subsequently the appeal could not be dismissed, in as much as, the stage for dismissing the appeal for noncompliance of Order XLI, Rule 1 had already been passed and the clock could not be turned back.

5. In the light of the aforesaid, the Court finds that the appeal was admitted and entertained and notice to the opposite party was issued. The defect in filing the decree stood waived or dispensed with by the Appellate Court. The subsequent filing of the decree was brought on record and the defect, if any, was cured. Consequently, this Court does not find any error in the impugned order. The writ petition fails and is dismissed.