THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 28-02-2014

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

RSA No.02 of 2013

1. Smt. Passang Lepcha,
   W/o Late Ongchu Lepcha

2. Shri Son Tshering Lepcha,
   S/o Late Ongchu Lepcha

3. Shri Lha Tshering Lepcha
   S/o Late Tashi Tshering Lepcha

4. Shri Sonam Lepcha
   S/o Late Tashi Tshering Lepcha

5. Shri Phurden Lepcha
   S/o Late Tashi Tshering Lepcha

All residents of Namchi-Jorethang Road,
Namchi,
South Sikkim. **... Appellants**

versus

Shri Saney Tshering Lepcha,
Son of Palo Targain Lepcha,
Resident of Chumlok Block,
South Sikkim. **... Respondent**

For Appellants : Mr. N. Rai, Senior Advocate with Ms. Bindu Gurung and Ms. Tamanna Chhetri, Advocates.

For Respondent : Mr. A. K. Upadhyaya, Senior Advocate with Ms. Binita Chhetri and Ms. Dawa Jangmu Sherpa, Advocates.

J U D G M E NT

Wangdi, J.

This Second Appeal arises out of the impugned judgment dated 01-04-2013 of the Learned District Judge, South and West Sikkim at Namchi in Title Appeal Case No. 1 of 2010 whereby Appeal filed by the Appellants against the judgment and decree dated 09-07-2008 of Learned Civil Judge, South Sikkim at Namchi in Title Suit No.7 of 2007 was dismissed.

2. The Appeal was admitted by this Court having found that ground C in the Memo of Appeal was a substantial question of law that required consideration. We may reproduce ground C hereunder:-

> **"**C. Whether the Court below dismissed the Appeal on the ground that only copy of the judgment was filed and no copy of the decree has been filed along with the memorandum of Appeal after the Code of Civil Procedure 1908 was amended by Act 46 of 1999, Section 31(i) with effect from 1.7.2002 is legal and has binding force?**"**

3. It may be relevant to note that when the matter came up for hearing on 13-11-2013 it was noticed that the First Appellate Court had not passed a decree when under Section 100 of the Code of Civil Procedure, 1908 (in short "CPC") a Second Appeal would lie only from a decree. The matter was accordingly referred back

to the First Appellate Court for framing the decree within a period of two weeks with the direction to send back the same to this Court soon after doing the needful. It is now reported that the decree has since been framed and is in the records of this Court and, therefore, this Appeal was taken for hearing confined to the ground referred to earlier.

4. Mr. N. Rai, Learned Senior Counsel, appearing on behalf of the Appellants, would argue that the impugned judgment is bad for the reason that the First Appellate Court after having heard the Appeal on merits ought to have decided the case in its entirety and not to have dismissed the Appeal on the technical ground of the Appellants having not placed on record a copy of the decree passed by the Trial Court. It is submitted that grave prejudice has been caused to the Appellants in not having been given an opportunity of filing a copy of the decree.

5. A number of propositions of law governing this question was placed by Mr. Rai but, in my view, these propositions would be redundant in view of Order XLI Rule 1 CPC as amended by the Code of Civil Procedure (Amendment) Act, 1999 particularly Section 31(i) thereof

pertaining to certain words that were brought into effect from 01-07-2002. Relevant portion of Order XLI Rule 1 CPC as amended is reproduced below:-

> **"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 [judgment]:
>
> ....."

6. The judgment against which the Appeal was filed before the First Appellate Court, i.e., the District Judge, South and West Sikkim being Title Appeal Case No.1 of 2010, was in a suit being Title Suit No.7 of 2007 for which the cause of action had arisen in the year 2003 as would appear from the narration of facts contained in paragraph 2 of the impugned judgment. Thus the proceeding in Title Suit No.7 of 2007 would fall squarely within the provisions of the Code of Civil Procedure as amended by the aforesaid Amendment Act. In other words, on and from 01-07-2002 when the Amendment Act came into force the Memorandums of Appeal were required to be accompanied only by a copy of the 'judgment' and not by copies of both the 'decree' and the 'judgment' as was the position earlier.

7. It is not disputed that a copy of the 'judgment' was not filed along with a Memo of Appeal before the First Appellate Court. In fact, Mr. A. K. Upadhyaya, Learned Senior Counsel, appearing on behalf of the Respondent, fairly concedes to this position. His only submission is that the Appeal is not in conformity with Section 96 CPC which provides that an Appeal shall lie only against decree passed by any Court exercising original jurisdiction. This submission is based upon the finding of the First Appellate Court that "nowhere in the appeal, they have prayed for setting aside the decree dated 09.07.2008 passed by Ld. Trial Court". We shall deal with this aspect a little later but for the moment it is necessary for us to appreciate that the First Appellate Court has dismissed the Appeal primarily on the ground that a copy of the decree had not been filed with the Memorandum of Appeal.

8. In my view, the impugned judgment is grossly erroneous being inconsistent and in conflict with the provisions of Order XLI Rule 1 CPC which most unambiguously require the Memorandum of Appeal to be accompanied by a copy of the judgment. The First Appellate Court has clearly mis-directed itself in relying upon a redundant provision of the CPC and a decision of

the Hon'ble Supreme Court in ***Jagat Dhish Bhargava*** vs. ***Jawahar Lal Bhargava and Others*** : ***AIR 1961 SC 832*** which is based upon such provision. Factually also the finding that the Appellants had nowhere prayed for setting aside the decree dated 09-07-2008 appears to be incorrect as would appear from the very pleadings contained in paragraph 12 of the Memorandum of Appeal which reads as under:-

> **"**12. That being aggrieved with the first part of the Judgement and decree of the Trial Court, the Appellants have preferred this Appeal before this Ld Court on the following grounds.**"** **[underlining mine]**

9. It is no doubt true that in the Memorandum of Appeal, no specific prayer is found to have been made to set aside the decree passed by the Trial Court but, at the same time we also find a prayer "to set aside the impugned judgment" passed by the Trial Court and "to decree the suit in favour of the Appellants in terms of prayers made in the Plaint" of the suit. Undeniably decree is framed in terms of the judgment and when the very judgment was being sought to be set aside, failure to make a prayer to set aside the decree, in my view, hardly vitiates the Appeal. The First Appellate Court appears to have taken a hyper-technical approach

diametrically opposed to the principle of fair dispensation of justice.

10. Section 96(1) upon which Mr. Upadhyaya has heavily relied upon begins with the words “save where otherwise expressly provided in the body of this Code or by any other law for the time being in force”. By these words it is abundantly clear that the provisions of amended Order XLI Rule 1 would be applicable making it permissible for the Memorandum of Appeal to be accompanied only by a copy of the judgment and the judgment shall have the force of a decree until a decree is drawn by the Trial Court. Section 96 CPC obviously is a substantive provision vesting upon an unsuccessful party a right of appeal for which the procedure to be followed is prescribed under Order XLI and the Rules thereunder. The contention of Mr. Upadhyaya being quite erroneous stands rejected.

11. Learned Senior Counsel for the parties concede to the fact that the decree had indeed been drawn by the Trial Court but due to oversight a copy thereof had not been placed before the First Appellate Court. It is also an admitted position that the First Appellate Court failed to give an opportunity to the Appellants to place on record a

copy of the decree which ought to have been done for an effective, efficacious and complete adjudication of the Appeal. The First Appellate Court appears to have chosen to cut the matter short by disposing of the Appeal by taking a pedantic view that the decree of the Trial Court had not been placed on record as required under the CPC.

12. Rules of procedure have been framed as handmaid of justice and not its mistress as has been held in a catena of decisions of the Hon'ble Supreme Court. We may refer to ***Uday Shankar Triyar*** vs. ***Ram Kalewar Prasad Singh and Another*** : ***AIR 2006 SC 269*** cited by Mr. N. Rai wherein it has been held as under:-

> **"17.** Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-
>
> i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.
>
> ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.**"**

13. In the present case, there is no denying of the fact that non-filing of the copy of a decree is a procedural error. The decision in ***Uday Shankar Triyar (supra)*** was rendered while considering the requirement under Rule 1 of Order XLI that every Appeal shall be preferred in the form of a Memorandum signed by the Appellants or its Pleader which, in that case was not complied. While dealing with this it was held as under:-

"15. ..... It is the duty of the Office to verify whether the memorandum of appeal was signed by the appellant or his authorized agent or pleader holding appropriate vakalatnama. If the Office does not point out such detect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such detect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorized by a Vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the detect by either signing the memorandum of appeal ....."

14. It is, therefore, quite clear that failure to file a copy of the decree would not result in automatic rejection of an Appeal without an opportunity being afforded to the Appellants to rectify the defect. In the present case, concededly such an opportunity was not provided to the Appellants.

15. There is another aspect which requires consideration and that is, once an Appeal is admitted for hearing under Rule 12 of Order XLI the only provision which authorizes the First Appellate Court to dismiss the Appeal thereafter is under Rule 17 of Order XLI CPC wherein under Sub-Rule (1) the Court has been empowered to dismiss an Appeal if the Appellant does not appear when the Appeal is called on for hearing on the date fixed. However, it may be restored or readmitted for hearing in terms of Rule 19 of Order XLI.

16. In ***Jagat Dhish Bhargava (supra)*** the Hon'ble Supreme Court while dealing with the provisions of Order XLI Rule 1 as it stood before its amendment held as under:-

> **"5.** …….
>
> ……. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41, R. 1. Appropriate orders will have to be passed having regard to the

circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant required to remedy the defects. ……."

17. In ***Puran Singh*** vs. ***Jagtar Singh*** : ***AIR 1985 Punjab and Haryana 84*** we find the following proposition laid down:-

"5. …….

It is not disputed that the provisions of O. XLI, R. 1 of the Code, are mandatory. But once an appeal is duly entertained without the production of a certified copy of the decree-sheet with it and neither the memorandum of appeal is rejected, nor returned, as provided under O. XLI, R. 3 of the Code, then, subsequently, the appeal could not be dismissed on the ground that at the time of the presentation of the appeal the same was not accompanied with a certified copy of the decree under appeal, because by that time the stage for dismissing the appeal for non-com compliance of the provisions of O. XLI, R. 1 of the Code had already passed. At that stage, the appellant could only be directed to file the certified copy of the decree under appeal after obtaining the same from the trial Court. Thus, the approach of the lower appellate Court in this behalf was wrong, illegal and misconceived.

……."

18. From the aforesaid two decisions, it would appear that defects in presentation of Appeals should be scrutinized at the initial stage as soon as the Appeal is filed and require that such defects be remedied at that stage. But, once the Appeal is duly entertained the Appeal cannot be dismissed on the ground that at the time of presentation of Appeal the same was not

accompanied with the certified copy of the decree under Appeal and that the only manner in which the defect could be cured is to direct the Appellant to file a certified copy of the decree. Although those two decisions were rendered by Benches of the High Court constituted by a Single Hon'ble Judge, I am inclined to be persuaded by the propositions laid down in them.

19. In the present case, the Appeal had been admitted by the First Appellate Court and summons issued to the Respondent. Therefore, even assuming that Appeal had been filed under Order XLI Rule 1 CPC as it stood before the Amendment Act of 1999, it was impermissible for the First Appellate Court to have dismissed the Appeal only on the ground that there was no proper presentation of the Appeal as the certified copy of the decree was not filed along with the Memo of Appeal.

20. We may in this regard also usefully refer to a decision of the Orissa High Court in ***Satyabhama Pattanaik*** vs. ***Bijendra Mohapatra and Others*** : ***AIR 2013 Orissa 26*** which involved almost identical facts and circumstances as in the present case.

21. Apart from the above, the First Appellate Court also appears to have lost sight of Order XX Rule 6A CPC which is found to have been quoted by it. A bare reading of Clause (2) of Order XX Rule 6A CPC would reveal that "an appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall for the purposes of rule 1 Order XLI be treated as decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose".

22. In ***United Phosphorous Limited*** vs. ***A. K. Kanoria*** : ***AIR 2003 Bombay 97*** a Bench of the Hon'ble Bombay High Court while dealing with proceedings under Order XXI Rule 41 CPC it was held that —

> **"8.** .....
>
> Clause (b) of sub-rule (2) of Rule 6-A specifically lays down that so long as the decree is not drawn up the last paragraph of the decree should be deemed to be a decree for the purpose of execution. By a legal fiction, last part of the judgment containing adjudication of the rights of the parties, is regarded as the decree. Thus, drawing up of a decree is not and cannot be a condition precedent for filing of an "execution petition" or an application under Order XXI, Rule 41 of the Code of Civil Procedure.**"**

23. Again in ***Md. Serajuddin*** vs. ***Md. Abdul Khalique*** : ***AIR 2005 Gauhati 40*** while dealing with

definition of ‘decree’ contained in Section 2(2) CPC it was held that —

> **“21.** ……
>
> So decree is nothing but ‘formal expression of an adjudication’ and it is a settled proposition of law that ‘form’ can neither supersede nor prioritize ‘substance’. Defect in drawing up a decree, in my opinion, is a curable irregularity and it can no way disturb the judgment of the Court. There is nothing in Order XX of C.P.C. to say that delayed drawing up of decree will have any adverse effect on its validity. If the judgment remains, the decree too, and delay in preparation of decree has nothing to do with the merit of the adjudication.**”**

24. A conjoint reading of the propositions laid down in the aforesaid two decisions would reveal that even if a decree is not drawn and only a copy of the judgment is filed with the Memo of Appeal an Appeal would not be incompetent as by a legal friction last part of the judgment containing adjudication of the rights of the parties is regarded as the decree and, a ‘decree’ as defined under Section 2(2) CPC is nothing but formal expression of an adjudication. In my view, the object of the amendment of Rule 1 of Order XLI was also to give expression to these legal propositions apart from avoiding delay in filing Appeal caused due to delay in obtaining copy of a decree which takes considerable time.

25. For these reasons, I am inclined to hold that the First Appellate Court has fallen in error in dismissing the Appeal purely on a technical ground and mis-directed itself in overlooking the relevant provisions contained in the CPC as alluded above and the principles of law laid down by the Hon'ble Supreme Court.

26. In the result, the Appeal is allowed.

27. The Appeal shall be restored to its original number and the First Appellate Court shall hear and dispose of the Appeal on its merits. The parties shall appear before the First Appellate Court on 15-03-2014.

28. No order as to costs.

29. A copy of this judgment and the original case records be transmitted forthwith to the Court of the Learned District Judge, South Sikkim at Namchi for compliance.

Sd/-
(S. P. Wangdi)
Judge
28-02-2014