

**(1946) 01 AHC CK 0011**

**Allahabad High Court**

**Case No:** Misc. Appeal No. 25 of 1942

Chhatanki and another

APPELLANT

Vs

Avadh Narain Sahib and another

RESPONDENT

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**Date of Decision:** Jan. 23, 1946

**Acts Referred:**

- Oudh Courts Act, 1925 - Section 12(2)
- Provincial Insolvency Act, 1920 - Section 75

**Hon'ble Judges:** Kaul, J

**Bench:** Single Bench

**Advocate:** Kalbe Mustafa,s, for the Appellant; Mohd. Husain, for Respondents, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Kaul, J.

A preliminary objection has been taken to the hearing of this appeal. The material facts are as follows:

On the 13th of December, 1937, Damodar Das, a creditor, made an application that Chhatanki, Sarju and Ramdhani be adjudicated insolvents. The order for adjudication was passed on the 28th of April, 1941 and a receiver appointed of the insolvents' property. The receiver made an application under Section 4 of the Provincial Insolvency Act praying that a house owned by the insolvents be allowed to be sold. The insolvents filed objection contending that they were agriculturists and used in house for the purpose of agriculture accordingly it could not be Sold. These objections were dismissed on the 27th of March, 1942. A formal order was prepared which was signed by the District judge on the 1st of April, 1942. The present appeal was filed against the order dismissing the objections on the 27th of April, 1942. No copy of the formal order was filed along with the memo random of appeal. The counsel stated that no formal order had been prepared, When the

record of the lower Court was received in this Court, and it was discovered that the Counsel's Statement that no formal order had been prepared was not correct, a notice was issued on the 27th of June, 1942 to the Appellants to file a copy of the formal order. The Appellants did not take any steps even on this notice. On the 22nd of July, 1942 the office reported that no formal order was filed, and the time for filing the appeal expired on the 11th of July, 1942. I find from the record that on the 25th of July, 1942, the following order was passed by the Hon'ble the Chief Judge.

one week allowed for filing copy of formal order subject to the question of limitation.

2. A copy of the formal order was filed on the 1st of August, 1942.

3. Order 41 Rule 1 of the CPC provides that 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 must 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.

4. Order 43, Rule 2 makes the provisions of this rule applicable to appeals from orders.

5. Rule 2 of Chapter XII of the Rules framed by the Chief Court of Oudh lays down that

no memorandum of appeal from an appellate decree or from an order shall be presented unless it be accompanied by a copy of the decree or order appealed against and a copy of the judgment upon which such decree or order is founded.

6. Thus it is clear that no proper appeal was presented to the Court in this case within the period of limitation provided for presentation thereof. It was contended however, by the Learned Counsel for the Appellants that the present appeal was one u/s 75 of the Provincial Insolvency Act under which it was not necessary at all that a formal order should be prepared in respect of the order appealed against. It was argued that this was not a case in which a formal order was necessary. The contention is without substance. Whether a formal order, should or should not be prepared is a matter governed not by the provisions of Section 75 of the Provincial Insolvency Act but by the CPC which applies to insolvency proceedings. Order 43, Rule 3 provides that in every appeal under Rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid. It will further be noted that u/s 75 the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final: Provided that the High Court, for the purpose of

satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

7. Thus an appeal is allowed under this provision against any decision come to or an order made in the exercise of insolvency jurisdiction. Sub-section (2) of that section provides that any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a subordinate Court, may appeal to the High Court. A reference to Schedule I will show that an order passed u/s 4 by a District Court is thus made appealable. It is clear from the language of the proviso to Sub-section (1) of Section 75 referred to above that every decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court constitutes a "case". Accordingly if the order appealed against had been passed by a Court subordinate to the District Court it would have constituted a case within the meaning of that expression as; used in Section 75. and it would be illogical to hold that such a decision or order arrived at by the District Court could not be case. I am accordingly satisfied that the order passed constitutes a miscellaneous case in which a formal order should have been prepared under Order 43, Rule 3 of the Code of Civil Procedure. Reference was also made to Rules 336 and 337 of the Oudh Civil Rules and it was contended that an objection petition like the made by the Appellants did not constitute a miscellaneous case. Rules 336, 337 and 338 are framed only for the purposes of classification of records and cannot be a proper guide for the determination of the proper construction to be put upon the expression "miscellaneous case" as used in Order 43, Rule 3 of the Code of Civil Procedure.

8. For the reasons given above I uphold the preliminary objection. No properly constituted appeal having been presented to this Court within the time allowed by law, the memorandum of appeal which is on the record must be rejected. The Respondent will get his costs from the Appellants.

9. An oral application is made by Mr. Kalbe Mustafa counsel for the Appellants that I should make a declaration that this is a fit case for appeal u/s 12(2) of the Oudh Courts Act. I make the declaration asked for.