

**(2002) 07 CAL CK 0011**

**Calcutta High Court**

**Case No:** Appeal from Original Order No. 235 of 2002

Nilmoni Mazumdar

APPELLANT

Vs

Smt. Sanghamitra Mazumdar

RESPONDENT

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**Date of Decision:** July 9, 2002

**Acts Referred:**

- Calcutta High Court (Appellate Side) Rules - Rule 17
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11
- Hindu Marriage (Amendment) Act, 1956 - Section 21, 25, 28, 28(1), 28(2)
- Provincial Insolvency Act, 1920 - Section 5(2), 75(3)

**Citation:** AIR 2003 Cal 146 : (2003) 1 CALLT 400 : (2003) 2 DMC 393

**Hon'ble Judges:** Joytosh Banerjee, J; Dilip Kumar Seth, J

**Bench:** Division Bench

**Advocate:** Amalesh Roy and Debashis Goon, for the Appellant; Jyotirmoy Bhattacharyya and Jiban Ratan Chatterjee, for the Respondent

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**Judgement**

D.K. Seth, J.

The learned counsel for the appellant had made an application for stay of the judgment in an appeal arising out of an order passed u/s 25 of the Hindu Marriage Act, 1956 (HM Act). Subsection (2) of Section 28 of HM Act provides for an appeal to a Court to which the appeal lies from the Court having original jurisdiction. In this case, admittedly, appeal lies to the High Court. Section 21 of the HM Act prescribes application of Code of Civil Procedure, 1908 (CPC) as far as possible. It is contended on behalf of the appellant that this appeal does not require any hearing under Order 41 Rule 11 of CPC, since it is a special right of appeal provided under the special statute. The right of appeal is available without any admission of the appeal. According to him, Order 41 Rule 11 of CPC cannot apply in respect of such an appeal.

2. Mr. Jyotirmoy Bhattacharyya was along with Mr. Jiban Ratan Chatterjee were requested to assist the Court on the question. The Court records its appreciation of the assistance rendered by them.
3. Since Section 21 of the HM Act specially makes it clear that all proceedings subject to the provisions contained in HM Act shall be regulated, as far as may be, by CPC. There having been no procedure provided in the Act or any Rules framed thereunder including application under Order 41 Rule 11 of CPC, the application thereof cannot be excepted. At the same time, the procedure in the High Court is governed by the Appellate Side Rules (AS Rules). Even if the application, though assuming but not admitting, of CPC can be excluded, still then the application of the AS Rules cannot be excluded.
4. Under the AS Rules, Chapter V Rule 17 provisions have been made for admission of appeals specified in Clause (a) thereof without being required to be set down for hearing under Order 41 Rule 11 CPC. The appeals, which are included in Clause (a) do not include an appeal u/s 28 Sub-section (2) of HM Act. Clause (b) of Rule 17 Chapter V of AS Rules prescribes that all other appeals excepting the appeals in Clause (b) are required to be set down for hearing under Order 41 Rule 11 CPC. The appeals mentioned in Clause (b) of AS Rules, are those, which were excluded, are the same referred to in Clause (a). Section 28 Sub-section (1) of HM Act refers to the decree, which is an original decree, which, by reason of Order 41 CPC is required to be set down for hearing under Rule 11. But by reason of Chapter V Rule 17 Clause (a) of AS Rules, the same can be admitted without hearing under Order 41 Rule 11 CPC by the Stamp Reporter as an appeal from original decree. An appeal u/s 28(2) of HM Act is an appeal against an order, though not an appeal under Order 43 CPC, yet the miscellaneous appeal not being an appeal from original decree and not being an appeal exempted under Clause (a) or Clause (b) of Rule 17 Chapter V of AS Rules is required to be set down for hearing under Order 41 Rule 11 of CPC. The application of Order 41 Rule 11 CPC cannot be excluded.
5. A special statute may provide special remedy. Unless special provision or procedure governing such appeal is specially made, the normal rules of procedure applicable to such Courts are applicable. Normal procedure applicable to a Court in respect of an appeal under a special statute, can be excluded only by express provision made in such statute or by express provision made in the rules governing the procedure of such Court. As observed above, by reason of Order 41 Rule 11 CPC, such an appeal is required to be set down for hearing under Order 41 Rule 11 CPC.
6. Such a view was taken by a Division Bench of this Court in [Lalit Chandra Dhar Vs. Abdul Rauf and Others](#), in respect of an appeal u/s 75(3) of the Provincial Insolvency Act. The same principle can be applied to an appeal u/s 28(2) of the HM Act, We may beneficially refer to the observation made therein, particularly, in paragraphs 6, 7 and 8 as quoted below:-

"6. But does Rule 11 of Order 41 provide for admission of appeal? Does the Court, under Rule 11, decide as to whether an appeal is to be admitted or not? It appears that an impression has gained ground that a Court really admits an appeal, particularly, a second appeal and also a first miscellaneous appeal, only after hearing the same under Rule 11 of Order 41. But the impression is wholly erroneous. The appeal cannot but stand admitted at a stage anterior to its hearing under Rule 11 and the Rule only enables the Court to dismiss the appeal at an early stage without sending notice to the lower Court and without serving notice to the respondent. As the Rule makes it irresistibly clear, what is determined in a hearing under Rule 11 is not whether the appeal is to be admitted, but whether the appeal, which cannot but already stand admitted, is to be dismissed. As the new Rule 11A, inserted by the 1976 Amendment, now makes it further clear, what is heard under Rule 11 is the appeal itself and not the question of its admission. This position would emerge with greater clarity from the relevant provisions of the Appellate Side Rules of this Court-- Part II, Chapter V Rule 17 and Chapter IX, Rule 79. Rule 17 (a) and Rule 79 as aforesaid dispense with any hearing under Order 41, Rule 11 of the Code in respect of appeals from Original Decrees and appeals under Workmen's Compensation Act, appeals from Orders under Article 226 of the Constitution, appeals from the decision of the Claims Commissioner under the Indian Railway Act and appeals from the Award of Claims Tribunal under the Motor Vehicles Act, it is provided that in respect of any such appeal, the concerned department "shall....admit it and cause it to be registered and to issue notice to the respondent" and it is obvious that if an appeal is to be admitted only on a hearing under Rule 11 of Order 41 of the Code, such a hearing could not be dispensed with and the appeal could not be admitted without such hearing, Rule 17(b) provides for hearing under Order 41 Rule 11 in respect of appeals from Appellate Decrees and from Orders other than those mentioned above, but clearly provides for admission of such appeal before being placed for hearing under Order 41 Rule 11, the relevant words being "shall admit it, cause it to be registered and posted to a Bench for hearing under Order XLI Rule 11 of Civil Procedure Code.

7. The very word may in Order 41 Rule 11 cannot but indicate that the Court may or may not hear a matter under Rule 11, and the hearing under the said Rule could not thus be made optional if the same was to be the only channel through which an appeal can be routed in. We should, therefore, have no doubt that Rule 11 does not provide for any hearing as to the admission of the appeal and we accordingly repel the contention of Mr. Mitra that if an appeal, for which leave has been granted u/s 75(3) of the Provincial Insolvency Act, is again placed for hearing under Order 41, Rule 11 that would amount to another admission hearing, and, therefore, the application of Order 41 Rule 11 should be held to be Impliedly barred u/s 5(2) of the Provincial Insolvency Act.

8. But even assuming that Section 5(2) of the Provincial Insolvency Act does not make Order 41, Rule 11 of the Code applicable to an appeal u/s 75(3) of the said Act,

we would still have to hold that the same has been made applicable by the relevant Appellate Side Rules of this Court. Rule 17(b) of the Rules, referred to hereinabove, clearly provides that "an appeal from an Appellate Decree or an appeal from an order, other than an appeal under the Workmen's Compensation Act and appeal from an Order under Article 226 of the Constitution." Shall after admission and registration be "posted to a Bench for hearing under Order XLI Rule 11 Code of Civil Procedure". As already noted, under Rule 79 (part II, Chapter IX) of the Appellate Side Rules, appeals from the decision of the Claims Commissioner, under the Indian Railways Act and appeals from the Award of Claims Tribunal, under the Motor vehicles Act have also been excluded from the operation of Rule 17(b). Be that as it may, according to these provisions of the Appellate Side Rules, an order appealable u/s 75(3) of the Provincial Insolvency Act, not thus being excluded, will be required to be placed for hearing under Order 41 Rule 11 of the Code. It is true that on its own force, order 41 can apply only to a decree under the CPC and to such Orders as are appealable under the CPC u/s 104 read with Order 43 hereof and it is obvious that an order appealable u/s 75(3) of the Provincial Insolvency Act is neither a decree nor an appealable order under the Code. But the provisions of Order 41 may be made application to other appeals also by suitable legislative provision to that effect and Rule 17 of the Appellate Side Rules is such legislative provision. The Appellate Side Rules have all the authorities of a legislation or statutory law under the provisions of the Charter Act, Clause 36 of the Letters Patent, Section 122 of the CPC and under Article 225 of the Constitution and since Rules 17 of the Appellate Side Rules has made the provisions of Order 41 Rule 11 of the Code Applicable to various appeals including appeals from an Order under the Provincial Insolvency Act, its application cannot be resisted, particularly, in the absence of any contrary or corresponding provision in the Provincial Insolvency Act. As already noted, we have found no such provision in the Provincial Insolvency Act which is incompatible with the application of Order 41, Rule 11 of the Code to appeals under that Act and therefore, its application to such appeals cannot, in our view, be doubtful or disputed."

7. Thus, the appeal u/s 28 Sub-section (2) of HM Act required to be set down for hearing under Order 41 Rule 11 CPC.

8. Until such hearing is effected, the application for stay cannot be taken up. Inasmuch as, no interim order can be passed in an appeal which is liable to be summarily rejected without sending notice to the respondent. The application if taken up and Interim order is passed, then notice of the application is to be sent. Whereas the dismissal of the appeal under Order 41 Rule 11 is contemplated without sending notice to the respondent. An interim order can be passed only if there is a prima facie case. Hearing of the appeal without being dismissed at the threshold before issuing notice determines the prima facie case for issuing interim order. The AS Rules also provides for setting down of the appeal for hearing under Order 41 immediately after it is found in order on its presentation.

Let the records be placed before the appropriate Court for hearing under Order 41 Rule 11 CPC, subject to its permission.

J. Banerjee, J.

I agree.

Directed to place the Records before appropriate Bench