

PART B.—GENERAL PROCEDURE OF APPELLATE COURTS

(a) *Copies to accompany the memorandum of appeal.*

1. Order XLI, Rule 1, of the Code of Civil Procedure provides that the memorandum of appeal shall be accompanied by a copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded. A Proviso has been added to this rule in Punjab making it possible that where two or more cases are tried together and disposed off by one judgment the appellant (s) may with the permission of the proper authority file only one copy of the judgment— though he/they may have filed more than one appeal.

First Appeals.
Second Appeals.
Judgment. Disposal
of some issues.
Duty of copying
agency.

In second appeals in addition to the copies specified in Order XLI, Rule I, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance, unless the Appellate Court dispenses therewith, Vide Rule 2, Order XLII, added by the Punjab High Court.

When some issues are disposed of at first and the rest by the final judgment, it is sufficient to attach a copy of the final judgment to the memorandum of appeal, for the purposes of the above Rules. (See Civil Appeal No. 2481 of 1928).

Whenever an application is made for a copy of a civil judgment for the purpose of appeal the applicant should be informed that a copy of the decree is also requisite and he should be supplied with such copy, unless he declines to pay the necessary fees in which case a certificate under the signature of the officer-in-charge of the Copying Department, should be endorsed on the copy of the judgment supplied to the applicant to the effect that he was duly informed that a copy of the decree was requisite, and, after being so informed declined to pay fees for the same. Similarly an applicant for a copy of an Appellate judgment for the purposes of a second appeal should be told that a copy of the trial Court's judgment is also requisite.

1. Section 12 of the Indian Limitation Act 1908 directs that the period allowed for appeal shall be reckoned exclusive of the time requisite for obtaining a copy of the judgment and decree appealed against. The time requisite is the time beyond the applicant's control occupied by the

Exclusion of time
spent in obtain-
ing copies for
limitation
purposes.

Copying Agency after an application for a copy has been duly made to the proper officer. In granting copies therefore, the Court or the Copying Agency should be careful to endorse on the copy the following particulars:

- (a) The date of presentation of the application for a copy;
- (b) the date on which the copy was examined and attested;
- (c) the date of delivery or dispatch of the copy.

Appellate Courts should be careful to notice any delay in furnishing these copies.

Translations.

3. Where the order appealed against is in English, it will be sufficient to file a copy of the English order without its counterpart in the vernacular. But should the appellant require it, he should be allowed to take a copy of the vernacular translation (if any) as well.

(b) *Preliminary reception of appeals.*

Reception,
service of
processes,
addresses for
service.

4. The general rules regarding the reception of plaint and service of summonses on defendants in Chapter 1, "Practice in the trial of civil suits" apply *mutatis mutandis* to the reception of appeals and service of notices on respondents. It should be noted that an address for service filed during the course of the trial holds good for the purposes of Appellate proceedings also; and such address given by the respondents must be stated in the memorandum of appeal according to Order XLI, Rule 38, as added by the Punjab High Court.

Reception by
court official.

5. In District Courts, the usual practice is for the Clerk of the Court or Superintendent to receive in the first instance the memorandum of appeal. There is no objection to this practice which is a convenient one for both the Court and suitors. It must however be distinctly remembered that the only duty which can legally be delegated to the Clerk of the Court or Superintendent is to receive the memorandum of appeal and note thereon the date of its receipt. The order as to its admission or rejection can be passed only by the Court itself.

Amendment.

6. If the grounds of objection to the decree appealed against are not set out concisely or are argumentative or in narrative form in contravention of Order XLI, Rule 1, of the Code of Civil Procedure, the petition of appeal should be returned for amendment under Order XLI, Rule 3 of the Code and Courts should exercise freely the

discretion thereby vested in them with a view to stricter compliance with the provisions of the second sub-rule of Order XLI Rule I (X) of the Code. Persistent disregard by any appeal-writer of these provisions should, after due warning lead to the withdrawal of his licence.

7. The memorandum of appeal, when bearing the proper Court fees, must be admitted, if presented in the prescribed form and within the prescribed time, unless it is rejected or returned for amendment under Order XLI, Rule 3, of the Code. When an appeal has been admitted, it will be endorsed with the date of presentation, and the date fixed for hearing, and will be registered by the proper officer of the Court.

Admission.

8.(i) In admitting the memorandum of appeal the Court should decide whether it will proceed under Order XLI, Rule 11, of the Code, and fix a time for hearing the appellant or his pleader (with or without the records) without issuing notice to the respondent, or send notice of the appeal to the respondent and to the Court against whose order the appeal is made, and fix a day for hearing the appeal.

Disposal
under Order
XLI, Rule
11.

(ii) Notice ought not to be issued to a respondent unless the Appellate Court, either without perusing the records of the lower Court or after calling for and perusing such records, is in doubt as to the correctness of the decree appealed against.

9. (a) The Appellate Courts should be careful to see that the object of the statutory provision of Order XLI, Rule 11, is not defeated and respondents put to unnecessary trouble and expense by the indiscriminate issue of notice to respondent in all cases.

Disposal under
Order XLI,
Rule 11.

When decision is confirmed under this rule, the confirmation should be notified to the lower Court.

Such confirmation falls within the definition of 'decree' as given in section 2 (2) of the Code, and being as such, appealable, a formal decree should be framed in every case disposed of under the provisions of Order XLI Rule 11.

(b) Attention is drawn to a recent Punjab amendment of Order XLI, Rule 14, which requires that every notice of appeal to a respondent other than a respondent stated to be proforma shall be accompanied by a copy of the Memorandum of appeal, or if so permitted by a concise statement. The required number of copies of the memo

or concise statements, as the case may be should be filed immediately after the appeal has been admitted and the court has fixed a day for hearing the appeal under Order XLI, Rule 12.

Amendment
after admission.

10. When an appeal has been registered and a date has been fixed for hearing, the petition cannot be returned for amendment. The appeal must be disposed of in the regular manner by dismissal, or by a judgment affirming, varying or reversing the decree of the lower Court. If the appellant should desire to urge any ground of objection not set forth in the memorandum of appeal, he can, under the provisions of Order XLI, Rule 2, of the Code of Civil Procedure, do so only with the permission of the Court and such permission should ordinarily be applied for in writing some time before the date fixed for the hearing, under Order XLI, Rule 12, of the Code, in order that the respondent may have sufficient opportunity of contesting the case on that ground, without the necessity of a postponement.

10. Attention is drawn to the definition of decree given in section 2 (2) of the Code and to sections 104, 105 and Order XLIII which specify what orders are appealable.

Pauper
Appeals.

11. Appeals in *forma pauperis* should not be admitted unless the Court, after perusal of the judgment and decree finds the decree to be contrary to law or some usage having the force of law or is otherwise erroneous or unjust. In this connection the amendments of Order XLIV, Rule 1, by Act 66 of 1956 may be studied.

(c) *Hearing and disposal of appeal.*

Default in
appearance.

12.(i) If, on the day fixed for the hearing of the appeal under Order XLI, Rule 12, of the Code or any other day to which the hearing is adjourned, the appellant does not attend in person or by agent, the appeal should usually be dismissed for default. It is illegal to take up a civil appeal in the absence of the appellant or his agent and confirm the decision of the lower Court on the merits instead of dismissing the appeal for default: for if the appellant afterwards appears, shows good cause for his absence on the day fixed for hearing and applies for re-admission of the appeal, the Court is met by the difficulty that the appeal has already been heard on the merits.

(ii) Attention is drawn to a recent amendment in Punjab making section 5 of the Indian Limitation Act

applicable to applications for re-admission of appeals under Order XLI, Rule 19.

(iii) In any case, where a party, whose non-attendance is ground for dismissal of the proceeding for default, is not present when the proceeding is called on for hearing, the Court may postpone passing final order, if there is other work, which the Court can conveniently take up in the meantime. No hard and fast rule can be laid down, and the matter is one for the exercise of proper discretion in view of all the circumstances. But Courts should endeavour to dispose of cases on merits as far as practicable and avoid dismissals in default when this can be done without wasting of time of the Court or prejudice to other litigants.

The above remarks also apply to the hearing of an appeal ex-parte owing to the absence of a respondent.

If an adjournment is necessary by reason of a party not having appeared when first called, he may properly be ordered to pay all the costs caused by the adjournment.

14 Special attention is invited to Order XLI, Rule 33, which introduces an English rule of law' whereby an Appellate Court is given the fullest power to do complete justice between the parties concerned in the suit, whether such parties have joined in the appeal or not.

Special power.

15. Appeals from orders in pending proceedings should be disposed of as promptly as possible, so as not to delay those proceedings unnecessarily.

Appeals from orders during proceedings.

(d) *Judgment in appeal.*

16. The judgment of the Appellate Court should contain the point or points for determination, the decision thereupon and the reasons for the decision, and, when the decree appealed against is reversed or varied, the relief to which the appellant is entitled (Order XLI, rule 31, of the Code of Civil Procedure). In other words, the judgment should be complete in itself and should give a concise account of the case between the parties, intelligible not only to the superior Appellate Courts, but to the public.

Contents.

16. It is not intended that the judgment of the lower Appellate Court should ordinarily be as detailed as that of the Court of first instance, e. g., it will rarely be necessary for the lower Appellate Court to deal with the evidence of particular witnesses or to examine in detail the whole of the evidence; but it should give an intelligent and clear summary of the evidence which it had to consider and

Grounds of appeal and evidence.

state the reasons for which it thinks particular portion of the evidence to have been more or less worthy of consideration. If any ground of appeal is not pressed by the counsel or is withdrawn, the Appellate Court should invariably mention this fact in the judgment. An appellant is entitled to expect not only that every objection to the judgment or the proceedings of the lower Court, which is taken in due form and is relevant and of a substantial character, should be considered, but also that a decision upon the point raised by such objection should be recorded in the Appellate Court's judgment.

Findings of fact.

18. The findings of fact arrived at by the court of first appeal are, as a rule, final and cannot be challenged in second appeal, except on certain grounds. The Courts of first appeal should therefore realise their responsibility in the matter and see that the findings of fact on which their decision is based are clear and precise. The judgment should indicate that all relevant evidence, oral as well as documentary, has been considered. Second appeals have to be frequently admitted for the reasons that the necessary findings of fact are either vague or non-existent or that important evidence on record has been ignored.

How parties to be named.

19. As confusion frequently arises from the use of the words "appellant" and "respondent" in two successive Appellate Courts, especially when the parties appealing belong to different sides, Appellate Courts should not use these terms without the addition of the words 'plaintiff' or 'defendant', as the case may be or the latter terms alone may be used.

(e) *Decrees in appeals.*

Contents of decrees.

18. Under the provisions of Order XLI, Rule 35, of the Code, the decree of the Appellate Court is required to contain the number of the appeal, the names and description of the parties, a clear statement of the relief granted or other determination of the appeal, and an order as to costs.

Note.—for the directions as to filling up decretal orders of Appellate Court see Chapter 11-B, Para 2 (ii)

(f) *Remands.*

Fixing date of appearance in lower court.

19. Whenever, a case is remanded for redecision under Order XLI, Rules 23 or 23-A or for the trial of certain issues under Order XLI, Rule 25, the Court ordering the remand shall at once, in the presence of the parties, give them a date on which they shall appear before the trial court and note the fact on the record,

22. (a) When a case is remanded by an Appellate Court under Order XLI, Rules 23 or 23-A it must be restored to its original number on the register of the Court, to which it is remanded and be considered as a pending regular suit; but if it is referred for the re-investigation of certain issues, under Order XLI, Rule 25, it should remain on the register of the Appellate Court and be considered as an appeal pending in that Court.

Court in which remand case is pending.

(b) Rule' 23-A of Order XLI was inserted in 1938 by the Punjab High Court and enables the appellate court to remand a case where retrial is considered necessary, even though the court from whose decree the appeal is preferred has disposed of the case otherwise than on a preliminary point.

Framing of decree.

23. An order of remand under Order XLI, Rule 23 or 23-A of the Code of Civil Procedure not being a decree as defined in the said Code, the framing of a formal decree by the Appellate Court in cases remanded by it under these rules is incorrect.

24. When a case is remanded under Order XLI, Rule 25, of the Code of Civil Procedure, reasonable time should be fixed for the return of findings by the lower Court. The latter Court should make every effort to submit the report by the date fixed, but if this is found to be impracticable, it should apply at once for an extension of time, stating its reasons and mentioning the date by which it expects to be able to submit the required report.

Date of return by lower court.

25. Appellate Courts should pay special attention to the provisions of Order XLI, Rule 26, of the Code of Civil Procedure. They should take measures to ensure that in all cases of remand under Order XLI, Rule 25, a definite period, subsequent to the return of the record of the inquiry to the Appellate Court, shall be fixed to admit of objections being filed by any dissatisfied party, due notice of such period being given to the parties. No Court should proceed to final judgment without ascertaining that such period has been duly allowed. If it has not, the Appellate Court should either postpone the appeal or ascertain and record the objections of the parties or either of them or ascertain and record that neither party has any objection to advance.

Date of objections.

26. Appellate Courts have the power to admit additional evidence under Order XLI, Rule 27, of the Code of Civil Procedure, but this can only be done on the grounds

Additional evidence.

stated therein and the reasons for admitting the evidence must always be clearly recorded. The test for the admission of such additional evidence and the manner in which the appellate courts should exercise their discretion in this behalf are laid down in 1951, Supreme Court Reports 258.

(g) Service of processes of Appellate Courts.

Duty of lower court in the matter of service.

27. In view of Rule 38 of Order XLI (added by Punjab amendment), Service of the notice issued in appeal and other processes for service of parties to appeal shall be issued at the address filed by the appellant/parties or as per order passed under Order V Rule 19 (added by Punjab amendment) or Order VIII Rule 11 or subsequently altered under order VII Rule 24 or Order VIII Rule 12. Service effected at such address shall be as effective as personal service.

Attention is also drawn to Order V, Rule 23 of the Code of Civil Procedure, which reads as follows:-

“The Court to which a summons is sent under Rule 21 or Rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.”

The above provisions shall be carefully attended to.

Provided that the Service of Process to the respondent/addressee can also be effected through electronic mode where the party has furnished the requisite details.

[Rule 27 substituted vide Correction Slip no. 79 Rules/II.D4 dated 16.11.2018.]

Statement of serving officer.

28. In the case of summonses from the High Court, the Court serving the summons shall record the statement of the peon as to such service on solemn affirmation, and shall verify the same with its signature before returning the summons.