

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR.
[Judicial Department]
C.R No. 202-P/2018 with
CM No. 308/2018.

Date of hearing:..... 17.12.2018.

Date of announcement on:..... 14.1.2019.

Petitioner (s):- **Nasir khan by Mr. Zia ur Rehman,**
Advocate.

Respondent(s) **Zamin Shah and others by Mr. Altaf**
Ahmad, Advocate.

J U D G M E N T

SYED AFSAR SHAH, J.- This civil revision is directed against the order dated 28.2.2018, recorded by learned Additional District Judge-IV, Kohat, whereby the appeal filed by the appellant, herein petitioner, was dismissed on the ground that he had not appended certified copy of the decree sheet with the memo of appeal.

2. **Having heard** learned counsel for the parties at length, it appears from the record available on file that on 21.10.2016, Nasir Khan, the petitioner filed a suit against Zamin Shah and one other, for declaration, grant of permanent/perpetual injunction and possession of the suit premises as an alternative relief. During the proceedings conducted in the learned lower court, the respondents/defendants moved an application for dismissal of the suit under Order XXIII rule I of the Code of Civil Procedure. The application, thus, given was vehemently resisted

by the petitioner/plaintiff on various grounds, however, the learned lower court, after hearing counsel for the parties, while adhering to Order VII Rule 11 C.P.C, rejected the plaint, vide its judgment/decreed dated 21.3.2017. The order of the learned lower court was appealed against by the petitioner in the court of learned Additional District Judge-IV, Kohat. The appellate forum, vide its order dated 28.2.2018, dismissed/rejected the appeal being not maintainable. Discontented with the order of the appellate forum, the petitioner has come to this court by filing the instant revision petition.

3. If one goes through the order of the appellate forum, one could reach to the conclusion that the learned appellate court has dismissed the appeal mainly on the ground that the appellant had failed to append certified copy of the decree with the memo of appeal. In the circumstances, the question which requires consideration before this court is as to whether in the given position the appellant was required to append certified copy of the decree with the memo of appeal.

Before entering into other aspects of the case, it would be more appropriate to reproduce the relevant provision of Order XLI Rule 1 C.P.C, which runs as under:-

“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 decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded.”

A plain reading of the above quoted provision would show that there it has been clearly provided that certified copy of the decree had to be appended with the memo of appeal. Simple is that the provision regarding production of certified copy of the decree sheet alongwith the memo of appeal is mandatory and the appeal unaccompanied with the certified copy of the decree sheet is not to be properly constituted and thus incompetent.

Learned counsel for the petitioner was of the view that if an appeal is filed against order rejecting the plaint (as in the instant case) without copy of decree sheet, the appeal cannot be thrown out for non-compliance of the provision of Order XLI rule 1 C.P.C. In support of his arguments, he further added that rejection of plaint does not fall within the ambit of adjudication conclusively determining the rights of the parties. I think the learned counsel has misconceived the situation in that an order rejecting the plaint has been included in the definition of a decree, which provision, for convenience, is reproduced below:-

“S.2(2)”Decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the **rejection of a plaint.**”

If one goes through the above quoted provisions, one could reach to an irresistible conclusion that rejection of plaint is very much there in the definition clause.

4. Another disturbing point for a judicial mind in the present case is that it is not the case of the petitioner that the

decree sheet was not prepared. It is with dismay that even after raising objection by the other side as the appeal was already fixed for maintainability, the petitioner/appellant failed to make compliance of the mandatory provisions of Order XLI Rule 1 C.P.C. He had not even applied for copy of the decree sheet, which as is evident from the record, has been prepared on 31.3.2017, while the appeal has been filed on 12.4.2017. In view of the mandatory provision with respect to the decree sheet the arguments of learned counsel for the petitioner that technicality should not come in the way of justice stand to no sound reason.

In view of the above, the revision petition being without any substance stands dismissed.

Announced.

J U D G E