

Q.12 Explain the difference between first and second appeal against decree. State the distinguishing features? (Appeal)

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1. INTRODUCTION

The term 'appeal' is not defined by the Code. It is a complaint made to a superior Court against the decision of a subordinate Court, with the object of getting such order set aside or revised. An appeal is a hearing of the matter by a superior tribunal and the appellate Court is vested with powers to pass any order that the trial court could have passed. In accordance of section 96 an appeal lies against all decrees passed by a Court in the exercise of original civil jurisdiction.

2. RELEVANT PROVISIONS

- * Sections 96 to 99-A C.P.C., 1908, (Appeal from original decree—1st Appeal)
- * Sections 100 to 103 C.P.C., 1908, (Appellate Decrees—2nd Appeal)
- * Sections 104 to 106 C.P.C., 1908, (Orders)
- * Sections 107 to 108 C.P.C., 1908, (General Provisions relating to appeal)
- * Section 111-A C.P.C., 1908, (Appeal to Federal Court)

3. OTHER RELEVANT PROVISIONS

Orders 41, 42 and 43 C.P.C., 1908

Ss. 17 & 18 of W.P. Civil Courts Ordinance, 1962

4. MEANING OF APPEAL

The term appeal has not been defined by the Code, so it has been defined as, "An appeal means removal of a cause from inferior to a superior Court for the purpose of a testing soundness of decision of an inferior Court".

In **Lakhshmiratan Engineering v. Assistant Commissioner, AIR 1968 SC 488**, the word 'appeal' is defined as judicial examination of the decision by a higher Court of the decision of an inferior Court.

5. APPEAL

(i) O. 41, R. 1(1) C.P.C., 1908

Proceedings taken before superior Court or authority reversing or modifying decision of inferior Court or authority on.

(ii) Shankar Ramchandra Abhyankar v. Krishji Dattatreya Bapal, AIR 1970 SC 1, to constitute appellate jurisdiction;

(a) The existence of relation of superior and inferior Courts.

(b) The Power in the former to reviews decisions of the Later.

(iii) Chappan v. Moidin Kutti, 8 MLJ 231, the power of the Superior Court to review decision of Inferior Courts.

6. MODES OF APPEAL

Appeal from

- (i) Original Decrees (u/Ss. 96-99-A)—First Appeal
- (ii) Appellate Decree (u/Ss. 100 to 103)—Second Appeal
- (iii) Orders (u/Ss. 104 to 108)

7. DISTINCTION BETWEEN CIVIL AND CRIMINAL APPEAL

- (i) **Criminal Appeal.**—Where questions of facts are in issue the same rule is to consider whether the conviction is right.
- (ii) **Civil Appeal.**—Court must be convinced before reversing a finding of fact by a lower Court that the finding is wrong. (King Emperor v. Chatter Singh, 7 P.R. 1904).

8. DISTINCITON BETWEEN RIGHT OF APPEAL AND RIGHT OF SUIT

- (i) **Right of suit.**—Right of suit for maintainability require no authority for law.
- (ii) **Right of appeal.**—Right of appeal for maintainability required authority for law. (Ganga bai Smt v. Vijay Kumar, AIR 1974 SC 1126).

9. REVIEW AND APPEAL

- (i) **Review.**—Reconsider of the same subject by the same judge.
- (ii) **Appeal.**—hearing before another tribunal.
(Mosherhar Singh v. Bengal Govt., 7 M.I.A. 283)

10. KINDS OF APPEAL

Following are the kinds of appeal;

- (i) First Appeal
- (ii) Second Appeal

11. FIRST APPEAL

A first appeal lies on a matter of fact or law and there is no restriction on the grounds which may be taken up.

(i) **Forum of Appeal.**—The forum where a first appeal is to be instituted is to be determined in accordance with local laws. In Punjab a first appeal lies to the District Court if the value of the subject matter of the suit is below two lakhs and fifty thousand rupees and to the High Court in all other cases. (1995 MLD 311)

(ii) **Appeal from preliminary decree.**—An appeal against a decree which has been preceded by a preliminary decree will be limited to points arising subsequent to the preliminary decree and any defect in proceedings prior to the passage of the preliminary decree cannot be made the ground of appeal in an appeal against the final decree. (PLD 1982 Kar. 327)

(iii) **Who may appeal**

- (a) The legal representatives of a party, after such person shall have been impleaded as parties.
- (b) An appeal cannot be filed on behalf of a dead person.
- (c) A person claiming under a party or a person represented by a party.
- (d) A benamidar on behalf of the real owner.
- (e) A guardian ad litem on behalf of minor.

- (f) An appeal by the Government can only be filed by the Government and not a department of the Government which is not a legal person.

12. SECOND APPEAL

Section 100 provides a second appeal to the High Court from an appellate decree passed by a decree subordinate to the High Court. The procedure for the institution and hearing of a second appeal is prescribed by Order 42 read with Order 41. Whilst a first appeal under section 96 is not limited to any particular ground, by virtue of section 101 a second appeal does not lie except on the grounds mentioned in section 100. **(PLD 1964 SC 617)**

(i) Grounds for second appeal u/s 100

The grounds on which a second appeal is permissible under section 100 are;

- (a) The decision being contrary to law.
- (b) The decision being contrary to usage having the force of law.
- (c) Failure to determine some material issue of law.
- (d) Failure to determine some material issue of usage having the force of law.
- (e) Substantial error or defect in the procedure provided by C.P.C. or by any other law for the time being in force which may possibly have produced an error or defect in the decision of the case upon the merits. **(1993 SCMR 1955)**

(ii) Second appeal on no other grounds

No second appeal lies except on the grounds mentioned in section 100.

(iii) Power of High Court to determine issue of fact u/s 103

In second appeal the High Court is empowered to determine an issue of fact, if the appeal is validly before it on any of the grounds mentioned in section 100, and where;

- (a) An issue of fact necessary for the disposal of the case has not been determined by the lower appellate Court, provided there is sufficient evidence on the record for determining such issue; (PLD 1971 SC 189)
- (b) An issue of fact has been wrongly determined by the lower appellate Court by reason of any illegality, omission, error or defect, such as is referred to in Section 100(1). (AIR 1936 Lah. 788).

13. DIFFERENCE BETWEEN FIRST AND SECOND APPEAL

Following are the differences between first and second appeal;

(i) Forum

- (a) **First Appeal.**—First appeal shall lie to the District Courts or the High Court.

- (b) **Second Appeal.**—An appeal shall lie to the High Court from every decree passed in appeal by a Court subordinate to a High Court.

(ii) **Scope**

- (a) **First Appeal.**—Wider
(b) **Second Appeal.**—Narrower

(iii) **Procedure**

- (a) **First Appeal.**—Order 41 C.P.C., prescribed procedure for first appeal.
(b) **Second Appeal.**—O. 42 C.P.C., prescribed procedure for second appeal.

(iv) **Appeal lies from**

- (a) **First Appeal.**—An appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
(b) **Second Appeal.**—It lies from appellate decree passed by a court subordinate to the High Court.

(v) **Bar to appeal**

- (a) **First Appeal.**—No appeal shall lie from a decree passed by the Court with consent of parties.
(b) **Second Appeal.**—Section appeals are barred by section 96(3) read with Section 108, section 102, section 104 and Order 47 rule 7.

(vi) Restriction on the grounds

(a) **First Appeal.**—There is no restriction on the grounds which may be taken up.

(b) **Second Appeal.**—No second appeal shall lie except on the grounds mentioned in section 100.

(vii) Subject-matter jurisdiction

(a) **First Appeal.**—A first appeal lies on a matter of fact or law.

(b) **Second Appeal.**—Second appeal lies on question of law and mixed question of law and fact.

14. APPEAL AND MEMORANDUM OF APPEAL

(i) **Appeal.**—Judicial Examination

(ii) **Memorandum of Appeal.**—contains grounds on which the judicial examination is invited.

15. APPEAL FORMA PAUPERIS

An appeal by an indigent party for whom costs of the Court are waived.

16. POWERS OF APPELLATE COURT U/S 107

- (i) To determine case finally
- (ii) To remand a case
- (iii) To frame issues and refer them for trials
- (iv) To take additional evidence

17. APPEAL TO THE SUPREME COURT U/S 109

Appeal shall lie to the Supreme Court from any;

- (i) Judgment;

(iii) Final Order

in a civil proceedings of High Court, if High Court certifies;

(a) that the case involves a substantial question of law of general importance; and

(b) opinion of High Court, the said question is to be divided by Supreme Court.

18. FINAL ANALYSIS

An appeal is a continuation of the suit, only such persons who were parties to the suit, and who are adversely affected, by the decree, may appeal. An appeal lies against the decree and not against the findings or decisions contained in the judgment upon which the decree is based. Where no decree has been drawn up and as such an appeal is not competent, a revision may be filed.

A litigant, having a grievance of a civil nature has, independently of any statute, a right to institute a suit in some Court or other, unless its cognizance is expressly or impliedly barred¹. First appeal is a valuable right and parties have a right to be heard both on question of law and on facts, and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings². Remedy of appeal, and more-so second appeal, is to be specifically provided by a statute and it cannot be

1 AIR 1974 SC 1126(1129)

2 A'R 2001 SC 2171

inferred on the sole ground that it is not prohibited³. A right of appeal is a substantive right and not a procedural matter⁴. Though there is a right of appeal vested in the litigant at the time, the action is brought, he has no vested right to have his appeal heard by a particular forum or by a particular number of judges⁵. Section 104 deals with appeals from orders and S. 96 with appeals from decrees⁶. Appeal from order can be heard and disposed of as a first appeal by the Court⁷. Section 96 does not confer a right of appeal from all adjudications, which are decrees, but confers such right only, where it is not expressly otherwise provided in the body of the Code, or by any other law for the time being in force⁸. There is a clear distinction between a civil regular appeal preferred under S. 96 or S. 100 and an appeal filed under Cl. 15 of the Letters Patent, whereas in the former case, the appeals are against the decrees, in the latter, the appeals are against the judgment⁹. The word 'appeal' has been held to mean "the removal of a cause from an inferior to a superior Court for the purposes of testing the soundness of the decision of the inferior Court". It is thus a remedy provided by law for getting the decree of the lower Court cancelled and is, in fact, a

3 AIR 2005 AP 95

4 AIR 1999 Ker 6(1)

5 AIR 1970 All 201 (206) (FB)

complaint made to the higher Court that the decree of the lower Court is unsound and wrong¹⁰. An appeal is not a fresh suit, but is only a continuation of the original proceedings and a stage in the suit itself. But this does not mean that the rights, which could be pleaded and enforced before the suit was finally adjudicated by the first Court, could be pleaded for the first time as of right, during the pendency of the appeal. Similarly this does not mean that any interim order passed at the stage of the proceeding in the primary Court automatically operates even after the proceeding is decided by that Court¹¹.

Section 100 of the Code, subject to any other provisions contained in the body of Code of Civil Procedure, or in any other law for the time being in force, provides that a second appeal may lie to the High Court from a decree passed in appeal by any Court subordinate to the High Court on any of the following grounds namely;

- i. the decision being contrary to the law or some usages having the force of the law;
- ii. the decision having failed to determine some material issue of law or usage having the force of law; and
- iii. a substantial error or defect in procedure provided by the Code or any other law for the

10 AIR 1953 Nag 56 (57)(DB)

11 AIR 1957 SC 540 (Pr 23)

time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Clauses (a), (b) and (c) of section 100 are very wide in effect and clauses (b) and (c) have led to plethora of conflicting judgments. In dealing with second appeals, the Courts have devised and successfully adopted, several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the Courts below. This has created confusion in the minds of the public as to the legitimate scope of second appeal under section 100 and has burdened the High Courts with an unnecessary large number of second appeals. Section 100, is therefore, being amended to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one"¹².

A right of appeal is not a natural or inherent right attaching to litigation, and does not exist and can not be assumed, unless expressly given by statute or by rules having the force of statute¹³. The jurisdiction of High Court under S. 100, C.P.C., is very peculiar. It is neither as wide as under S. 96, nor as restricted as under S. 115, C.P.C.¹⁴. The right of

appeal is a substantive right. An appeal is essentially continuation of original proceedings and provisions applied at the time of institution of suit are to be operative even in respect of appeals¹⁵. The scope of a first appeal differs from that of a second appeal in that the former is not limited to any particular grounds of appeal, such as those provided by this section. The provision restricting the grounds that may be taken in second appeal is based on public policy expressed in the maxim, 'interest re publicae ut sit finis litium' (it concerns the State that there be an end to litigation)¹⁶. The scope of second appeal is quite different from the scope of first appeal under S. 96, C.P.C. No questions of fact can be agitated before the High Court, which a party filing first appeal can always do¹⁷. The conditions mentioned in the section must, therefore, be strictly fulfilled before a second appeal can be maintained and no Court has any power to add to or enlarge those grounds¹⁸. Ss. 100 and 101 read together make it quite clear that;

- i. a second appeal will lie only on the ground of an error in law or procedure¹⁹.
- ii. a second appeal will not lie merely on the ground of an error on a question of fact²⁰.

15 AIR 2003 SC 2434(2439)

16 AIR 1921 Oudh 98 (99)

17 (1995) 2 Bom CR 540 (543)

18 1999 AIR SCW 2240(2242)

19 AIR 1981 SC 1183 (1185,1186)

20 AIR 1977 SC 1285 (1292)

Under this section, only one memorandum of appeal against the decree is permissible even though the decree is a composite one giving distinct relief. Where there are distinct subject-matters in the appeal, it is open to the Court to admit a part and dismiss the rest after giving reasons. There is nothing in O. 41, Rr. 11 and 12 to indicate a prohibition of this course²¹. Second appeal could lie on the grounds mentioned in S. 100, C.P.C. and not on question of fact²². The interference in second appeal under S. 100 C.P.C. is only permissible, if the impugned decision was contrary to law or it had been rendered without deciding some material issue of law or there had been any error or defect of procedure provided by law²³. The second appeal lies on the grounds mentioned in S.100 of C.P.C., and not on the question of facts²⁴. The jurisdiction of High Court is limited in second appeal, to the extent of interference on a question of law and not on facts²⁵. The Court of facts could appraise and appreciate evidence and when no misreading and non-reading or perversity of reasoning had been shown, such finding could not be interfered within second appeal²⁶.

21 AIR 1984 Pat 220

22 2004 YLR (Lah) 1928

23 MLD 2004 [Lah.] 1033