PETITIONER:
MANNAN LAL

Vs.

RESPONDENT:
MST. CHHOTAKA BIBI

DATE OF JUDGMENT:
10/04/1970

BENCH:
MITTER, G.K.
BENCH:
MITTER, G.K.
SHELAT, J.M.

CITATION:
1971 AIR 1374 1971 SCR (1) 253
CITATOR INFO :
RF 1976 SC1503 (10)

ACT:
The U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 (U.P. Act 14 of 1962), s. 3-Special Appeal against judgment of Single Judge of High Court presented with deficient court-fees before coming into force U.P. Act 14 of 1962-Deficiency made up under order of Court after coming into force of Act-Appeal whether to be treated as pending on day immediately preceding coming into force of Act within meaning of s. 3(2)Court Fees Act, S. 4 and Code of Civil Procedures s. 149 should he read harmoniously.

HEADNOTE:
The U.P. High Court (Abolition of Letters Patent Appeals) Act came in-to force on November 13 1962. Section 3(1) of-the Act provided that no appeal arising from a suit or a proceeding instituted or commenced whether prior or subsequent to the enforcement of the Act, shall lie to the High Court from a judgment and order of one Judge of the High Court, made in exercise of appellate jurisdiction in respect of a decree or order made by a court subject to the superintendence of the High Court, anything to the contrary contained in cl. 10 of the, Letters Patent of Her Majesty dated 17th March 1866 read with cls, 17 of the U.P. High Court Amalgamation Order of 1948, or in 'any law, notwithstanding. In subs. (2) of the section an exception was made in the case of appeals pending before the, High Court on the date immediately preceding the date of en-forcement of the Act. The memorandum of appeal in Special Appeal No. 1880 of 1962 was presented in the High Court of Allababad on November 9, 1962. The High Court directed the payment of additional court fees and on that being done that memorandum was 'accented and registered in January 1963. Eventually, however the High Court held that the appeal was not saved by s. 3(2) of U.P. Act of 1962, since in view of s. 4 of the Court Fees Act the memorandum of appeal had no effect before the making good of the deficiency in court fees. In appeal by certificate, to this Court, the question for decision was whether there was an appeal pending before the High Court on November 12, 1962 i.e. tile date immediately preceding the date of the enforcement of Act 14

of 1962.
HELD : In considering the question as to the maintainability of an appeal when the court fee paid was insufficient to start with but the deficiency was made good later on, the provisions of the Court Fees Act and the Code of Civil Procedure have to be read together to form a harmonious whole and no effort should be made to give precedence to provisions in, one over those of the other unless the express words of a statute clearly override there of the other. In the present context this could only-be done by readings s. 149 of the Code of Civil Procedure as. a proviso to s. 4 of the Court Fees Act by allowing the deficiency to be made good within the period of time fixed by it. [261 F-H]
Although there is no definition of the word "appeal" in the Code of Civil Procedure, it can be instituted by filing a memorandum of appeal as provided in O. 41, r. 1 of the Code. The filing of a memorandum of appeal therefore bring an appeal into existence; if the memorandum is deficient in court-fee, it may be rejected and if rejected, the appeal comes to an end. But if it is not rejected and time is given to the appellant
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to make up the deficiency and this opportunity is availed of s. 149 of the Code which expressly provides that the document is to have validity with retrospective effect as if the deficiency had been made good in the first instance comes into play. By reason of the deeming provision in s. 149 the memorandum of appeal is to have, full force and effect and the appeal has to be treated as one pending from the date when it was before the Stamp Reporter and the deficiency noted therein. [264 H; 265 D-H]
Applying the above principle the bar of s. 3(1) of U.P. Act 14 of 1962 would not operate in the instant case since the appeal in question must be held to have been 'pending' within the meaning of s. 3(2). [265 D]

JUDGMENT:
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 544 of 1967.
Appeal from the judgment and decree dated August 18, 1964 of the Allahabad High Court in-Special Appeal No. 880 of 1962.
Gobind Das and G. S. Chatterjee for the appellant.
C. B. Agarwala, Yogeshwar Prasad and S. K. Bagga, for respondent No. 1.
The Judgment of the Court was delivered by--
Mitter, J. In this appeal by certificate granted by the Allahabad High Court the only question is, whether Special Appeal No. 880 of 196 of that court was maintainable in view of the provisions of the U.P. Act XIV of 1962 abolishing such appeals.
The said Act styled the U.P. High Court (Abolition of Letters Patent Appeals) Act came into force on 13th November, 1962. Section 3 of the Act provided as follows :-

> "(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment and order of one Judge of the the High Court, made in exercise of appellate jurisdiction, in respect of a decree or order made by a court subject to the superintendence of the High Court, anything to the contrary contained in clause ten of the Letters Patent

of Her Majesty, dated the 17th March 1866 read with Clause 17 of the U.P. High Courts' (Amalgamation) Order, 1948, or in any law not with standing.

(2) Notwithstanding anything contained in sub-section (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as heretobefore, as if this Act had not been brought into force."

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The memorandum of appeal in Special Appeal No. 880 of 1962 was presented in the High Court on 9th November, 1962. There was some doubt as to whether the court-fee paid in respect of the memorandum at the date of its presentment was sufficient. Ultimately however a Bench of the High Court directed the payment of additional court-fee and on that being done the memorandum was accepted and registered in January 1963. The question before us is, whether there was an appeal pending before the High Court on 12th November 1962 i.e. the date immediately preceding the date of enforcement of the above U.P. Act.

It will not be out of place to set forth a short history of the litigation culminating in the filing of the said memorandum of appeal. On 2nd-April 1872 a property was mortgaged with possession to one Beni Madho by two mortgagers, namely, Girdharilal and Smt. Sunder Bibi for a sum of Rs. 3,684. The first respondent herein claiming to be the representative-in-interest of the mortgagors claimed to have paid the amount of the mortgage money to respondents 2 to 7 herein on 10th September 1945. She filed a suit on September 26, 1946 'being Suit No. 117 of 1946 praying inter alia for)ejectment from the suit property of the appellant (impleaded as defendant No. 1 in the suit) and another person impleaded as defendant No. 8, a sub-tenant. For purposes of jurisdiction and court-fee she valued the property in suit i.e. a grove with houses, at Rs. 5,200 besides Rs. 420 by way of mesne profits. Alternatively, she prayed for a decree for Rs. 3,684 in case possession and occupation was not decreed to her. On 2nd November 1951 the Additional Civil Judge of Mirzapur dismissed the suit as, against the appellant and defendants 3 and 4. The plaintiff, the first respondent herein, filed First Appeal No. 309 of 1952 is the High Court at Allahabad oil 26th February, 1952. She valued the appeal at Rs. 4,816 and paid court-fee amounting to Rs. 493-12-0. During the pendency of the appeal to the High Court, the original plaintiff died and her legal representatives were brought on record. A learned single Judge or the High Court allowed the appeal by a judgment rendered on 10th September 1962 He held that the plaintiff was entitled to a decree for possession against respondents 1 and 8 and also passed a decree for Rs. 420 against respondent No. 1 alone. According to the learned Judge defendants 2 to 7 being the representatives of the mortgagee were proforma defendants and were not liable for the Dlaintiffs costs. On 8th November, 1962 the appellant (defendant No. 1 in the suit) filed a memorandum of appeal which was ultimately registered as Special Appeal No. 880 of 1962 paying court-fee amounting to Rs. 425 on the basis of the valuation of the property at Rs. 4,816. The Stamp Reporter of the Court reported that the court-fee stamps affixed to the

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memorandum were insufficient by Rs. 425 according to the

valuation of the property which was Rs. 8,920 on the basis of the relief claimed. Counsel for the appellant made an endorsement at the foot of the said report raising objections thereto. The Joint Registrar made a note on 9th November 1962 reading:

> "Without going through the papers the question of court-fees cannot be decided forthwith. Let it be taken as presented to-day."
> The order sheet shows that
> In compliance with the Registrar's order dated 11th December 1962 an objection filed by counsel for, the appellant was put up with the Stain Reporter's Report."

On 20th December 1962 the Taxing Officer made a note that the deficiency, of Rs. 425/- had been made good on that date by the appellant and that counsel expressed his desire not to press the objection raised earlier. The Taxing' Officer directed that the matter be placed before the Court for orders as to the acceptance of stamps to make good the deficiency and for amendment of the valuation of the Special Appeal. The matter appeared on the board of a Division Bench of the High Court on 31st December, 1962 when it was adjourned till 3rd January 1963. On the last mentioned date the Bench allowed the amendment of the valuation of the appeal and directed the admission of the appeal and issue of notices. On the matter appearing before another Division Bench on 4th January, 1963 and explanatory order was made recording, that the court-fee on the memorandum of the Special Appeal was originally deficient because the First Appeal had been wrongly under-valued inasmuch as the valuation of the property had been determined by the tral court at the figure of Rs. 8,920. After that determination, the trial court had called upon the plaintiff to make up the deficiency in respect of the court-fee for the relief of possession and the plaintiff had complied with that order. Consequently the order of the trial court determining the court-fee payable as well as the valuation had become final. The plaintiff should have valued the First Appeal at Rs. 8,920 and his counsel was prepared to make up the deficiency in court-fee.

The point to note is that the appellant in the Special Appeal was probably not very much to blame inasmuch as he had valued the same according to the valuation put on the First Appeal by the plaintiff herself to start with. The question however remains as to whether on the deficiency being made good the appeal could be treated as one pending on 12th November, 1962.

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Appeals being creatures of statutes or statutory rules, we must turn to the Code of Civil Procedure first to find out how they are to be instituted. Order 41 rule 1 (1) lays down 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 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."

Sub-r.(2) of the rule provides that the memorandum shall set forth concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. Under rule 9(1) of the Order:

> "Whether a memorandum of appeal is admitted, the Appellate Court of the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose."

Under sub-r.(2) such book is called the Register of Appeals. Rule 22 of Order 41 gives the respondent, although he may not have appealed from any part of the decree the right to support the decree on any of the grounds decided against him and further to take any cross-objection to the decree which he could have taken by way of appeal provided he files such objection in the appellate court in- the manner laid down. Under sub-r.(2) such cross-objection has to be put up in the form of a memorandum.

It is necessary to note the relevant provisions of the Rules of the High Court Allahabad High Court made in exercise of the powers conferred by Art.225 of the Constitution of India and all other powers enabling the court in that behalf with regard to the institution of appeals generally and also Special Appeals. In Chapter 1 rule 3 a Special Appeal is defined as an appeal from the judgment of one Judge. Omitting the words which are not relevant, rule 5 of Chapter VIII. provides

> An appeal shall lie to the Court from the judgment..... of one Judge made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendency of the Court, where the Judge who passed the judgment declares that the case is a fit one for- appeal."

Chapter XI deals in general with the presentation of appeals and applications. Under rule 1 of this Chapter every memorandum of

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appeal or objections must be presented for admission in court.(This rule however does not apply to appeals and applications that may under the rules of the court be filed before the Registrar or other officers. Under r. 3 of Chapter Xi no memorandum of appeal shall be presented unless it bears an office report specifying the matters mentioned in clauses (a) to (f) thereof. Cl. (a) relates to the question whether the memorandum of appeal is within time or if beyond time, the period by Which it is beyond time. Under cl. (d) a statement has to be made whether any court-fee is payable or not. The matters mentioned in cl. (e) are :

> "Where court-fee is payable, whether the court"fee paid is sufficient and in case it is deficient, the extent fo such deficiency."

The rule also lays down that where a report under cl. (e) cannot be made without an examination of the record, the office shall state that a further report would be made on receipt of the record. Under r. 4 it is open to the appellant or his advocate if he contests the office report as to court-fee to take the memorandum of appeal to the Taxing Officer for the determination of his objection and the Taxing Officer must determine it forthwith. Further, if the Taxing Officer decides that there is deficiency in the amount of the court-fee paid, the appellant or the applicant as the case may be shall make good such deficiency before presenting the memorandum or application to the court; provided that if limitation is about to expire and the time is too Short to enable the appellant to make good such deficiency, he can present the memorandum of appeal in

court and make good such deficiency within such time as may be allowed by the court. Under r. 10(2) of Chapter IX

> "In a Special Appeal from the judgment of one Judge passed in the exercise of appellate jurisdiction, the memorandum of appeal, duly stamped, shall be presented within sixty days from the date of judgment. The memorandum of appeal need not be accompanied by a copy of the judgment appealed from or a copy of the decree or formal order and the time taken in obtaining such copies shall not be excluded in computing the said period of sixty days."

Under sub-r. (1) of r. 21 of Chapter IX no memorandum of appeal shall be received if it is not in the proper form or it is not accompanied by the necessary documents. Under sub-r. (2) :

> "If the required documents are not supplied or the defects are not removed within the time allowed by the Judge or the Registrar, as the case may be, the appli-
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> cation or memorandum of appeal shall be-listed for rejection before the Court."

Rule 1 of Chapter XXXVII lays down that a separate register of institutions in the prescribed form has to be kept for each of the classes of cases mentioned therein. The 14th item in the list is "Special Appeals". Under this rule cases must be, entered in the register according to the date of admission and no defective case should be entered therein. Under r. 3 of this Chapter a register in the prescribed form has to be maintained of all defective cases under several classes mentioned in rule 1 including Special Appeals. Such cases have to be entered in the register according to the date of presentation and a record kept of the steps taken from time to time to remove the defect. As soon as the defect has been removed and the case admitted, it has to be entered in the appropriate register of institutions.

The recital of facts given above show that the rules of the High Court were folowed in this case and the requirements thereof were duly complied with.

The Court Fees Act, VII of 1870, provides for the payment of various fees payable in respect of different kinds of documents to be filed in court. Omitting the words which are not relevant, s. 4 lays down that :

> "No document of any of the kinds specified in the First or Second Schedule to this Act annexed, as chargeable with fees, shall be exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its jurisdiction as regards appeals from the judgments of one or more Judges of the said Court, or of a Division Court unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document."

Among the documents specified in the First Schedule chargeable with fees which are ad valorem are memoranda of appeal presented to any court. Section 28 of the Act lays down that no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. This is however subject to the qualification that if any such document is through mistake or inadvertance

received, filed or used in any court without being properly stamped, the presiding Judge or the head of the office as the case may be or in the case of a High Court, any Judge of such court may, if he thinks fit, order that such document be stamped as he may direct; and on such document being
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stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

As an appeal under the Code of Civil Procedure can only be preferred in the form of a memorandum laid down in Order 41 rule 1 of the Code and further as the memorandum of appeal has to be stamped in accordance with the Court Fees Act it would appear that unless there were some saving provisions such a memorandum if not properly stamped could not be recei ved at all by the High Court when a litigant desires to file an appeal or a Special Appeal. The rules of the Allahabad High Court specified above are aimed at adjudication of any dispute or objection as to court-fee payable on a memorandum of appeal. When it is found that the court-fee paid is deficient, the court has power to allow time for the purpose of making the deficiency good. Even where limitation is about to expire and the time is too short to enable the appellant to make good the deficiency the court may allow the litigant time for the purpose. This shows that the court can keep on its file a memorandum of appeal although insufficiently stamped and the court will ordinarily allow an opportunity to the appellant to make good the deficiency and will not throw it out of hand. The Court Fees Act however lays an embargo on the court from receiving any document including a memorandum of appeal if it is not properly stamped. this provision of law was strictly construed in the case of Balkaran Rai v. Gobind Nath Tiwari(1) where the Allahabad High Court took the view that where a memorandum of appeal was insufficiently stamps when tendered was subsequently stamped sufficiently, the affixing %of the full stamps would not have a retrospective effect so as to validate the original presentation unless it has been done by order made under the second paragraph of s. 28 of the Court Fees Act. In that case the court allowed the Preliminary objection that as the making good of the deficiency had taken peace after the period of limitation there was before the court no valid appeal in regard whereof a decision could be given on merits.

The rigour of the law as interpreted in this decision was mitigated by the amendment of the Code of Civil Procedure of 1882 by the insertion of section 582-A by Act VI of 1892 reading

> "If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped, and the insufficiency of the stamp was caused by a mistake on the part of the appellant or applicant as to the amount of the requisite stamp, the
> (1) I.L.R. 12 Allahabad 129 F.B.
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> memorandum of appeal or application shall have the same effect, and be, as valid as if it had been properly stamped :
> Provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the

mistake to be fixed by the court."

The above provision was enacted in a slightly different form in the Code of 1908. S. 149 of the new Code reads:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

The above section therefore mitigates 'the rigour of s. 4 of the Court Fees Act and it is for the court in its discretion to allow a person who has filed a memorandum of appeal with deficient court-fee to make good the deficiency and the making, good of such deficiency cures the defect in the memorandum not from the time when it is made but from the time when it was first presented in court.

In our view in considering the question as to the maintain-ability of an appeal when the court-fee paid was insufficient to start with but the deficiency is made good later on, the provisions of the Court Fees Act and the Code of Civil Procedure have to be read together to form a harmonious whole and no effort should be made to give precedence to provisions in one over those of the other unless the express words of a statute clearly override those of the other.

Apart from the decisions bearing on the point, there can in our opinion, be no doubt that s.4 of the Court Fees Act is not the last word on the subject and the court must consider the provisions of both the Act and the Code to harmonise the sets of provisions which can only be done by reading s. 149 as a proviso to s. 4 of the Court Fees Act by allowing the deficiency to be made good within a period of time fixed by it. If the deficiency is made good no possible objection can be raised on the ground of the bar of limitation : the memorandum of appeal must be treated as one filed within the period fixed by the Limitation Act subject to any

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express provision to the contrary in that Act and the appeal must be treated as pending from the date when the memorandum of appeal was presented in court. In our view it must be treated as pending from the date of presentation not only for the purpose of limitation but also for, the purpose of sufficiency as to court-fee under s. 149 of the Code. If such a construction be accepted, the bar of s. 3 of the Abolition of Letters Patent Appeals Act of 1962 would not operate in the instant case.

In the case of Gavarnga Sahu v. Botokrishna Patro(1) a Full Bench of the Madras High Court was called upon to adjudicate on the question of the validity of a plaint presented on a paper insufficiently stamped to start with but where the deficiency was made good within the time given by the court under s.54(b) of the Code of Civil Procedure, 1882. Section 54(b) of the Code of 1882 is reproduced in Order 7, rule 11 of the Code of 1908. Under the said provisions a plaint has to be rejected if the relief sought is properly valued but the plant is 'Written upon a paper insufficiently stamped and the plaintiff on being required by the court to supply the requisite stamp within a time to be fixed by it fails to do so. The argument advanced in that case before the court

appears to have been to the effect that a plaint which was not sufficiently stamped within the period of limitation was not a valid plaint at all. In the order of reference the law on the subject was set forth in some detail and the learned referring judge opined that an insufficiently stamped plaint did not become a new plaint when the deficiency was supplied. The learned Judges of the Full Bench fully agreed with the view taken in the order of reference and with the reasons upon which it was based and merely added that s.149 of the Civil Procedure Code of 1908 was in accordance, with the view.

The Judicial Committee of the Party Council gave a decision much to the same effect in Faizullah v. Mauladad(2). In this case the suit was filed for accounts and the settlement of the sums due in connection with the affairs of a partnership firm, the plaintiffs valuing the suit at Rs. 3,000 for the purpose of court fees 'and asking for rendition of accounts and a decree for Rs. 3,000 with the statement that if more than that amount was found due the plaintiffs would pay an additional court-fee. The defendant asked for a decree in his own favour for Rs. 29,000/. The trial Judge passed a final decree in favour of the defendant for Rs. 19,991 and no sum was found due by him to the plaintiffs under their claim for Rs. 3,000. The judgment was appealed from by both parties. The plaintiffs-,appellants challenged the decree against them and maintained that not only that decree be set aside but one in their favour for Rs. 3,000/_ or less or more should be granted. They

(1) I.L.R. 32 Madras 305 F.B.

(2) A.I.R. 1929 P.C. 147.

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valued the appeal for purposes of court-fee at Rs. 19,991 and paid fees thereon amounting to Rs. 975. The question as to the invalidity of the appeal on the ground of insufficiency of court-fee was answered by the Judicial Committee by holding that the memorandum of appeal did state in terms of the Act (i.e. the Court Fees Act) the amount at which the relief was sought and that determined the appeal. According to the Judicial Committee even if it was held that the fee payable was insufficient it was the duty of the court in exercise of its discretion to give an opportunity to add to the amount lodged the extra sum of Rs. 70 or 80 required for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained. Referring to the provisions of s. 149 of the Code the Board observed that the discretion under that section "extended to the whole or any part of any fee prescribed and could be exercised at any stage in the case, while finally, upon the extra payment being made, the document is to have the same effect as if it had been paid in the first instance". The Board further held that as the decree of the Subordinate Judge was dated 24th March, 1924, the first appeal was on 27th May and the Second Appeal on 2nd June the time for limitation of the appeal being 90 days both appeals were within time. It was further held that the appeals were not a nullity and on the contrary they were documents duly presented to and accepted by the court, and as to the court fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document, namely, the memorandum of appeal, stands good from its date and the appeals are accordingly not time-barred

On a parity of reasoning it is difficult to see why if a memorandum of appeal insufficiently stamped is not to be

rejected as barred under the Limitation Act, why a different conclusion should flow as regards compliance with the Court Fees Act in view of the express provisions of s. 1 49 of the Code. In our opinion s. 1. 49 will cure the defect as from the date when the memorandum of appeal was filed alike for the purpose of Limitation Act and the Court Fees Act and the appeal must be treated as one pending on the 9th November 1962 and as such unaffected by s.3 of the U.P. Act of 1962.

In Wajid Ali v. Isar Bano(1) s. 149 was interpreted as a proviso to s. 4 of the Court Fees Act in order to avoid contradiction between the two sections. The court was however careful to lay down that discretion had to be exercised in allowing deficiency of court fees to be made good but once it was done a document was to be deemed to have been presented and received on the date on which it was originally filed. This was a case of plaint.

(1) A.I.R. 1951 Allahabad 4 F. B.
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In another Full Bench, Hari Har Prasad Singh v. Beni Chand(1) of the same, year dealing with a case of a memorandum of appeal which was found defective for want of proper court-fee and not admitted in view of s. 4 of the Court Fees Act but returned or rejected on that ground it was held that the memorandum could not be treated as an appeal. It was there observed

> "If s. 4 of the Act (i.e. Court Fees, Act) had stood by itself, an unstamped or insufficiently stamped memorandum of appeal, chargeable with fees, could not have been received by the High Court for any purpose..... There is nothing in s. 149 of the Code which overrides the provisions of s. 4, Court-fees Act,, it merely postpones the operation of that section for the time being. If the whole or part of the requisite court-fee is not paid within the time allowed by the Court, s. 149 of the Code ceases to have effect, and the Court is precluded from filing or recording an unstamped or insufficiently stamped memorandum of appeal in court."

According to Stroud, a legal proceeding is "pending" as soon as commenced, and until it is concluded i.e. so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein.

When the deficiency in the payment of court-fees is made good and the document or memorandum of appeal is to be given the force and effect which it would have had if there had been no deficiency, the appeal must be treated as pending on 12th November, 1962. In Nagendra Nath v. Suresh (2) which turned on the interpretation of Art. 182(2) of the Limitation Act of 1908 as regards the validity of an appeal presented in an irregular form the Board observed that although there was no definition of 'appeal' in the Civil Procedure Code any application by a party to an appellate court asking it to set aside or revise a decision of a Subordinate Judge, is an appeal within the ordinary acceptation of the term, and that it was no less an appeal because it was irregular and incompetent.

The words used in that judgment are no doubt of wide import. But however that may be in the case before us there can be no difficulty in holding that an appeal was presented in terms of Order 41, r. 1 of the Code inasmuch as all that this provision of law requires for an appeal to be preferred is the presentation in the form of a memorandum as therein prescribed. If the court fees paid thereon be insufficient

it does not cease to be a memorandum of appeal although the court may reject . If the deficiency in
(1) A.I.R. 1951 Allahabad 79. (2) A.I.R. 1932 P.C. 165.
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the fees is made good in terms of an order of the court, it must be held that though the curing of the defect takes place on the date of the making good of the deficiency, the defect must be treated as remedied from the date of its original institution.

In view of the above reasons, we find ourselves unable to concur in the judgment of the High Court. In the main judgment under appeal, the reasoning appears to be that the memorandum of appeal had no effect before the making good of the deficiency and as the same took place after 12th November 1962 the appeal was not saved by s. 3 (2) of the U.P. Act. The learned Chief Justice of the Allahabad High Court expressed the opinion that a memorandum of appeal barred by time stood on a footing different from the one in which there was deficiency in the court free paid. According to him under s. 3 of the Limitation Act it is an appeal that is dismissed and not a memorandum of appeal. When therefore s.4 of the Court Fees Act deals with a memorandum of appeal the consideration of the laws of limitation bears no analogy to a deficiency in court-fees. With due respect we are not impressed by the above reasoning. As already noted, although there is no definition of the word "appeal" in the Code of Civil Procedure, it can only be instituted by filing a memorandum of appeal. The filing of memorandum of appeal therefore brings an appeal into existence; if the memorandum is deficient in court-fees, it may be rejected and if rejected, the appeal comes to an end. But if it is not rejected and time is given to the appellant to make up the deficiency and this opportunity is availed of, s. 149 of the Code expressly provides that the document is to have validity with retrospective effect as if the deficiency had been made good in the first instance. By reason of the deeming provision in s. 149 the memorandum of appeal is to have full force and effect and the appeal has to be treated as one pending from the date when it was before the Stamp Reporter and the deficiency noted therein.

In the result, the appeal must be allowed with a direction that the High Court should hear the Special Appeal instituted on the 9th November, 1962. The costs of this appeal will abide by the decision of the Special Appeal.

G.C. Appeal allowed.
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