Parties will be at liberty to lead such further evidence on all matters sent back for reconsideration as they think fit. In the circumstances we order parties to bear their own costs.

Appeal allowed.

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Birla Cotton Spg. & Wvg. Mills v. Workmen

Wanchoo J.

THAKUR SUKHPAL SINGH

v.

THAKUR KALYAN SINGH

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May 2.

(J. L. KAPUR, K. C. DAS GUPTA and RAGHUBAR DAYAL, JJ.)

Appeal—Appellant appearing at hearing but not addressing court—Dismissal for default—Legality of—If Court bound to decide appeal on merits after perusal of record—Refusal of adjournment—Interference by appellate court—Code of Civil Procedure, 1908 (Art. V of 1908), O. 41, rr. 16, 30, 31, 32.

The appellant's appeal was listed for hearing before the High Court four times during the course of about a year. On the last occasion the appellant's counsel stated that he had no instructions. The appellant who was present asked for an adjournment to arrange for the fees and to instruct another counsel. The adjournment was refused and upon the appellant expressing inability to address the court the High Court dismissed the appeal for default. The appellant contended that the High Court was bound to dispose of the appeal on merits on the material before it.

Held, that the High Court had the power to dismiss the appeal without considering the merits. An appellate court was bound to consider only the submissions made by the appellant and if no submissions were made by him, it was not bound to look into the record ; it could simply say that the appellant had not urged anything to show that the judgment and decree under appeal were wrong.

Mt. Fakrunisa v. *Moulvi Izarus*, A. I. R. 1921 P. C. 55, relied on.

Mathura Das v. *Narain Das*, I. L. R. 1940 All. 220, approved.

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Sangram Singh v. *Election Tribunal. Kotah, Bhurey Lal Baya*, (1955) 2 S.C.R. 1, referred to.

Baldeo Prasad v. *Kunwar Bahadur*, (1912) I.L.R. 35 All, 105; *Syed Mohammadi Husain* v. *Mt. Chandro*, A.I.R. 1937 All. 284; and *Barkat Ali* v. *Gujrat Municipality*, A.I.R. 1937 Lah. 691, not approved.

Per Kapur and Dayal, JJ.—The High Court was right in refusing the application for adjournment. The appellant had ample time and opportunity to instruct his counsel. It was within the discretion of the High Court to allow or not to allow the adjournment and the Supreme Court ordinarily did not interfere with such discretionary orders.

Per Das Gupta, J.—The High Court was wrong in refusing to grant the adjournment. When the counsel engaged refused to address the court it was next to impossible for the client to engage another counsel on the spot to argue the case and impossible for such counsel to address the Court. It is also not reasonable to expect the lay client to argue the appeal. Though an appellate court should not lightly interfere with the discretion exercised by a court in refusing a prayer for adjournment it could interfere if the refusal was not in the interests of justice.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 469 of 1960.

Appeal by special leave from the judgment and decree dated January 5, 1955, of the former High Court of Madhya Bharat, Gwalior, in Civil First Appeal No. 11 of 1950.

K. L. Gosain. P. W. Sahasrabudhe and *A. G. Ratnaparkhi*, for the appellant.

K. L. Mehta for the respondent No. 1.

1962. May 2. The Judgment of Kapur and Dayal, JJ., was delivered by Dayal, J., Das Gupta, J., delivered a separate Judgment.

Raghubar Dayal J.

RAGHUBAR DAYAL, J.—This appeal, by special leave, against the decree of the Madhya Bharat High Court dated January 5, 1955, raises the

question whether the Appellate Court is bound to decide an appeal on merits on the basis of the material on record when the appellant appears at the hearing but does not address the Court.

The appellant's first appeal against the respondents came up for hearing before the High Court on January 4, 1955. Mr. Mungre, who was the counsel for the appellant, stated that he had no instructions to represent the appellant. The appellant did not deny this fact. His application for adjournment was rejected. The appellant was not prepared to address the Court. The High Court therefore dismissed the appeal, relying on the decision in *Mathura Das* v. *Narain Das* (1), for default, with costs.

The contention raised for the appellant is that the High Court had no jurisdiction to decide the appeal fixed for final hearing without considering the proceedings of the Trial Court and the memorandum of appeal before it and that the right of the appellant to have the case decided on merits on the material before the Court was not dependent on his addressing the Court. Reliance is placed on the provisions of O.XLI, rr. 30, 31 and 32, Code of Civil Procedure. We do not agree with this contention.

Order XLI, r. 16 of the Code provides the procedure to be followed by the appellate Court on the hearing of an appeal which has not been dismissed under sub-r. (1) of r. 11 of that order. Rule 16 reads:

> "(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(1) I. L. R. 1 49 All. 120: A. I. R. 1 40 All. 248.

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(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply."

It is clear from sub-r. (1) that it is the duty of Appellate Court to hear the appellant in support of the appeal. This however, does not mean that the appellate Court cannot decide the appeal if the appellant does not make his submissions to the Court showing that the judgment and decree under appeal were wrong. The appellate Court is not to force the appellant to address it. It can, at best, afford him an opportunity to address it. If the appellant does not avail of that opportunity, the appellate Court can decide the appeal. Sub-r. (2) indicates that the appeal can be dismissed without hearing the respondent. The appellate Court will do so if it was not satisfied that the judgment under appeal was wrong.

Learned counsel for the appellant does not dispute these propositions. His contention, however, is that even if the appellant does not address the Court, the Court must go through the record and the judgment under appeal and come to its own conclusion about the correctness of the decision under appeal. Support for this contention is sought from the provisions of r. 32 of O.XLI which reads:

"The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination;

(b) the decision there on;

(c) the reasons for the decision; and,

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

It is urged that the judgment of the appellate Court has to state the points for determination, the decision thereon and the reasons for the decision, and these the appellate Court cannot do till it has gone through the record and considered the entire matter on record including the judgment under appeal. The matters have to be in the judgment when points in dispute between the parties are raised before the appellate Court. If no such points are raised for consideration, the appellate judgment cannot refer to the points for determination in its judgment and, when there be no points raised for determination, there can be no decision thereon and no reasons for such decision. Such is the position when the appellant does not address the Court and does not submit anything against the decision of the Court below. The memorandum of appeal does contain the grounds of objection to the decree appealed from, without any argument or narative as laid down in sub-r. (2) of r. 1, O.XLI. Such grounds cannot take the place of the points for determination contemplated by r. 31. Not unoften certain grounds of objection raised in the memorandum of appeal are not argued or passed at the hearing and in that case such grounds cannot be taken to be the points for determination and are rightly not discussed in the judgment at all. It is for the appellant to raise the points against the judgment appealed from. He has to submit reasons against its correctness. He cannot just raise objections in his memorandum of appeal and leave it to the appellate Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the appellate

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Court itself to find out that the points for determination can be and then proceed to give a decision on those points.

The Privy Council observed in *Mt. Fakrunisa* v. *Moulvi Izarus* (1)

> "In every appeal it is incumbent upon the appellants to show reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered, to justify the alteration of the judgment that stands. Their Lord-ships are unable to find that this duty has been discharged."

With respect, we agree with this and hold that it is the duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the appellate Court can fully contain all the various matters mentioned in r. 31, O.XLI.

This Court observed in *Sangram Singh* v. *Election Tribunal, Kotah, Bhurey Lal Baya* (2) at page 8:

> "Now a code of procedure must be regarded as such: It is *procedure*, something designed to facilitate justice and further its ends: ... Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both* sides) lest the very means designed for the furtherance of justice be used to frustrate it."

(1) A.I.R. 1921 P.C. 55, 56. (2) (1955) 2 S.C.R. 1.

The provisions of r.31 should therefore be reasonably construed and should held to require the various particulars to be mentioned in the judgment only when the appellate has actually raised certain points for determination by the appellate Court, and not when no such points have been raised as had been the case in the present instance when the appellant did not address the Court at all.

The provisions of r.30 of O.XLI support our construction of r.31. This rule reads:

> "The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceeding, whether on appeal or in the Court from whose decree the appeal is preferred to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders."

It is to be noticed that this rule does not make it incumbent on the appellate Court to refer to any part of the proceedings in the Court from whose decree the appeal is preferred. The appellate Court can refer, after hearing the parties and their pleaders, to any part of these proceedings to which reference be considered necessary. It is in the discretion of the appellate Court to refer to the proceedings. It is competent to pronounce judgment after hearing what the parties or their pleaders submit to it for consideration. It follows therefore that if the appellant submits nothing for its consideration, the appellate Court can decide the appeal without any reference to any proceedings of the Courts below and, in doing so, it can simply say that the appellants have not urged anything which would tend to show that the judgment and decree under appeal were wrong.

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In this connection, reference may be made to the provisions of s.423, Criminal Procedure Code, which provides the procedure to be followed by the appellate Court in disposing of criminal appeals. The relevant portion of its sub-s.(1) is :

> "The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411A, sub-section (2), or section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may —
>
> x x x x x "

The appellate Court is thus enjoined to pass the final order in the appeal after it had perused the record and heard the appellant or his pleader and the Public Prosecutor. The perusal of the record is enjoined on the Court. The Court cannot dispose of the appeal merely after hearing the appellant or his pleader and the Public Prosecutor. It has to peruse the record. In this respect, these provisions are different from the provisions of r.30, O.XLI, C.P.C. and the Legislature specifically requires the perusal of the record by the appellate Court before deciding the appeal. It does not so provide in r.30, O.XLI, C.P.C.

The view that we take, also finds support from the object which the Legislature probably had in providing that the judgment must contain the matters mentioned in r.31. The object seems to be that the parties should know for what reasons the decision has gone against them and thereby be in a position to decide whether they should go up

in appeal or revision against the judgment. If they do not know the decision and the reasons therefore they cannot make up their mind and, even if they have no intention to go up in appeal, they may not even be satisfied about the Court considering the matter for determination properly.

Another object can be that the second appellant Court or the revision be in a position to know why the Courts below came to a certain conclusion. Such knowledge is undoubtedly of great assistance to the Court. If therefore, no contention is raised by the appellant in the first appellate Court, no question of raising any contention in the next appellate Court arises, and therefore, the necessity of writing a complete judgment contemplated by r.31 does not arise.

This matter has been before a few High Courts for decision and the expression of opinion had not been uniform.

In *Baldeo Prasad* v. *Kunwar Bahadur* (1) of the two appellants, one appeared at the date of hearing and in the absence of his counsel, made an application for adjournment which was rejected, and when asked to address the Court, failed to do so saying that he had nothing to say, the appellate Court dismissed the appeal as it was not supported. The other appellant, Musammat Ram Piari, applied for the restoration of the appeal. It was rejected. Two appeals were taken to the High Court and the High Court allowed the appeals and said :

> "It is quite clear that the learned District Judge is wrong. To ask a non-legal appellant to argue his case is asking for what is practically impossible. The application for adjournment shows clearly and distinctly that he do not wish to drop his appeal. He wished di

(1) (1912) I.L.R. 35 All. 105.

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press it. The bare fact that he could not argue it did not justify the District Judge in dismissing it. It was necessary for him under the circumstances to consider the grounds of appeal and to decide the case on the merits. This he has not done."

This may be a good order on general grounds. But no attempt has been made to justify it on the basis of the provisions of the Code of Civil Procedure.

In *Syed Mohammadi Husain* v. *Mt. Chandro* (1) Niamatullah J., said :

> "After refusing to adjourn the case, lower appellate Court was bound to decide the appeal before it. The inability of the pleader to argue did not relieve the Court of the necessity of applying its mind to the facts of the case and to decide it on its merits. A Court is not entitled to dismiss an appeal for 'want of prosecution' only because the appellant, if he appears personally, or his pleader, who represents him, is, for any reason, unable to argue the appeal. The Court should proceed in the manner laid down by 0.41, rr. 30 and 31, Civil P.C....."

This was a case in which the appeal was dismissed for want of prosecution and the judgment therefore dealt with the correctness of the appellate Court in dismissing the appeal for want of prosecution when the appellant, though present in Court, was unable to argue the appeal. This case, however, does not indicate how compliance can be made with the provisions of rr. 30 and 31 of O. XLI when the appellant submits nothing to the Court for consideration. This case was considered and over-ruled by the Division Bench of the Allahabad High Court in

(1) A.I.R. 1937 All. 284, 285 . 1937 All. L.R. 439.

Mathura Das v. *Narain Das* (1) on which the High Court of Madhya Bharat relied. This case held that in such circumstances it was sufficient for the Court to pass an order of dismissal for default which did not necessarily mean that the appeal was dismissed for default of appearance but would mean that it was dismissed for default of proof.

In *Barkat Ali* v. *Gujrat Municipality* (2) observations similar to those made in *Baldeo Prasad* v. *Kunwar Bahadur* (3) were made. No reference was made to the provisions of the Code of Civil Proceedure in that connection. Rather, it appears from the following observation that the view was expressed on general grounds :

> "The case is an important one from the point of view of all concerned and it is not desirable that a case of this description should go practically in default".

There is little support for this basis of decision in the Code of Civil Procedure and the Privy Council has pronounced against it. We find it difficult to uphold the view that even when no arguments are urged and no reasons put forward in arguments against the correctness of the decision appealed against, the appellate Court should peruse the record and find out for itself whether the judgment is right or wrong.

We therefore repel the contention for the appellant that the High Court had to decide the appeal after going through the record of the case and the judgment of the Court below and must have complied with the provisions of r. 31 of O.XLI, C.P.C., when the appellant did not address the Court.

(1) I.L.R. 1940, All. 220 : A.I.R. 1940, All 248.
(2) A I.P . 1937 Lah. 691. (3) (1912) I.L.R. 35 All. 105.

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Another point urged for the appellant is that the High Court should not have rejected the appellant's application for adjournment of the case on January 4, 1955. It is a matter within the discretion of the Court to allow an adjournment and such a discretionary order is, ordinarily, not a matter for the consideration of this Court in an appeal under Art. 136 of the Constitution. The petition for special leave did not mention this contention among the grounds of appeal. No special reasons exist for our entering into this contention. The order under appeal gives adequate reasons for rejecting the application for adjournment.

The adjournment was sought on the ground that the appellant could not arrange for the payment of fees to his counsel and to instruct him, as he got intimation of hearing of the appeal three days before the date of hearing. The application for adjournment does not form part of the record prepared in this Court. The learned Judges of the High Court were of opinion that the appellant had sufficient time to instruct his counsel and to make arrangements for making the necessary payment to him. The appeal was posted for hearing on Feb. 23, 1954, practically a year before the date of hearing on which the appellant was refused adjournment of the hearing. Between February 23, 1954 and January 4, 1955, the case was also put up for hearing on April 5, and May 4, 1954. In the circumstances, the appellant ought to have completed his instructions to the counsel prior to February 23, 1954. He failed to do so and failed to complete the instructions till January 4, 1955. In the circumstances, we are of opinion that the exercise of discretion by the Court below was not in any way capricious or arbitrary and therefore is not to be interfered with.

We therefore see no force in this appeal and dismiss it with costs.

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DAS GUPTA, J.—On the main question of law raised in this case, viz., whether the appellate Court is bound to decide an appeal on merits on the basis of the material on the record when the appellant appears at the hearing but does not address the Court, I agree, for the reasons mentioned in the judgment of my learned brother Mr. Justice Raghubar Dayal J. that the answer must be in the negative.

In my opinion, however, there is considerable force in the further submission made on behalf of the appellant that the refusal of the appellant's prayer for adjournment on the January 4, 1955 has resulted in a denial of justice to him.

It has been rightly stressed on behalf of the respondents that the conduct of the proceedings before a court must necessarily be left to the court itself and an appellate court should not lightly interfere with the discretion exercised by a Court in refusing a prayer for adjournment. To say, however, that a Court hearing an appeal shall in no circumstances interfere with an order made by the Court below refusing a prayer for adjournment is to be the slave of a formula. But you cannot do justice by formulee only.

The circumstances under which the prayer for adjournment was made in this case are peculiar. It appears that after numerous adjournments in the hearing of appeal before the High Court, some of which were given at the instance of the appellant, some at the instance of the respondents and some were necessitated by the Court being otherwise engaged, the appeal finally came up for hearing before the High Court on January 4, 1955. On that date the Counsel of the present appellant, who was also the appellant before the High Court, informed the Court that he had no instructions to represent the appellant. Apparently, the Counsel had not

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received his fees and so was not prepared to argue the case on behalf of the appellant. The appellant who was present in person, appears to have admitted that he had not been able to pay the fees but he wanted some time so that he could make the necessary arrangements. The High Court refused this prayer for time and appears to have asked the appellant whether he would argue the case himself. The appellant expressed his inability to address the Court.

It appears to me that when a Counsel engaged by a party refuses to address the court on behalf of his client it is next to impossible for a client to engage another Counsel on the spot to argue the case and ordinarily, impossible for the Counsel thus engaged to address the Court then and there. It is not also reasonable, in my opinion, to expect that a lay client should be able to argue his appeal. To ask the appellant personally, in the circumstances like these, to argue the appeal is to ask for the impossible. It appears to me to be neither fair nor just that when a Counsel suddenly withdraws from a case, the lay client should be asked to argue the appeal himself. Justice, in my opinion, requires that in such a case the client should be given some time—however short—to engage a Counsel.

I am constrained to think that the action of the High Court in refusing the appellant's prayer for time to engage a counsel and to call on him to argue the case himself was not in the interests of justice.

In the peculiar circumstances of the case, I would therefore allow the appeal and remand the case to the High Court for a proper hearing of the appeal before it.

BY COURT. In accordance with the opinion of the majority, the appeal is dismissed with costs.