

GHANSHYAM DASS GUPTA

A

v.

MAKHAN LAL

(Civil Appeal No. 5950 of 2012)

AUGUST 21, 2012

B

**[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]**

*Code of Civil Procedure, 1908 – Order 41 Rule 17 (1) Explanation – Scope of – Dismissal of appeal on merit by High Court, when there was no appearance on behalf of the appellant – Held: In view of the explicit language of Explanation to Order 41 Rule 17(1), High Court could not have gone into the merits of the case, if there was no appearance on behalf of the appellant – Direction to High Court to dispose of the appeal in accordance with law.*

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*Abdur Rahman and Ors. vs. Athifa Begum and Ors. (1996) 6 SCC62: 1996 (5) Suppl. SCR 391 – relied on.*

**Case Law Reference:**

**1996 (5) Suppl. SCR 391 Relied on Para 9**

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**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5950 of 2012.**

From the Judgment & Order dated 13.1.2012 of the High Court of Delhi at New Delhi in RFA No. 664 of 2003.

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Rakesh Dahiya, Gagan Deep Sharma, Preeti Singh, Vikram Gulia for the Appellant.

The following Order of the Court was delivered

**ORDER**

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Leave granted.

1. The question that arises for consideration in this case is whether the High Court was justified in deciding the appeal on merits when there was no appearance on behalf of the

A appellant, in view of the explanation to Order 41 Rule 17(1) of the Code of Civil Procedure. (CPC).

2. The appellant herein had engaged a lawyer for conducting his appeal before the Delhi High Court. The appeal was admitted and was pending for adjudication. Later, the lawyer of the appellant was elevated as a Judge of the Delhi High Court and hence he returned the files to the appellant. The appellant later engaged another lawyer to conduct the case. However, due to the mistake by the clerk, the Vakalatnama of that advocate could not be filed and hence the name of the newly engaged lawyer did not figure in the cause list. The appeal came up for final hearing on 13.1.2012. representation was made by a lawyer on behalf of the previous lawyer stating that the case files had already been returned to the party. Consequently, there was no effective appearance on behalf of the appellant before the High Court. In fact, there was no appearance on behalf of the respondent as well.

3. Learned Judge, however, proceeded to consider the appeal on merits, without the assistance of learned counsel on either side. By a detailed judgment, the appeal was dismissed on 13.1.2012 stating as follows:

“6. In view of the above, there is no merit in the appeal inasmuch as not only because the appellant/defendant was guilty of breach of contract but also because the appellant/defendant did not plead and prove the orfeiture of earnest money or any loss having been caused to him. The appellant/defendant was, therefore, liable to refund the amount which he received under the Agreement to Sell.

7. In view of the above, there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs.”

4. Aggrieved by the judgment of the High Court, this appeal has been preferred.

5. Shri Rakesh Dahiya, learned counsel appearing on

behalf of the appellant, submitted that the High Court was not justified in deciding the appeal on merits since there was no representation on behalf of the appellant. Learned counsel pointed out that the only course open to the Court was either to dismiss the appeal on default or adjourn the same, but not to decide the matter on merits, in view of the explanation to Order 41 Rule 17(1) CPC.

6. Learned counsel appearing on behalf of the respondent supported the judgment of the High Court contending that the appeal was of the year 2003 and came up for final hearing after a period of nine years, and the High Court was justified in deciding the matter on merits even if there was no appearance on behalf of the appellant.

7. We are, in this case, called upon to consider whether the High Court was justified in deciding the appeal on merits in the absence of any representation on behalf of the appellant, in view of Explanation to Order 41 Rule 17(1) CPA. The said provision is given below for easy reference:

*“Rule 17. Dismissal of appeal for appellant’s default.- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may take an order that the appeal be dismissed.*

*Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.”*

8. Rule 17(1) of Order 41 deals with the dismissal of appeal for appellant’s default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. Prior to 1976,

- A conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The Legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left un-represented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.

9. We may, in this connection, refer to a judgment of this Court in *Abdur Rahman and Others v. Athifa Begum and Others* (1996) 6 SCC 62, wherein the scope of explanation to Rule 17(1) of Order 41 CPC came up for consideration. While interpreting the said provision, this Court took the view that the High Court could not go into the merits of the case if there was no appearance on behalf of the appellant. We also endorse that view.

10. For the reasons stated above, we are inclined to allow this appeal and set aside the judgment of the High Court and restore FRA No. 664 of 2003 and direct the High Court to dispose of the same in accordance with law. However, there will be no order as to costs.

H K.K.T.

Appeal allowed—