

Before Ajay Kumar Mittal, J.

SOHAN LAL—Appellant

versus

HARI RAM—Respondent

R.S.A. No. 146 of 1991

19th January, 2005

Code of Civil Procedure, 1908—O.XLI Rl. 17(1)—Suit of plaintiff decreed by the trial Court—Appeal by defendant against the order of trial Court filed—Ist appellate Court fixing date after admission of the appeal—Neither appellant nor his counsel put appearance before Ist Appellate Court on the date fixed—Ist Appellate Court dismissing the appeal on merits—Challenge thereto—Rl. 17(1) of O.XLI CPC provides that in the absence of appellant, the appellate Court can adjourn the appeal or dismiss it in default but has no jurisdiction to dismiss the same on merits—Appeal allowed, judgment & decree passed by Ist Appellate Court set aside while remanding the matter back to decide the same afresh in accordance with law.

Held, that a bare reading of Rule 17(1) of Order XLI, CPC clearly shows that where the appellant is absent when the appeal is called for hearing, the appellate Court can adjourn the appeal or dismiss the same in default but has no jurisdiction to dismiss the same on merits. This has been incorporated as the appellant gets an opportunity to explain his absence or that of his counsel that the same was for sufficient cause and, therefore, the dismissal of the appeal in default could be recalled.

(Para 5)

Sanjay Mittal, Advocate, *for the appellant.*

Prabodh Mittal, Advocate, *for the respondent.*

JUDGMENT

AJAY KUMAR MITTAL, J.

(1) The controversy involved in the present Regular Second Appeal is whether in the absence of the defendant—appellant or his counsel on the date of arguments, could the Appellate Court dismiss the appeal on merits.

(2) This is defendant's appeal arising from a suit for declaration and in the alternative for possession filed by the plaintiff—respondent. The learned trial Court,—*vide* judgment and decree dated 30th January, 1987 decreed the suit of the plaintiff-respondent. The defendant-appellant questioned the said judgment and decree and preferred an appeal before the learned District Judge, Narnaul. The appeal was admitted for hearing on 16th October, 1987. The case was fixed on 5th June, 1990 for arguments when neither the appellant—defendant nor his counsel appeared and the Lower Appellate Court dismissed the appeal of the defendant—appellant on merits. The defendant-appellant has assailed the judgment and decree dated 5th June, 1990 in this Regular Second Appeal.

(3) Shri Sanjay Mittal, learned counsel for the appellant submitted that the judgment and decree of the learned Ist Appellate Court dated 5th June, 1990 dismissing the appeal on merits cannot be sustained in law as according to him, under Order XLI Rule 17 (1) of the Code of Civil Procedure, the Ist Appellate Court had no jurisdiction to dismiss the appeal on merits on non-appearance of the appellant or his counsel. According to the learned counsel, the Appellate Court could have dismissed the appeal in default. He relied upon the cases reported in **Abdur Rahman and others versus Athifa Begum and others (1)** and **M/s Oriental Sales versus Bank of India, (2)** in support of his submissions.

(4) Order XII Rule 17(1) of the Code of Civil Procedure reads as under :—

“17. Dismissal of appeal for appellant's default—

- (1) Where on the day fixed, or 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 make 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.”

(1) (1996) 6 S.C.C. 62

(2) 1999 (1) R.C.R. (Civil) 677

(5) A bare reading of the above rule clearly shows that where the appellant is absent when the appeal is called for hearing, the Appellate Court can adjourn the appeal or dismiss the same in default but has no jurisdiction to dismiss the same on merits. This has been incorporated as the appellant gets an opportunity to explain his absence or that of his counsel that the same was for sufficient cause and, therefore, the dismissal of the appeal in default could be recalled. The explanation to the aforesaid sub-rule leaves no manner of doubt for the interpretation as placed above. The Hon'ble Supreme Court while interpreting the aforesaid provision in **Abdul Rehman's case** (*supra*) has held as under :—

“The respondents learned counsel has been confronted with the proposition that though the High Court could have dismissed the appeal in default in the absence of the appellants counsel, it could not have adverted to the merits of the case. Here, the High Court has recorded that all relevant aspects of the matter have been taken into account in order to held that there was no available ground for interference with the decision of the trial court. This was an exercise against which the High Court should have been well advised not to indulge in at the stage of (sic of) Order 41 Rule 17 CPC. The Explanation to Order 41 Rule 17 (1) CPC says that nothing in this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits. The High Court having transgressed that limit, we have therefore no option but to allow the appeal, set aside the impugned judgment and order of the High Court and put the matter back to its file for fresh disposal in accordance with law.”

(6) The Single Bench of this Court in *M/s Oriental Sales's case* (*supra*) following the dictum of the Apex Court has held that the Appellate Court should not decide the appeal on merits in the absence of the appellant or his counsel. In view of above, the judgment and decree dated 5th June, 1990 passed by the learned Appellate Court cannot be legally sustained.

(7) Consequently, this appeal is allowed. The judgment and decree dated 5th June, 1990 passed by the learned Appellate Court are set aside and the matter is remanded back to the Court of learned District Judge, Narnaul to decide the same afresh, in accordance with law.

(8) Since the matter is old relating to a suit filed in 1980, therefore, the Appellate Court shall dispose of the appeal on or before 31st July, 2005.

(9) No costs.

(10) Parties through their counsel are directed to appear before the Learned Appellate Court, Narnaul on 10th March, 2005.

R.N.R.

Before Amar Dutt and Surya Kant, JJ.

P.K. KHANNA,—*Petitioner*

versus

NATIONAL FERTILIZERS LTD. & ANOTHER,—
Respondents

C.W.P. No. 10895 of 2000

12th March, 2005

Constitution of India, 1950—Art. 226—NFL Employees (Conduct, Discipline and Appeal) Rules—Rl. 29—Allegations of fraud & dishonesty against an officer of NFL—Enquiry Officer finding the officer guilty of the charges—Petitioner submitting detailed objections against the findings of the Enquiry Officer—Disciplinary authority merely agreeing with the conclusions arrived at by Enquiry Officer without discussing the material on record—Appellate authority confirming the penalty of removal from service—Rl. 29 mandates that the prescribed penalties can be imposed by the disciplinary authority “for good and sufficient reasons”, thus, casts a duty upon it to sequester the objections, if any, put forth by the employee against the enquiry report—It is imperative upon the disciplinary authority to meet out the challenge/objections submitted by the employee and to give reasons in support of its conclusions—Disciplinary authority merely making a mechanical statement that it finds itself in complete agreement with the enquiry report—Non-observance of principles of natural justice, fair and just play—Appellate authority also failing to meet the challenges put forth by the petitioner in his appeal—Petition allowed, orders of removal of petitioner and orders of appellate authority quashed while granting liberty to Disciplinary authority to pass fresh orders in accordance with law.