

**HIGH COURT OF JUDICATURE AT ALLAHABAD
(LUCKNOW)**

AFR
Reserved

Case :- SECOND APPEAL No. - 247 of 2015

Appellant :- Janki Prasad

Respondent :- Sanjay Kumar And Ors.

Counsel for Appellant :- S.Mohd Kazim

Counsel for Respondent :- Pratap Krishan

Hon'ble Salil Kumar Rai,J.

Heard the counsel for the appellant and the counsel for the respondents.

The present Second Appeal has been filed against the judgment and decree dated 23.9.2015 passed by the Special Judge (Prevention of Corruption Act), Court No. 2/Additional District Judge, Lucknow (hereinafter in short referred to as 'lower appellate Court') dismissing the *Regular Civil Appeal No. 5000248 of 2013 (Janki Prasad vs. Sanjay Kumar and others)* filed by the appellant. The records of the case indicate that the appeal has not yet been admitted for final hearing. By order dated 4.12.2015, the records of the case were summoned and have been received by this Court. In the circumstances, with the consent of the counsel for the parties, the Court proceeded to hear the present Second Appeal on admission and also for final hearing.

The facts relevant for the decision of the Second Appeal are that the respondents instituted Original Suit No. 36 of 2010 praying for a decree of permanent prohibitory injunction restraining the appellant from interfering in their peaceful possession over the suit-property. The respondents were the

plaintiffs in the Suit and the appellant was the defendant in the Suit. The Trial Court i.e., the Additional Civil Judge (Junior Division), Court No. 35, District Lucknow vide its judgment and decree dated 29.8.2013 decreed Original Suit No. 36 of 2010. Against the judgment and decree dated 29.8.2013 passed by the Trial Court, the defendant-appellant filed Regular Civil Appeal No. 5000248 of 2015. The records of the lower appellate Court show that by order dated 18.8.2015 passed by the District Judge, Lucknow the case was transferred to the Special Judge (Prevention of Corruption Act), Court No. 2/Additional District Judge, Lucknow and the same was received by the said Court on 25.8.2015. The appeal was called out for hearing on 8.9.2015 on which date the hearing of the appeal was adjourned on the request of the counsel for the appellant and 15.9.2015 was fixed for hearing. On 15.9.2015, the lower appellate Court recorded, on its order-sheet, that the counsel for the parties were present but despite repeated requests they were not arguing the case and the judgment in the appeal was reserved to be delivered on 23.9.2015. By order dated 15.9.2015, the lower appellate Court also permitted the parties to argue the case on any date till two days before the pronouncement of judgment. The order-sheet does not show that the case was argued by the parties as permitted by order dated 15.9.2015. Vide its judgment dated 23.9.2015, the lower appellate Court dismissed the appeal on merits. In its judgment dated 23.9.2015 also the lower appellate Court has recited the fact that the counsel for the parties were present on the date fixed for hearing of the case but despite repeated requests they did not argue the case. The judgment also recites the fact that the records of the

Trial Court had been received by the lower appellate Court and the same were perused by the lower appellate Court.

The lower appellate Court framed point for determination in appeal and after considering the appeal on merits held against the appellant. In its impugned judgment, the lower appellate Court has extensively referred to the evidence and pleadings of the parties filed in the Trial Court.

The following substantial question of law arises in the present appeal and the appeal was heard on the said question of law:

“Whether the Explanation to Order XLI Rule 17 CPC would apply in a case where, when the appeal is called out for hearing by the appellate Court, the counsel for the appellant though physically present in the Court, refuses to argue the same for any reason and whether in such circumstances, the appellate Court has the power to decide the appeal on merits after considering the records of the case?”

It was argued by the counsel for the appellant that the recital dated 15.9.2015 in the order-sheet of the appeal and in the judgment dated 23.9.2015 to the effect that the counsel for the parties had not argued the case despite repeated requests, amounts to refusal by the counsel to argue the case and, in the circumstances the lower appellate Court had no jurisdiction to decide the appeal on merits but in light of the Explanation to Order XLI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter in short referred to as ‘CPC) could have only dismissed the appeal in default. It was argued that the appearance of the counsel referred in Order XLI Rule 17 CPC means ‘appearance to argue the appeal’ and if the counsel for the appellant refuses to argue the case or does not argue the case, even though physically present in the Court when the case is called on for hearing, the appellate Court has no jurisdiction to consider and

decide the appeal on merits. It was argued that for the aforesaid reason the judgment dated 23.9.2015 passed by the lower appellate Court is without jurisdiction and liable to be set-aside. In support of his arguments, the counsel for the appellant has relied on the judgment of the Supreme Court reported in ***Ghanshyam Das Gupta versus Makhan Lal; [2012 (30) LCD 1806]***.

Rebutting the arguments of the counsel for the appellant, the counsel for the plaintiffs-respondents has argued that from the recitals in the order-sheet as well as in the judgment of the lower appellate Court, it was evident that the counsel for the appellant was physically present and appeared when the appeal was called out for hearing on 15.9.2015 but did not argue the appeal, therefore, the Explanation to Order XLI Rule 17 CPC was not applicable because the provision does not prohibit the Court from considering and deciding the appeal on merits if the counsel for the appellant is present but does not argue the case. It was argued that in the circumstances the appellate Court was not bound to dismiss the appeal in default, but had a discretion to either dismiss the appeal in default or pass any other order, including an order deciding the appeal on merits. In support of his contentions, the counsel for the respondents relied on the judgment of the Supreme Court reported in ***Mohammad Khalil versus Kamaruddin; (1996) 5 SCC 625*** and the judgment of this Court reported in ***Smt. Binda Bau & Ors versus Board of Revenue & Ors; AIR 2007 ALLAHABAD 10***.

I have considered the rival submissions of the counsel for the parties and perused the records.

Before proceeding further, it would be apt to reproduce Order XLI Rule 17 CPC:

“ORDER XLI APPEALS FROM ORIGINAL DECREES. 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 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.]

(2) Hearing appeal ex parte.—Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.”

The Explanation to Order XLI Rule 17 (1) CPC which provides that nothing in the sub-rule shall be construed as empowering the Court to dismiss the appeal on merits was added by Act No. 104 of 1976. Before 1976, there was a difference of opinion between the High Courts regarding the powers of the appellate Court under Order XLI Rule 17 (1) CPC. Certain High Courts were of the opinion that if the counsel for the parties were not present when the appeal is called on for hearing, the appellate Court did not have the jurisdiction to decide the appeal on merits but could only dismiss the same in default or adjourn the case, while some High Courts were of the opinion that under Order XLI Rule 17 CPC, the appellate Court had a discretion to either dismiss the appeal in default or to decide the same on merits in the absence of the appellant and his counsel. The Allahabad High Court subscribed to the second view and in this context reference is made to the Full Bench decision of the Allahabad High Court in *Babu Ram versus Bhagwan Din and another; AIR 1966 All 1 (FB)*.

Subsequently, by Act No. 104 of 1976, CPC was amended and the Explanation was added in Order XLI Rule 17 (1) CPC and now, the appellate Court has no jurisdiction to decide the appeal on merits if the counsel for the appellant is not present when the appeal is called on for hearing. However, the question involved in the present appeal is as to whether the Explanation to Order XLI Rule 17 (1) CPC would apply when the counsel for the appellant, even though physically present in the Court while the appeal is called on for hearing, either refuses or for any other reason, does not argue the appeal on merits.

For all practical purposes, there is no difference between the counsel for the appellant being not present in the Court when the case is called on for hearing and, even though physically present when the case is called on for hearing, but refusing to argue the appeal. In both situations the appellant, i.e., the litigant in the case, fails to avail the opportunity of hearing given to him. In both the situations, the appellate Court is deprived of the assistance provided by the counsel as required under Order XLI Rule 16 CPC. It is the assistance given by the counsel which helps the appellate Court in framing the points for determination stipulated in Order XLI Rule 31 CPC. The fact that there is no difference between the physical absence of the counsel for the appellant when the appeal is called on for hearing and his refusal to argue, even though physically present, was also noted by the Full Bench of this Court in ***Babu Ram*** (supra). In this context, the relevant observations of this Court in paragraph no. 20 are reproduced below:

“20. The above observations make it clear that a provision enjoining that the appellant shall be heard is complied with if the appellant has been afforded an opportunity to be heard, and it cannot be said that he has not been heard merely because he has not availed of the opportunity given to him. The force of these observations is in no way lessened by the fact that the appellant in that case was present at the hearing but was not prepared to address the Court, because it should make no difference in principle whether the failure to avail of the opportunity consists in the absence of the appellant or in his refusal or inability to address the Court in support of the appeal. The essence of the matter is that opportunity to be heard has been given but has not been availed of. If the requirement of hearing is to be deemed to be fulfilled by giving the appellant who is present an opportunity to be heard it should be regarded as equally fulfilled even in the case of an appellant who has chosen to be absent in spite of having been given an opportunity to be heard. The principle laid down by the Supreme Court with reference to Order XLI, Rule 16 applies with equal force to Order XLI, Rule 30 as well and it must likewise be held that what Order XLI, Rule 30 requires is not that the parties or their pleaders be actually heard but that they should be given the opportunity of being heard. The requirement of Order XLI, Rule 30 must, therefore, be considered as having been satisfied if the opportunity so given is not availed of, whether the failure to do so consists in the absence of the parties and their pleaders or in their refusal or inability to address the Court.”

(emphasis supplied)

The Full Bench of this Court in **Babu Ram** (supra), while interpreting Order XLI Rule 17 (as it stood before 1976) held that an appeal Court has the jurisdiction to decide the appeal on merits even if the appellant and his counsel are absent when the appeal is called on for hearing. The proposition decided by the Full Bench is no more the law in view of the Explanation added to Order XLI Rule 17 CPC. The Full Bench has been referred as a precedent only to show that, in principle, there is no difference between the two situations, i.e., when the counsel is physically not present when the appeal is called on for

hearing and when the counsel refuses to argue the appeal, though physically present, when the appeal is called on for hearing. In the circumstances, the prohibition prescribed in the Explanation to Order XLI Rule 17 (1) CPC shall also be applicable in cases where the counsel for the appellant is physically present in the Court when the appeal is called on for hearing but does not address the Court on merits or refuses to argue the appeal.

The view that the appeal Court has no jurisdiction to decide the appeal on merits if the counsel for the appellant is physically present in the Court when the appeal is called on for hearing but refuses to argue it is also supported by the observations of the Supreme Court in paragraph 5 of its judgment reported in *State of J&K versus Enquiry Officer and others; (1998) 9 SCC 387*. The observations of the Supreme Court in paragraph 5 of the said judgment are reproduced below:

*“5. The appeal was dismissed for this reason: “.... a request for adjournment sought by the Government Advocate, Mr. Geelani, is rejected and this appeal is dismissed for non-prosecution”. That the High Court was right in declining the adjournment is not in dispute, but it was then necessary for it to hear the appeal and come to a conclusion on its merits. **If for any reason the appellant’s advocate declined to argue the appeal, that is what the High Court should have recorded and should then have dismissed the appeal on the ground of non-prosecution.** There was no justification for dismissing the appeal only on the ground that the appellant’s application for adjournment had been rejected.”*

(emphasis supplied)

At this stage, it would be relevant to consider the judgments relied upon by the counsel for the respondents. In *Mohammad Khalil* (supra), there were four appellants before the second appellate Court i.e., the High Court and the counsel for one of the appellants had initially argued the matter on behalf of

other appellants also and, therefore, the Explanation to Order XLI Rule 17 CPC was not applicable in the case.

In *Smt. Binda Bau & Ors.* (supra), the counsel for the appellant had appeared and moved an application for adjournment which had been rejected and consequently the Board of Revenue proceeded to decide the case on merits. The facts of the case as reported in *Smt. Binda Bau & Ors* (supra) show that the counsel for the appellant was physically present in the Court when the appeal was called for hearing but the facts as reported do not indicate that the counsel for the appellant had either refused to argue the case or did not for any other reason address the Court. The judgment is clearly not applicable in the facts of the present case.

It is also relevant to note that the judgment in *Smt. Binda Bau and Ors* (supra) relies on the Full Bench judgment of this Court in *M.S. Khalsa vs. Chiranji Lal (AIR 1976 All 290)*. The Full Bench in *M.S. Khalsa* (supra) held that an application for adjournment was within the purview of the Explanation to the Allahabad amendment in Order XVII Rule 2 CPC. Order XVII Rule 2 CPC along with Allahabad amendment is reproduced below:

“Order XVII Rule 2. Procedure if parties fail to appear on day fixed-- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[Explanation.--Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]

High Court Amendments

ALLAHABAD.--Add the following:

"Where the evidence, or a substantial portion of the evidence, of any party has already been recorded, and such party fails to appear on such day, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation.--No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application."(28-5-1943)

Order XVII prescribes the procedure to be followed by the Court in trial of Suits. The procedure to be followed by appeal Court while hearing an appeal is prescribed in Order XLI CPC. The Explanation to Order XVII Rule 2 (Allahabad amendment) only clarifies or explains the phrase 'the parties or any of them fail to appear' in Order XVII Rule 2. Explanation added to a particular provision in an enactment cannot be treated as an illustration to define a similar situation or concept in a different provision in the same enactment. The role of an Explanation is to explain the meaning and effect of the main provision to which, it is an explanation and to clear up any doubt or ambiguity in it'. [*Dattatraya Govind Mahajan and Ors. vs. State of Maharashtra and Ors (1997) 2 SCC 548; Government of Andhra Pradesh vs. Cooperative Bank (2007) 9 SCC 55*]. The Explanation to Order XVII Rule 2 (Allahabad amendment) cannot be read in Order XLI Rule 17 (1) CPC to interpret the phrase 'the appellant does not appear when the appeal is called on for hearing'. The phrase has to be interpreted independently of the Explanation to Order XVII Rule 2 CPC.

Evidently, the judgments in *Mohammad Khalil* (supra) and *Smt. Binda Bau & Ors* (supra) are not applicable in the present case and do not help the respondents.

The substantial question of law framed by this Court is decided in favour of the appellant and it is held that the Explanation to Order XLI Rule 17 CPC also applies in cases where the counsel for the appellant, though physically present in the Court when the appeal is called on for hearing, refuses to argue the appeal or for any other reason is not able to address the Court and in such situations the appellate Court has no jurisdiction to decide the appeal on merits. For the aforesaid reason, the lower appellate Court had exceeded its jurisdiction in deciding the appeal on merits vide its judgment dated 23.9.2015 and the appeal is to be allowed.

The question that remains to be decided is regarding the order to be passed by this Court. By virtue of Section 107 CPC the appellate Courts have the same power as are conferred on Courts of Original jurisdiction in respect of Suits instituted therein. Order XLI Rule 33 CPC provides that the appellate Court shall have the power to pass any order which ought to have been passed and to pass such further other orders as the case may require. A similar situation arose before the Division Bench of this Court in *Nasir Khan versus Itwari & Ors.; AIR 1924 All 144* and the Division Bench while allowing the Second Appeal passed order which the first appellate Court should have passed. The Division Bench dismissed the appeal of the Court below for default and

permitted the appellant to file an application for restoration of appeal which was to be decided by the lower appellate Court on merits.

Following the Division Bench judgment of this Court in *Nasir Khan* (supra), the present Second Appeal is allowed, the judgment and decree of the lower appellate Court is set aside and the *Regular Civil Appeal No. 5000248 of 2013 (Janki Prasad vs. Sanjay Kumar and others)* filed by the appellant is dismissed in default. The appellant shall have the liberty to file an application for restoration of the said appeal before the lower appellate Court which, if filed, shall be decided by the lower appellate Court in accordance with law.

With the aforesaid observations, the Second Appeal is *allowed*.

[Salil Kumar Rai, J.]

Order Date :- 24/12/2021

Santosh/-