

(1976) 03 OHC CK 0014

In the Orissa High Court

Case No : Miscellaneous Appeal No. 189 of 1974

Bishnu Shankar Bhoi and Others

APPELLANT

Vs

Mukteswar Dandasena and Others

RESPONDENT

Date of Decision : 04-03-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 19

Citation : (1976) 42 CLT 416

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : B.B. Mohanty, for the Appellant; R.K. Rath and N.C. Panigrahi, for the Respondent

Final Decision : Allowed

Judgement

S. Acharya, J.—The Appellants are the Defendants in Title Suit No. 105/65. The suit having been decided against the Defendants, they went up in appeal and that appeal (T.A. No. 73/3 of 1967/68) was allowed by the appellate Court. Thereafter the Plaintiffs preferred Second Appeal No. 138/69 before this Court. The appellate decision was set aside and the case was remanded to the appellate Court. It may be noted that the High Court while remanding the case to the appellate Court had directed the first appellate Court to dispose of the said appeal before 5-1-1973. The Appellants appeared before the appellate Court and with the consent of both the parties the Court fixed the hearing of the appeal on 2-1-1973.

2. According to the Appellants, after the date of hearing of the appeal was fixed to 2-1-1973. On 26-12-1972 Appellant No. 2 approached their lawyer Sri B.K. Pal at Cuttack to get the case records from him, but Mr. Pal was absent from Cuttack on that

date and so the Appellant could not get the case records of the appeal. Therefore, he returned home by requesting the men in the office of Mr. Pal to

send the papers to him. As the papers were not sent to the Appellants by their Advocates the Appellants applied for time before the appellate Court on 2-1-1973, but the appellate Court dismissed the said petition.

3. On 2-1-1973 the Respondents' Advocate was heard in the absence of the Appellants and their lawyer and orders dismissing the appeal on merits were passed on 3-1-1973. The Appellants thereafter on 25-1-1973 filed a petition under Order 41, Rule 19, CPC before the Court below for the restoration of the appeal by setting aside the ex parte judgment. The petition was registered as Misc. Case No. 10/73. In the miscellaneous case Appellant No. 2 examined himself, but the opposite parties who had notice of the said miscellaneous case did not contest the Appellants' case. The Court however dismissed the suit petition by holding that as its predecessor-in-office had disposed of the appeal on merits by a separate judgment the Appellants should have gone up in appeal against the said judgment, and this miscellaneous petition by the Appellants under Order 41, Rule 19, CPC was not maintainable.

4. It is urged by Mr. Das appearing on behalf of the Appellants that the appellate Court should not have taken up the appeal for hearing on merits and should not have decided the same on merits in the absence of the Appellants from the Court on the date of hearing of that appeal. His above submission is supported squarely by the decision reported in *Kawleshwar Singh and Another Vs. Raghubir Singh and Others*, wherein it has been held:

In default of the Appellants the appeal ought not to be decided on merits, The Court either ought to adjourn the hearing of the appeal or ought to desist from deciding it for default under Rule 17 of Order 41, CPC Code. It has no jurisdiction to dismiss it on merits.

The above view also gets support from the Division Bench decision of the Patna High Court reported in *Krishnadeo Prasad Vs. Mt. Budhni*, wherein it has been held that the appellate Court has no jurisdiction to hear the appeal on merits if the Appellant does not appear in Court at the time the appeal is called on for hearing. The only course open to the appellate Court in these circumstances is to adjourn the case to another date or to make an order dismissing the appeal ex parte. I am in respectful agreement with the view expressed in the above-mentioned two decisions.

5. Appellant No. 2 on oath has deposed as to under what circumstances he could not appear in the Court on 2-1-1973, which was the agreed date of hearing of the appeal. His statement on oath to that effect has not been challenged for cross-examination and there is nothing on record to show that the reason given by the Appellant stating his inability to appear before the Court below was any way false or incorrect. From this it appears that Appellant No. 2 was prevented by sufficient cause from appearing in the Court and taking part in the hearing of the appeal. On the statement on oath in the petition filed by the Appellants under Order 41, Rule 19, CPC in the Court below and Appellant No. 2's

unassailed testimony in Court, and in view of the fact the Court below was not competent to dispose of the appeal on merits the order of the Court below dismissing the miscellaneous petition under Order 41, Rule 19, CPC and ex parte judgment of the Court below in appeal have to be set aside and are hereby set aside. The appellate Court is directed to hear the appeal on merits and to dispose of the same in accordance with law within a very short time.

The appeal is allowed, but in the circumstances parties to bear their own costs of this appeal.

The L.C.R. be sent back immediately.