
(1975) 08 DEL CK 0014

In the Delhi High Court

Case No : C.M. 179 of 1975 in F.A.O. 117 of 1971

Emmanual Simon Peters

APPELLANT

Vs

Alice Peters and Another

RESPONDENT

Date of Decision : 12-08-1975

Acts Referred:

Citation : AIR 1976 Delhi 148

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : K.L. Budhiraja, for the Appellant; H.R. Bhutani, for the Respondent

Judgement

1. By this application u/s 151 of the Code of Civil Procedure, the petitioner, an appellant in F. A. O. 117/71, Prays that the order made by this Court on November 12, 1975, dismissing the appeal on merits by a detailed judgment, though in the absence of the appellant and his counsel, be set aside on the ground that for reasons which are set up in the application, the appeal could not have been heard on the merits on the date on which it was heard and decided and because this Court had no power or jurisdiction to dismiss the appeal on merits in the absence of the appellant and his counsel and that such dismissal must, Therefore, be treated as if it was a dismissal in default under Rule 17 of Order Xli of the Code of Civil Procedure.

2. The appeal was listed for disposal on November 12, 1974 but it appears that prior to it, when it came up for hearing on November 7, 1974, learned counsel for the appellant had pointed out that the appellant had filed an application in the Registry of this Court under Order Xli, Rule 27 read with Section 151 of the CPC and prayed that the hearing of the appeal be postponed till after the said application had been listed and decided. It, however appears that although the appeal was listed, as referred to above, the application of the appellant was returned to the appellant because of some objection and was re-filed by the appellant only after the appeal had been heard and decided on November 12, 1974. The appellant apparently remained under the impression that the appeal

would neither be listed nor heard until the application of the appellant had been listed and disposed of obviously because the decision of the application in favor of the appellant would have, to an extent, made a difference in the evidence that could be considered at the hearing of the appeal.

3. Shri Budhiraja learned counsel for the appellant, contended that (a) by virtue of the provisions of O. Xli, R. 17 of the Code of Civil Procedure, this Court had no jurisdiction to dismiss the appeal on merits in the absence of the appellant and his counsel, and (b) the dismissal of the appeal be treated as dismissal in default and as there has been sufficient cause for non-appearance of the appellant and his counsel on the date of hearing, the ex parte order should be set aside in exercise of power under R. 19, O. Xli of the CPC and the other enabling Provisions of the Code and the appeal listed for hearing. In support of his contentions, learned counsel relies on a Division Bench Judgment of the Patna High Court in the case of Deo Dutta Singh and Others Vs. Ram Naresh Singh and Others, .

4. The application is opposed on behalf of the respondents on the ground that an application, in so far as it purports to seek a virtual review of the judgment is not maintainable and since the appeal was not dismissed in default of appearance, there was no question of ex parte order being set aside. It is further contended that this Court had ample power to dismiss the appeal on merits even in the absence of the appellant. Learned counsel relies on a decision of the Allahabad High Court in the case of Syed Mohammadi Husain Vs. Mt. Chandro and Others, in support of his last contention and on a judgment of the Madras High Court in the case of Siva Subramania Chettiar, minor by natural father and guardian, Veerappa Chettiar Vs. Adaikkalam Chettiar and Others, .

5. After hearing learned counsel for the parties, it appears to me that the judgment must be set aside and the appeal be restored for disposal in accordance with law.

6. Order Xli, Rule 17 of the CPC provides that when on the date fixed or on any other date to which the hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the "Court may make an order that the appeal be dismissed". In the Code of 1882, the word used in the correspondent provision was "shall". This led to some controversy if having regard to the discretionary nature of the provision in the new Code the appellate Court has any jurisdiction to decide the appeal on merits where the appellant does not appear or is either bound to dismiss the appeal for default of appearance or adjourn it to any other date, as envisaged by Rule 17. A review of the decisions of the various High Courts on the question discloses that except the Allahabad High Court, Syed Mohammadi Husain Vs. Mt. Chandro and Others, which has taken the view that the appellate Court would be empowered to decide the appeal on merits in the absence of the appellant and was not bound to dismiss it in default of appearance or to adjourn it, there is near unanimity among the other High Courts that the appellate Court has no such jurisdiction

and was bound to either dismiss the appeal in default or adjourn the same. Most recent of the decisions is that of the Patna High Court in Deo Dutta Singh and Others Vs. Ram Naresh Singh and Others, on which reliance is placed on behalf of the appellant and all the other decisions have been referred to in that judgment. Untwalia, C. J., as his Lordship then was, pointed out in that case that having reared to the provisions of Order Xli, Rule 17 and the rules that follow that the appellate Court would have no jurisdiction to dismissed an appeal an merits in the absence of the appellant and has succinctly brought out the difficulties that would arise if a contrary view was taken. It was further pointed out that the decision of the Allahabad High Court in the case of Syed Mohammadi Husain Vs. Mt. Chandro and Others, did not represent the true legal position and that the later decision of that High Court in Babu Ram Vs. Bhagwan Din and Another, was based on a misreading of certain observations of the Supreme Court made in the case of Thakur Sukhpal Singh Vs. Thakur Kalyan Singh, . In view of the preponderance of judicial opinion on the question, with which I am in respectful agreement, I am of the view that the appellate Court would have no jurisdiction to dismiss the appeal on merit in the absence of the appellant. Such a course was bound to cause hardship to the appellant because he would have no remedy to have the order set aside by the Court that made it in view of the provision of Rule 19 of the said Order. The position where either the appellant or his counsel appeared but either refused to make a submission or was unable to do so, would however, be different. as was pointed out both in the decision. of the Patna High Court and the judgment of the Supreme Court referred to above.

7. So far as the question as to the maintainability of the application either for review or under Order XII Rule 19 is concerned, it appears to me that once it is held, as I have held above, that there was no jurisdiction to dismiss the appeal on merits in the absence of the appellant, the judgment dismissing the appeal on merits would, tantamount in law to judgment dismissing the appeal in default of appearance, and that being so. there would be ample power in the Court under the provisions of Order XL1, Rule 19 to set aside such a judgment on sufficient cause being shown.

8. It was not disputed that the circumstances set out above would constitute sufficient ground for the non-appearance of the appellant when the appeal was called for hearing.

9. In the way I have looked at the matter it is unnecessary to consider if the plea of the applicant amounts to a review and if it is maintainable.

10. In the result the application succeeds. The judgment of this Court made on November 12, 1974 in F. A. O. 117/71 is set aside and the appeal of the appellant is restored to be dealt with according to law.

11. In view, however, of the fact that by aforesaid judgment. I had dealt with all aspects of the matter and expressed definite opinion on the questions that arose in the appeal, it would not be proper that the appeal is listed before me. Let the

appeal be listed for disposal before any other learned Judge of this Court in accordance with the rules.

12. There would be no order as to costs in the present application.

13. Order accordingly.