
(2014) 04 UK CK 0016

In the Uttarakhand High Court

Case No : Appeal from Order No. 74 of 2012

Kamal Cotton Traders and Others

APPELLANT

Vs

Belwal Spinning Mills Ltd. and Others

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 19, Order 43 Rule 1(t), 104

Citation : (2015) 1 UC 348

Hon'ble Judges : Alok Singh, J.

Bench : Single Bench

Advocate : Sharad Sharma, Senior Advocate assisted by Vandana Singh, Advocate, for the Appellant; Sarvesh Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Alok Singh, J. Present appeal is preferred under Order 43 Rule 1(t) read with Section 104 C.P.C. assailing the judgment and order dated 17.02.2012, passed by the Additional District Judge whereby application moved by the appellants herein under Order 41 Rule 19 C.P.C. was rejected. Brief facts of the present case, inter alia, are that first Civil Appeal No. 6 of 1999, M/s. Kamal Cotton Traders v. Belwal Spinning Mills Ltd., was listed for final hearing on 16/10/2003. When appeal was called out, none appeared for the appellant and, consequently, learned first Appellate Court dismissed the appeal at its own merit. Thereafter, appellant moved application under order 41 Rule 19 C.P.C. for recalling the order dated 16.10.2003 and to restore the appeal at its own number. Learned appellate court has observed that since appeal was decided on merit, therefore, application under Order 41 Rule 19 C.P.C. is not maintainable.

2. have heard Mr. Sharad Sharma, learned Senior Counsel assisted by Ms. Vandana Singh, learned counsel for the appellants and Mr. Sarvesh Agrawal, Advocate for the respondent No. 1.

3. Order 41 Rule 17 C.P.C. reads as under :--

"17. Dismissal of appeal for appellant's default. - (1) Where on the date 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. "

4. The only interpretation of Rule 17 of Order 41 C.P.C. would be if appellant or his counsel does not appear on the date fixed, Appellate Court either may dismiss the appeal for want of prosecution or may adjourn it for future hearing. However, in any case, appeal cannot be dismissed on merit in the absence of appellant or his counsel. Even if appeal is dismissed on merit in the absence of appellant or his counsel, application under Order 41 Rule 19 would be maintainable treating that appeal was dismissed in default of the appellant.

5. In the peculiar facts and circumstances of the case, in my considered opinion, interest of justice would be served if a fair opportunity is given both the parties to appear before the Appellate Court and to argue the appeal on its own merit so that appeal may be decided at its own merit in accordance with law. Consequently, present appeal is allowed. Impugned judgment and order dated 17.02.2012 is hereby set aside Order dated 16.10.2003, passed in Civil Appeal No. 6 of 1999 dismissing the appeal on merit is hereby set aside. Civil Appeal No. 6 of 1999 is restored to its original number on the file of the learned first appellate court. Parties shall remain present before the learned Appellate Court on 12th May, 2014. Appellate Court, thereafter, shall fix the appeal for final hearing and decide the appeal at its own merit in accordance with law within 30 days from 12th May, 2014. Cost of this appeal shall be subject to the final decision in the First Appeal.