

(1982) 09 KAR CK 0024
In the Karnataka High Court
Case No : RSA 670/75

Marisetty

APPELLANT

Vs

Karigowda

RESPONDENT

Date of Decision : 24-09-1982

Acts Referred:

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

Citation : (1982) 2 KarLJ 552

Hon'ble Judges : G. N. Sabhahit, J

Judgement

1. This appeal by the plaintiff is directed against the judgment and decree dated 17-2-1975 passed by the Civil Judge, Mandya, in RA No. 74 of 1974 on his file dismissing the appeal with costs.

2. The sole point that is urged before me by the learned counsel for the appellant in the above second appeal is that the learned Civil Judge had no jurisdiction to pass a judgment on merits when the appellant and his counsel were absent on the date of hearing.

3. Or. 41, R. 17(1) of CPC reads:

"Dismissal of appeal for appellant's default: Whereon 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.

By Amendment Act of 1976, an Explanation is added to this rule which reads:

Explanation: Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

The Explanation being the result of the judicial view taken consistently in this behalf, the Court had no jurisdiction to hear and dismiss on merits an appeal when the appellant and his counsel were absent, even prior to the insertion of the Explanation. Hence, it is obvious that the judgment passed by the Civil

Judge, on merits in the absence of the appellant and his counsel, is one without jurisdiction. The appeal should have been merely dismissed for default. (Vide: Emmanuel Siman Peters v. Alice Peters, AIR 1976 Delhi 148, 150. and Shantilal Chandrashankar v. Bai Basi, AIR 1976 Guj. 1, 7.

4. It is ah the more interesting and significant to note that before the judgment was pronounced on 17-2-1975, an application was submitted by the appellant before the first appellate Court on 12-2-1975 for an opportunity being given to him to argue the matter. Strangely enough, that application is dismissed on 17-2-1975 and the judgment is pronounced, which is clearly wrong and illegal.

5. In the result, the appeal is allowed. The judgment and decree of the first appellate Court are set aside and the appeal is sent back to the first appellate Court with a direction that the first appellate Court shall now give an opportunity to the appellant and the respondent for arguing the matter afresh and then proceed to judgment in accordance with law and in the light of observations made above.

6. The parties are directed to be present before the first appellate Court on 25-11-1982 to take further instructions.

7. Send back the concerned records to to the first appellate Court forthwith.

8. There shall be no order as to costs in this appeal in the peculiar facts of this case.