

**(1980) 03 AHC CK 0049**

**In the Allahabad High Court**

**Case No :** Civil Misc. (Restoration) Application No. Nil of 1976 in First Appeal No. 84 of 1970

Ramji Upadhyaya and Others

APPELLANT

Vs

Madho Pd. Sharma and Others

RESPONDENT

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**Date of Decision :** 21-03-1980

**Acts Referred:**

Limitation Act, 1963 — Section 5

**Citation :** (1981) AWC 659

**Hon'ble Judges :** Gopi Nath, J

**Bench :** Single Bench

**Advocate :** Sidheshwari Prasad, for the Appellant;

**Final Decision :** Allowed

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## **Judgement**

Gopi Nath, J.—This is an application dated 8-9-1976 for recalling of the order dated 16-4-1976. The appeal was dismissed as not pressed on that date. The order was in the following terms :

Mr. Siddheshwari Prasad, learned Counsel for the Appellant, states that he has no instructions to press the appeal. It is, accordingly, dismissed as not pressed.

By means of this application it is prayed that the order of dismissal be recalled and the appeal be heard on merits. The application states that the applicant did not know the date of hearing, and he could not be contacted by his counsel as the former was out, and the repeated letters sent to him could not be received by him. It is stated that since the learned Counsel could not contact the client and obtain instructions from him to press the appeal, he made the statement which led to the dismissal of the appeal as not pressed. The applicant came to know of the dismissal of the appeal long after the passing of the order. It is stated that learned Counsel for the applicant visited Varanasi, and the applicant then contacted him and enquired about fate of the appeal. learned Counsel asked him to come to Allahabad and ascertain the position of the case. The applicant

then came to Allahabad and learnt that the appeal had been dismissed for non-prosecution. In support of the application, the applicant has filed his own affidavit and those of the junior counsel of the applicant and the clerk of the senior counsel. These affidavits clearly show that learned Counsel for the applicant made repeated efforts to contact the applicant but he could not be contacted as he had gone out to Calcutta in connection with the illness of his wife, and from there to Kathmandu. Since the application was filed beyond time, an application for condonation of delay u/s 5 of the Limitation Act had also been filed, which has been allowed after contest, and the allegations made in support of that application have been believed as true.

2. The instant application for recalling of the order was strenuously opposed on behalf of the opposite parties mainly on the ground that the order of dismissal not being for default of appearance but for default of proof, it could not be recalled under Order XLI, Rule 19, of the Code of Criminal Procedure. learned Counsel for the applicant, on the other hand, contended that the appeal was not disposed of on merits, and the order was one for default of prosecution of the appeal. The appeal could, accordingly, be restored and heard on merits under Order XLI Rule 19, Code of Criminal Procedure.

3. In *Achhar Singh v. The District Judge, Dehradun* 1979 AWC 124 it was held that even if an appeal was dismissed on merits under Rule 17 of Order 41, it could be restored under Order 41, Rule 19. See also *Seth Munna Lal Vs. Seth Jai Prakash*, and *M.S. Khalsa Vs. Chiranji Lal and Others*, . learned Counsel for the opposite party, on the other hand, contended that once the Appellant appears, the appeal would not be liable to be restored under Order 41, Rule 19, CPC if the same had been disposed of on merits. Two questions thus fall for determination (i) whether the appeal was dismissed on merits by the order dated 16-4-1976 or it was dismissed for default; and (ii) whether the Appellant had appeared on that date. If so, whether the Court has the power to restore the appeal under Order 41, Rule 19, CPC According to the learned Counsel for the applicant, since he expressed his inability to argue the appeal on merits for want of instructions from the Appellant, the dismissal, could not be on merits.

learned Counsel for the opposite party, on the other hand, pointed out that the authority of the counsel had not been withdrawn, and he continued to be a counsel in the case. He could accordingly press the appeal, and has in fact pressed the application for restoration in the case. In these circumstances, the Appellant would be deemed to be present on the date of hearing, and it would not be case of nonappearance. The question falling for consideration thus is : what is the true meaning of the word appearance ? In *Muzammal Hussain v. Chaganlal Jain* AIR 1967 A&N 14 it was held :

The failure to appear does not necessarily mean the physical absence of the Defendant. If the Defendant asked for an adjournment on the ground that he is not prepared with the witnesses and the adjournment is refused and he did not participate in the proceedings it cannot be said that he was present .....

In Thummala Suryamma Vs. The Andhra Pradesh State Electricity Board and Others, , relying on the decision in M. Agaiah Vs. Mohd. Abdul Kereem, , it was held :

Mere physical presence in Court does not amount to participation in the hearing when there is no actual participation as such in the hearing.

In Marothu Suryarao Vs. Paluri Pedyiya and Others, it was held that mere physical presence on the part of the Defendant or his counsel does not make the decree as one passed under Order XVII, Rule 3, CPC if as a matter of fact the Defendant did not participate in the hearing of the case. It was observed :

It must be remembered that if the party who is present takes no further part in the proceedings his mere presence in the Court does not make it an appearance in the suit.

In Dewari Lal Vs. Sunder Lal and Others, it was held that a mere notional presence of a party with no intent to proceed with the prosecution of the case amounts to his absence, and the order made against him could be on ex-parte basis. In Juggi Lal Kamla Pat v. Ram Janki Gupta AIR 1961 All. 407 it was observed :

Where on the day of the adjourned hearing, the counsel of a party makes a statement in Court that he has no instructions to proceed with an application made by him, it must be held that he had ceased to represent the party because it would be inconsistent to hold that a pleader who has no instructions to proceed with the case still holds authority to represent his client for the purpose of the case.

In Lull v. Bhagelu, Second Appeal No. 729 of 1963 decided on 24-9-1977 while considering the Explanation added to Order XVII, Rule 2, CPC it was held that the presence of a party in terms of the Explanation will at best be a notional presence and no such presence can take away the effect of Order XVII, Rule 2, Code of Civil Procedure. The decision in Dewari Lal Vs. Sunder Lal and Others, was relied upon. In Natesa Thevar v. Vairavan Servaigaran AIR 1955 Mad 258 it was found that the Plaintiff, though physically present in Court, refused to take part in the proceedings after the dismissal of his application for adjournment. It was held that he could not be said to be present as Plaintiff taking part in the proceedings. His physical presence in Court could not be taken cognizance of, and he could be deemed not to have appeared at the hearing. In Hindusthan Steel Ltd. Vs. Prakash Chand Agarwal and Another, it was held that an advocate who has no instruction to proceed with the case cannot be held to hold an authority to represent his client. It was observed :

The word "appearance" has a well recognised meaning and implies that the party is present at the trial either in person or through a pleader properly authorised on his behalf, and in either case, the party or the person authorised on his behalf must be present for the purpose of conducting the case. The mere physical

presence of the party unless he is there for the purpose of conducting the case is not "appearance" as contemplated in the rule nor does the presence of his pleader who had been instructed to appear on previous occasions constitute an appearance, unless he is instructed to represent him on the occasion in question and attends for that purpose.

In Rama Rao and Others Vs. Shantibai and Others, it was held :

If, when a case is called on for hearing, the counsel appears (without making any request for adjournment) merely to inform the Court that he has no instructions and, therefore, would not appear, it will be no appearance of the party .....

In Sohanlal Ruia and Another Vs. Kedarnath Purushottamdas and Co. Private Ltd. and Others, it was observed that mere physical presence of a lawyer did not constitute appearance unless he had instructions to participate in the proceedings. In Gajrani and Others Vs. Ram Rati and Others, it was held :

When an appellant's pleader is present in Court when the appeal is called on for hearing he has either instructions from the Appellant to put in appearance or he has no instructions at all. If he has no instructions at all, it is not a case of his being present, and if the Appellant also is not present, it is a case of absence of the Appellant within the meaning of Order 41 Rule 17 .....

The mere physical presence of the pleader does not make out a case of the appellant's being present." In Gajrani's case (supra), the counsel for the appellants made a statement before the Court on the date of hearing that he had no instructions. The learned Civil Judge heard the respondent's counsel and then dismissed the appeal on merits. A question arose whether the appeal could be disposed of on merits and whether the appellants could be deemed to be present on the date of hearing in view of the appearance of their counsel. It was held that since the counsel reported no instructions, the appeal could be dismissed in default under Order 41, Rule 17, CPC but the Court was not precluded from going into merits and disposing of the same on merits under Order 41, Rule 30. The relevant observations were as follows :

In this case the appeal could have been dismissed by the lower appellate Court in default under Rule 17, or on merits under Rule 30 of Order 41

Gajrani's case (supra) was approved in Babu Ram v. Bhagwan Din 1965 AWR 231 . Babu Ram's case was mainly concerned with the question whether in the absence of the Appellant or his counsel the Court had the power to dispose of an appeal on merits. It was held that there was no bar to disposing of the appeal on merits although discretion was to be exercised in dismissing the same in default. An appeal dismissed for default may sometimes be a dismissal not for default of appearance but for default of proof-see Thakur Sukhpal Singh Vs. Thakur Kalyan Singh, . That would, however, depend upon the circumstances of the case and the intention of the Court passing the order. It, to my mind, cannot be laid down

as a proposition of law that in all cases where an appellant's counsel engaged not for the purposes of arguing the case on merits but for another purpose, is present in Court, an order of dismissal of appeal for default would mean a dismissal for default of proof. Presence of a counsel in an appeal may be for prosecuting the same on merits or for any other purpose, and a counsel who has no instructions to argue the appeal on merits cannot risk the fate of his client by trying to argue the same. A pleader who is not competent to address the Court on merits cannot, by a statement of his inability to address the Court, lead to an order of dismissal being passed for default of proof. We have already noticed that appearance for hearing has a particular meaning in the Code of Criminal Procedure, and unless there is appearance as contemplated by the Code, the order of dismissal for default would, in the normal course, be one under Order 41, Rule 17. It may have been competent to a Court to pass an order under Order 41, Rule 30 before the amendment of Order 41, Rule 17, but after the addition of the Explanation to that provision, the dismissal can only be for default of appearance. In *M. S. Khaha v. Chiranji Lal* 1976 AWC 23 it was observed :

The court's attempt to decide the case on merits on the view that the parties have appeared cannot prevent a party from seeking proper remedy. If he proves his absence, the court's order will be presumed or construed to be *ex parte*.

The Full Bench approved the view expressed in *Munna Lal v. Jai Prakash* 1968 AWR 860 as follows :

If facts on the basis of which the Court proceeded under Order XVII, Rule 3, are such that an order under Rule 2 could be justified, the order can be treated as one under Rule 2.

It, therefore, follows that the tenor of the order and the nature of presence, if any are relevant facts to determine what remedy is available to the party affected by the order. In *Babu Ram's* case (*supra*) it was observed :

But, it is only after the Court has made up its mind that it will dispose of the appeal on merits and not dismiss it for default of appearance that it will ordinarily inquire into its merits. At the stage of making up its mind in regard to the discretion to be exercised by it, it cannot anticipate what kind of decision the merits of the case would require ...

It follows that there has to be an application of mind on merits before an order of dismissal for default can be held to be an order on merits. It is thus open to a Court to consider the true nature of the order in the light of circumstances attending the passing of it. If an order of dismissal is made on the appearance of party, it may not be open to recall it under Order 41, Rule 19. But if the same is made in his absence the question of its construction and true effect become important so as to determine the application of Order 41, Rule 19, Code of Criminal Procedure. In *Balram v. Ram Nihore* 1963 AWR 316 it was observed :

The consistent practice in this Court and the courts subordinate to it has always

been that whatever may be the ground on which a counsel states that he has no instructions if he does state that he has no instructions he is deemed to have withdrawn from the case and is not considered to be a duly authorised counsel to present the party who appointed him. If, therefore, the party himself is absent and his counsel stated that he has no instructions it has always been held that the party has not appeared.

This case was relied upon in Gajrani's case (supra). The physical presence of a counsel thus cannot be held as his appearance to conduct a case if he has no instructions to do so. Babu Ram's case (supra) was mainly a case dealing with the power of an appellate Court to dismiss an appeal on merits in the absence of the Appellant or his counsel, and reliance was placed on the observations of the Supreme Court in Thakur Sukhpal Singh's case (supra) for the purposes of determining the power of the appellate Court in regard to orders which it could pass. The following observations in Babu Ram's case (supra) clarify this position :

And if it is held, as I think it must be held in view of the decision of the Supreme Court, that Order XLI, Rule 30 applies even in the case of the absence of the appellant at the hearing, there should be little doubt left, that in the situation mentioned in Order XLI, Rule 17 (1) the alternatives before the Court are not exhausted between either making an order for dismissal of the appeal for default of appearance or adjourning the case, and the Court has also the option of considering the appeal on merits and confirming, varying or reversing the decree appealed against as provided by Order XLI, Rule 32.

Strong reliance was placed by the learned Counsel for the opposite party on the observations of the Supreme Court that an order of dismissal for default can be construed as dismissal in default of proof if the pleader was not prepared to address the Court. The existence of power to dismiss an appeal in default of proof does not necessarily mean that the same had been so dismissed.

4. A statement by a counsel that he has no instructions in the case or that he has no instructions to press an appeal does not necessarily mean that he has instructions not to press the case or the appeal on merits. No instructions to press and instructions not to press are two different kinds of statements. In Thakur Sukhpal Singh v. Thakur Kalyan Singh AIR 1963 SC 146 it was held that the judgment of an appellate Court is required to contain the matters mentioned in Order 41, Rule 31, only if the Appellant shows that the judgment under appeal was erroneous for reasons disclosed by him but if that was not done the appellate Court could decide the appeal on merits even without complying with the requirements of Order 41 Rule 31, and the judgment would be one under Order 41, Rule 30, and the appeal would be deemed to be dismissed for default of proof. This case is thus only an authority for the proposition that a dismissal on merits can follow in the absence of the Appellant or his counsel, and the judgment would be one under Order 41, Rule 30, notwithstanding the non-compliance of the requirements of Order 41, Rule 31. This would be the result if the appellate Court intended to dismiss the appeal on merits, but not when it did

not apply its mind to the merits and intended to dismiss it for default of appearance. Default of appearance may or may not lead to dismissal on merits. But it cannot, be laid down as a rule that every dismissal of appeal for default of appearance is a dismissal on merits. In the instant case, the appeal was mechanically dismissed without mind being applied to its merits, on the ground that the appellant's counsel had no instruction in the case. The order dated 16-4-1976, in these circumstances, cannot be construed as an order of dismissal on merits or for default of proof. Every dismissal for default cannot be held to be a dismissal for default of proof. Its true construction has to depend on the intention of the Court passing the order. In the instant case, since mind was not applied to the merits of the appeal and it was mechanically dismissed for want of instructions of the counsel, it could not be held that it was dismissed for want of proof. The application for restoration was opposed only on the legal ground that the Court had no power to restore the appeal. I have, however, reached the conclusion that the Court has the power to restore the appeal. The circumstances under which the Appellant could not appear on the date fixed and the counsel had to make the statement that he did, have been set out in detail in the application and have been accepted as correct. The cause shown thus appears sufficient for restoration of the appeal. In *Ramji Das v. Mohan Singh* 1978 All RC 496 it was observed by the Supreme Court that Court's discretion should be exercised in favour of hearing, and not to shut out hearing.

5. For the reasons discussed, the application deserves to be allowed.

6. The application is allowed. The order dated 6-4-1976 is recalled and the appeal is restored to its original number and may be listed for hearing in the ordinary course.