

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 49 OF 2015

Smt. Nayan alias
Chandrakala Chandrakant Borkar,
widow of late Shri Chandrakant Hari Borkar,
45 years of age, Housewife,
r/o. H. No. 157,
Near Raviraj Hotel,
Shirvodem Navelim,
Salcete, Goa and
Flat no. G-5, Dharti,
Agalim, Margao,
Salcete, Goa.

..... Appellant

V e r s u s

Shri Gurudas Hari borkar,
son of late Shri Hari Borkar,
Aged about 6 years, businessman,
r/o. H. No. 1151,
Colmorod, Margao,
Salcete, Goa.

..... Respondent

Mr. John A. Lobo, Advocate for the Appellant.

Mr. Abhay Nachinolkar, Advocate for the Respondent.

Coram:- K. L. WADANE, J.

Date of reserving Judgment :- 21.01.2016

Date of pronouncement of Judgment:- 22.01.2016

JUDGMENT

Heard Shri John Lobo, learned Counsel appearing for the Appellant
and Shri Nachinolkar, learned Counsel appearing for the Respondent.

2. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondent, waives service.

3. The Appellant challenges the Judgment and Order dated 30.12.2014 passed by the learned Adhoc District Judge-1, FTC-1, South Goa, Margao, in Regular Civil Appeal no. 110/2014 by which, the came to be dismissed.

4. The brief facts of the case may be stated as follows :

The Respondent in the present Appeal filed a suit against the Appellant bearing Regular Civil Suit no. 62/2007/F before the Civil Judge, Junior Division, Margao, for eviction of the Appellant from the suit house and for perpetual injunction restraining the Appellant from entering the suit house. The learned Civil Judge, Junior Division, Margao, decreed the suit on 09.05.2014.

5. Being aggrieved with the same, the Appellant filed an Appeal against the Respondent bearing Regular Civil Appeal no.110 of 2014 before the Adhoc District Judge-1, FTC-1, South Goa, Margao, for quashing and setting aside the Judgment and Decree passed by the learned Civil Judge, Junior Division at Margao, Goa.

6. On 25.11.2014, the matter was called out before the First Appellate Court. At that time, the Advocate appearing for the Appellant was present. The Respondent appeared in person and made a request for time which was granted. Then, the matter was adjourned to 11.12.2014 for final argument. On 11.12.2014,

the matter was called out before the First Appellate Court. None appeared for the Appellant. The final arguments of the Advocate appearing for the Respondent was heard and nine days were allowed for the Appellant to file written arguments with no leave to advance oral arguments. On 30.12.2014, the First Appellate Court dismissed the Appeal on merits. Hence, the present Appeal.

7. The following point arises for my determination in the present Appeal :

(i) Whether the impugned Order of the learned first Appellate Court is contrary to the provisions of Order 41 Rule 17 of the Civil Procedure Code ?

8. During the course of arguments, Mr. Lobo, learned Counsel appearing for the Appellant, has argued that the Appeal of the Appellant was decided on merits which is not permissible under the provisions of Order 41 Rule 17 of the Civil Procedure Code. In support of his argument, Mr. Lobo, learned Counsel appearing for the Appellant has placed reliance on the relevant roznama dated 11.12.2014 and by referring the contents of the roznama, Mr. Lobo, learned Counsel, has pointed out that the Appellant was not present on the date on which the arguments of the Respondent were heard. The relevant roznama is re-produced as follows :

“11.12.2014 : Called out today. Appellant & Advocate for Appellant absent. Advocate Shri A. Furtado present for Respondent filed Wakalatnama on behalf of Respondent of- file. Heard final argument of Advocate for the Respondent. None present for the Appellant till rising of the Court. Appellant is given opportunity to file written

argument if any by 20.12.2014. Matter is adjourned and fixed for Judgment on30.12.2014...10.00 a.m.”

9. From the contents of the roznama, it appears that the Appeal of the Appellant was heard and decided in the absence of the Appellant which is contrary to the provisions of Order 41 Rule 17 of the Civil Procedure Code. The relevant provisions read as follows :

“17. Dismissal of appeal for appellant's default.-

(1) Where on 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.

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.”

10. As per the provisions of Order 41 Rule 16 of the Civil Procedure Code, it seems that on the day fixed for hearing, the Appellant shall be heard in support of the Appeal and if the Court does not dismiss the Appeal at once, then it has to hear the Respondent against the Appeal and, in such case, the Appellant shall be entitled to reply. As per the provisions of Order 41 Rule 17 of the Civil Procedure Code, where on the day fixed for hearing the Appellant does not appear when the Appeal is called for hearing, the Court may pass an Order to dismiss the Appeal.

11. When the Appellate Court does not dismiss an Appeal summarily, it should fix a date of the hearing of the Appeal. The procedure therefore is provided in Rule 17 which provides that where on 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 for hearing, the Court may pass an Order that the Appeal be dismissed. In this Rule and the word “may” shows that apart from the dismissal of the Appeal for default, the Court can pass other Orders. To clarify whether the Appeal can be dismissed in default or on merits, Rule 17 is being made more explicit by adding an explanation thereto to the effect that dismissal of an Appeal on merit would not be permissible.

12. Looking to the above mentioned provisions and the fact that the Appeal was decided on its own merits without opportunity of being heard the Appellant, which is contrary to the principles of natural justice as well as against the provisions of Order 41 Rule 17 of the Civil Procedure Code.

13. It appears that the Appellant was absent on 11.12.2014 as well as on the day of 30.12.2014. Therefore, there was some negligence on the part of the Appellant and, accordingly, causing inconvenience to the Respondent. Hence, the Respondent has to be compensated with some costs which is quantified to the extent of Rs.1,000/-. Therefore, the impugned Order needs to be set aside.

13. In view of the above, I pass the following :

ORDER

(i) The Appeal is allowed subject to the payment of costs of Rs.1,000/- to be paid by the Appellant to the Respondent as condition precedent.

(ii) The impugned Judgment and Order dated 30.12.2014 passed by the learned Adhoc District Judge-1, FTC-1, Margao, in Regular Civil Appeal no. 110/2014, is hereby quashed and set aside.

(iii) The matter is remanded to the First Appellate Court to decide the same after giving an opportunity of being heard to both the sides.

(iv) The parties are directed to remain present before the First Appellate Court on 08.02.2016 at 10.30 a.m.

(v) The First Appellate Court is directed to decide the Appeal within a period of three months from the date of the receipt of the Order.

(vi) Rue stands discharged accordingly.

K. L. WADANE, J.

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