

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.358/2014

(Satyabhamabai w/o Bandu Dipake ..vs.. Sakharam Natthu Dipake (Dead) thr. Lrs
Mathurabai wd/o Sakharam Dipake and ors.)

AND

SECOND APPEAL NO.378/2014

(Satyabhamabai w/o Bandu Dipake ..vs.. Sakharam Natthu Dipake (Dead) thr. Lrs
Mathurabai wd/o Sakharam Dipake and ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. Rohit Joshi, Advocate for appellants.

CORAM : A. B. CHAUDHARI, J.

DATE : FEBRUARY 10, 2016

Heard learned counsel for the appellants.

None appears for the respondents, though served.

Taken up for final hearing at the stage of admission in view of the legal position which is crystal clear. It is not in dispute that the appellant had filed Regular Civil Appeal Nos.58/2006 and 59/2006. After admission of the appeals, they were called out for final hearing by the lower appellate Court. None appeared before the lower appellate Court on behalf of the appellant. I quote paragraph 7 of the judgment of the lower appellate Court as under:

“7. I would like to mention here that both these matters are pending since long. Parties to both appeals are too old. Nobody is

turning up. Taking into consideration the general directions of Hon'ble High Court to dispose of the old matter earlier, I am going to decide the instant appeals on the basis of material available on record.”

It appears that the lower appellate Court was anxious to decide the appeals because they were old. The anxiety of the lower appellate Court can be understood but then the provisions of Order XLI Rule 17 of the CPC are required to be followed. Order XLI Rule 17 reads thus:

“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 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. “

The explanation to Rule 17 above is of mandatory nature that the Court does not have a power to dismiss the appeal on merits. Hence, following substantial question of law needs to be

answered in the affirmative.

(i) *Whether the lower appellate Court committed error in deciding Regular Civil Appeal Nos. 58/2006 and 59/2006 on merits despite the appellant and his counsel being absent when the appeal was called out for hearing?*

...AFFIRMATIVE

Mr. Joshi, learned counsel for the appellant in both these appears assures this Court that he would instruct his client to take care to appear before the trial Judge and argue the appeal on merits, in order to avoid the dismissal of appeals again.

Hence, following order is passed.

ORDER

(i) Second Appeal Nos.358/2014 and 378/2014 are disposed of.

(ii) Regular Civil Appeal No.58/2006 and Regular Civil Appeal No.59/2006 are remanded to the lower appellate Court for hearing and disposal afresh, in accordance with law.

(iii) The appellant shall appear before the lower appellate Court on 06.04.2016.

(iv) The lower appellate Court shall issue notice to the respondents and thereafter hear the appeals, as expeditiously as possible.

JUDGE