

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

CIVIL APPLICATION (S) NO.7 OF 2014  
IN  
SECOND APPEAL ST. NO.20589 OF 2013.

RAMRAO GANPATRAO MUDHOLKAR  
VS  
RAMNE NEMI SHARMA AND ORS

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Office Notes, Office Memoranda of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
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Court's or Judge's orders

Shri V. D. Darne, Advocate for the appellant.  
Shri S. S. Bhalerao, Advocate for respondent No.1.

**CORAM : A.S. CHANDURKAR, J.**  
**DATED : JUNE 20, 2017.**

Though the prayer for condonation of delay is opposed by the learned Counsel for respondent no.1, considering the reasons mentioned the delay stands condoned.

Civil application is allowed and disposed of.  
**SECOND APPEAL ST. NO.20589 OF 2013.**

While issuing notice on the application for condonation of delay as well as for final disposal of the second appeal, the substantial question of law that was framed was whether the appellate Court could have dismissed the appeal on merits when the Counsel for the the appellant was not present.

The appellant is the original plaintiff who has filed suit for declaration that sale deed dated 1-7-1987 executed in favour of respondent no.1 was not binding on

him. The trial Court by judgment dated 31-3-2007 dismissed the suit. The original plaintiff then filed an appeal under Section 96 of the Code of Civil Procedure, 1908. The appeal was fixed for hearing on 4-4-2013. On said date the Counsel for the appellant was absent. After hearing the Counsel for the respondent no.1, the appeal came to be dismissed on merits.

The provisions of Order XLI Rule 17(1) along with explanation thereto read 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 in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]”

From the aforesaid explanation, it is clear that in absence of the appellant and his Counsel, the appeal cannot be considered on merits and thereafter dismissed. The appellate Court in para 8 of its judgment has clearly recorded the absence of the appellant and his learned Counsel. It has then proceeded to adjudicate the appeal on merits. Considering the aforesaid provisions such course was not permissible for the appellate Court. The impugned judgment is, therefore, liable to be set aside on this short ground.

The substantial question of law is answered by holding that it was not open for the appellate Court to adjudicate the appeal on merits in absence of the Counsel for the appellant. As a result, judgment dated 4-4-2013 in Regular Civil Appeal No.38/2007 is quashed and set aside. The proceedings in Regular Civil Appeal No.38/2007 are restored. The appeal shall be decided on its own merits and

in accordance with law. The appellant and the respondent no.1 shall appear before the appellate Court on 3-7-2017. The appellate Court shall decide the appeal by the end of December, 2017.

Second appeal is allowed in aforesaid terms.  
No costs.

JUDGE

/MULEY/