

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

RSA No. 155/2016

%

18th October, 2016

SMT.GURMEET KAUR LR. OF LATE SHRI SARWAN SINGH

..... Appellant

Through: Mr. Rakesh Dahiya and Brig. M.C.
Khatte, Advocates.

versus

SHRI HARBHAJAN SINGH & ANR

..... Respondents

Through: Mr. D.D. Joshi, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. On the last date of hearing, i.e on 6.9.2016, it was argued on behalf of the appellant that the First Appellate Court has passed the impugned Judgment on 29.1.2016 on merits but in the absence of appearance on behalf of the appellant. Reliance was placed on Order XLI Rule 17(1) of the Code of Civil Procedure, 1908 (CPC) which states that if an appeal is called on a date fixed for hearing, when the appellant does not appear, then the appeal cannot be decided on merits, and the appeal can only be dismissed in default.

2. By the last Order passed on 6.9.2016 the first appellate court record was called to see the applicability of Order XLI Rule 17(1) CPC. The record of the first appellate court received shows that on behalf of the appellant an adjournment was sought and granted on 28.7.2014. The second adjournment was granted to the appellant on 7.10.2014. The third adjournment granted to the appellant was then on 10.3.2015. The fourth adjournment granted to the appellant was then on 9.11.2015. The fifth adjournment then was prayed on behalf of the appellant on 22.1.2016, but that request for adjournment was declined and matter was fixed for judgment giving liberty to the appellant to file written submissions. The impugned Judgment was thereafter passed by the First Appellate Court on 29.1.2016.

3. The relevant order of the first appellate court is the Order dated 22.1.2016 and the same reads as under:-

“RCA No. 31/10

Swaran Singh v Harbhajan Singh

22.01.2016

Present: Sh. Narender Chauhan, proxy counsel for LR of deceased appellant.

None for R-1.

Sh. Pradeep Saini, ld. counsel for R-2.

Matter is listed today for arguments on appeal. Request for adjournment is made by proxy counsel for appellant on the ground that main counsel is held up in Hon'ble High Court of Delhi.

Opposed. Request is not tenable on this ground and hence **dismissed**.

Submissions of ld counsel for R-2 heard.

Matter be now put up for orders/judgment on **27.1.2016** with liberty to the appellant to file written submissions, if any, within two days.

(Manish Yaduvanshi)
ADJ-06 (Central) Delhi
22.01.2016.”

4. It is noted that by the very language Order XLI Rule 17(1) along with its Explanation will not apply because this rule would only apply when the appellant does not appear when the appeal is called for hearing. A counsel for the appellant appeared on 22.1.2016 and adjournment was sought on behalf of the appellant, and which was earlier granted on four consecutive dates to the appellant, showing that the appellant was deliberately not pursuing the appeal. Order XLI Rule 17(1) has therefore no application to the facts of the present case because appellant was represented on the date fixed i.e 22.1.2016 and Order XLI Rule 17(1) only applies as per its language when there is no appearance on behalf of the appellant.

5. Reliance placed upon by the appellant on the judgment of the Supreme Court in the case of ***Ghanshyam Dass Gupta Vs. Makhan Lal (2012) 8 SCC 745*** will not apply in the facts of the present case because in the said reported case it is noted that on facts there was no appearance on behalf of the appellant when the first appeal was called out for hearing. In fact, there was no date fixed for hearing in the case of ***Ghanshyam Dass Gupta (supra)*** because as per the procedure of this Court, after admission of the appeal, the same is put in regular matters, and regular matters are called out by turn without there being

a fixed date of hearing. In the judgment in the case of *Ghanshyam Dass Gupta (supra)*, Order XLI Rule 17(1) was called into play because there was no representation and no appearance on behalf of the appellant, whereas in the present case there was appearance on behalf of the appellant before the first appellate court on 22.1.2016, may be through a proxy counsel. I would also like to observe that the benign intention of Order XLI Rule 17(1) CPC is that for some reason the appellant or his counsel is not aware of the date of hearing or has genuine reason for non-appearance, and which therefore results in non-appearance on behalf of the appellant on a date of hearing, in such circumstances the first appeal cannot be decided on merits as per Explanation to Order XLI Rule 17(1) CPC, but, it cannot be that an appellant will deliberately keep on seeking repeated adjournments after adjournments in a first appeal, appearing on each date of hearing and taking adjournments, and then appear on a particular date fixed for arguments and again seek adjournment which is declined, and then at that stage the first appeal is therefore decided on merits. Also, it is seen that by the Order dated 22.1.2016 hearing was in fact granted to the appellant in the sense that the appellant was given an opportunity to file written submissions and which once again the appellant as per his habit of non-pursuing of the first appeal did not file, and therefore, the first appeal was decided on merits by the First Appellate Court vide its impugned Judgment dated 29.1.2016.

6. Therefore even on a plain reading Order XLI Rule 17 CPC would not apply in the facts of the present case, nor will apply the ratio of the judgment of the Supreme Court in the case of *Ghanshyam Dass Gupta (supra)* where facts were different of there not being a fixed date of hearing as the matter was taken up in regulars and no one whatsoever had appeared for the appellant in the case of *Ghanshyam Dass Gupta (supra)*.

7. In view of the above, it is held that the first appeal could have been decided on merits by the impugned Judgment dated 29.1.2016 and therefore appellant will now have to argue this second appeal on merits against the Judgment of the First Appellate Court dated 29.1.2016 whereby the first appeal was decided on merits.

8. List on 4th January, 2017.

9. Let the trial court record be requisitioned.

OCTOBER 18, 2016

AK

VALMIKI J. MEHTA, J