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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : 13.02.2020

+ **RSA 2/2019 & CM 142/2019**

ARCHANA RAWAL

..... Appellant

Through: Mr.Vikram Gulati, Adv.

versus

VIJAY KATARIA

..... Respondent

Through: Mr.Pujya Kumar Singh &
Mr.Tarun Kumar Narang,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This appeal has been filed challenging the judgment and order dated 30.08.2018 passed by the learned Additional District Judge-04, South West District, Dwarka Courts, Delhi in RCA No. 99/2017 titled ***Smt Archana Rawal vs. Shri Vijay Kataria.***

2. The following substantial questions of law were framed by this Court by its order dated 27.03.2019:-

“a. Whether in terms of the explanation to Order 41 Rule 17 of the CPC in force w.e.f. 01.02.1977, the appeal RCA 99/2017 could not have been

disposed of by the First Appellate Court on merits in the absence of the appellant and,

b. Whether the proceedings in RCA 99/2017 which were then pending before the ADJ-04 (South) are liable to be remanded back.”

3. The Impugned Order clearly reflects that the appellant herein, who was also the appellant before the learned Appellate Court, did not appear before the learned Appellate Court on the date when the appeal was taken up for hearing. The learned Appellate Court, instead of dismissing the appeal in default, proceeded to adjudicate upon the same on merits.

4. Placing reliance on the Order XLI Rule 17(1) of the Code of Civil Procedure, 1908 and the Judgment dated 21.08.2012 of the Supreme Court in Civil Appeal No.5950/2012, ***Ghanshyam Dass Gupta vs. Makhan Lal***, and Judgment dated 13.12.2019 in Civil Appeal No.9407/2019 ***Shri Prabodh Ch. Das and Anr. vs. Mahamaya Das and Ors.***, the learned counsel for the appellant submits that the learned Trial Court could not have proceeded to decide the appeal on merits in absence of the appellant; the only option available to the learned Trial Court was to dismiss the appeal in default.

5. On the other hand, the learned counsel for the respondent submits that the appellant had filed her written submissions before the learned Appellate Court and thereafter, did not appear in spite of

imposition of cost. He submits that, therefore, the learned Appellate Court did not err in deciding the appeal on merit, even in absence of the Appellant.

6. I do not find any merit in the submission made by the learned counsel for the respondent. In ***Ghanshyam Dass Gupta*** (Supra), interpreting the provision of Order XLI Rule 17(1) of the Code of Civil Procedure, 1908, the Supreme Court has held as under:-

“Rule 17(1) of Order 41 deals with the dismissal of appeal for appellant’s default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. Prior to 1976, conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant’s default. Conflicting views raised by the various High Courts gave rise to more

litigation. The Legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left un-represented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.

We may, in this connection, refer to a judgment of this Court in **Abdur Rahman and Others v. Athifa Begum and Others** (1996) 6 SCC 62, wherein the scope of explanation to Rule 17(1) of Order 41 CPC came up for consideration. While interpreting the said provision, this Court took the view that the High Court could not go into the merits of the case if there was no appearance on behalf of the appellant. We also endorse that view.”

7. This was reiterated by the Supreme Court in **Shri Prabodh Ch. Das** (Supra), observing as under:-

“9. Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976. Prior to 1976 conflicting views

were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 of CPC. Therefore, the explanation was introduced w.e.f 01.02.1977, to clarify the law by making an express provision that where the appellant does not appear, the Court has no power to dismiss the appeal on merits. Thus, Order 41 Rule 17(1) read with its explanation makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the appellant does not appear, the Court may if it deems fit dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.”

8. In view of the above judgments, the question of law is answered by holding that the learned First Appellate Court has erred in dismissing the appeal, being RCA 99/2017, on merits in the absence of the appellant. The Impugned Judgment and Order dated 30.08.2018 is therefore set aside. The appeal is remanded back to the First-Appellate Court to consider the same in accordance with law. The parties shall appear before the Learned First Appellate Court on 16.03.2020.

9. The appeal is allowed in the above terms with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 13, 2020/rv