

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.74/2022
WITH
CIVIL APPLICATION NO.85/2022
IN
SECOND APPEAL NO.74/2022**

1. Laxmi Laxman Toraskar,
wife of late Laxman Toraskar,
aged 69 years, service, r/o. House
No.219, Haliwada, Britona,
Bardez, Goa.

... Appellant.

Versus

1. Subhash Velingkar,
son of Subhash Velingkar,
aged about 71 years, married,
retired teacher, and his wife.

2. Late Smt Sushma Velingkar
(Since. Deceased)
(a) Mrs Gauri Tukaram Borkar,
Daughter of late Sushma Velingkar,
married, 46 years, r/o Flat No-S-2,
second floor, Siridur Apts, Above
ICICI Bank, Swami Vivekanand
Road, Panaji.
(b) Shailendra Subhash Velingkar,
Son of late Sushma Velingkar
bachelor, 43 years r/o. H.No-63,
Dr. Dada Vaidya Road, Near
Mahalaxmi Temple, Panaji.

(c) Mrs. Geeta Vishal Signapurkar, alias (Geeta Subhash Velingkar), Daughter of late Sushma Velingkar 39 years, r/o flat No-2/S-2/ Building No-2, Rosary Apts, La Campala, Main Colony, Miramar, Panaji.

(d) Mr Rajendra Subhash Velingar, Married, 50 years, R/o 63, Dr. Dada Vaidya Near Mahalaxmi Temple Goa.

3. Shri Sanjay Laxman Toraskar, S/o late Laxman Toraskar, aged about 41 years, unmarried, occupation service,

4, Shri Ompraksh Laxman Toraskar, s/o late Laxman Toraskar, aged about 32 years, unmarried, both r/o H. No. 219, Haliwada, Britona, Bardez, Goa.

5. Smt. Swapna Vishwas Naik, w/o Vishwas Naik, aged about 40 years, housewife, and her husband,

6. Shri Vishwas Naik, s/o Vaman Naik, Aged about 37 years, Service, Both r/o of H. No. 155 E/2, Duler, Mapusa, Bardez, Goa.

7. Shri Ramchandra Anand Sinai Rataboli,

Son of Anand Sinai Rataboli,
married, business,

8. Smt. Sitabai Ramchandra Sinai
Rataboli, d/o Keshav Kamat,
housewife, major of age,
Both r/o H. No. is not known,
Penha-da-Franca, Bardez, Goa. ... Respondents.

Mr. Iftikhar Agha with Mr. Ketan Morajkar,
Advocates for the Appellant.

Mr. Rui Alberto Gomes Pereira, Advocate for the
Respondents No.1, and 2(a) to 2(d).

CORAM: M. S. SONAK, J.

DATED: 6th January 2023

ORAL JUDGMENT :

1. Mr Agha, learned Counsel for the Appellant, points out that the only contesting respondents are Respondent No.1 and the legal representatives of Respondent No.2. The contesting Respondents are represented in this Court by Mr Rui Alberto Gomes Pereira. Accordingly, service upon Respondents No.3 to 8 is dispensed with.

2. This Appeal is admitted on the following substantial question of law on 21/09/2021 :

Whether the impugned judgment passed by the Appellate Court is sustainable when it is in the teeth of Order XLI Rule 17 of the Civil Procedure Code?

3. At the request of and with the consent of the learned Counsel for the parties, the Appeal is taken up for final disposal because the issue raised stands covered by the decision of the Supreme Court in ***Prabodh Choudhury Das and anr. vs. Mahamaya Das and ors.*** - (2020) 18 SCC 701.

4. In this case, the First Appellate Court decided the Appellant's Appeal on merits even though on the date fixed for hearing, neither the Appellant nor his Advocate appeared. Order XLI Rule 17(1) of CPC 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 on for hearing, the Court may make an order that the Appeal be dismissed. However, the explanation to this rule provides that nothing in this sub-rule shall be construed as empowering the Court to dismiss the Appeal on the merits.

5. In *Prabodh Choudhury Das* (supra), the Hon'ble Supreme Court, after quoting the provisions of Order XLI Rule 17(1) of CPC, observed as follows at paragraphs 8, 9, and 10 :

"8. The 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.

9. This position has been clarified by this Court in [Abdur Rahman and others v. Athifa Begum \(1996\) 6 SCC 62](#) wherein it was held that High Court cannot go into the merits of the case when there was non-appearance of the Appellant. In [Ghanshyam Dass Gupta v. Makhan Lal \(2012\) 8 SCC 745](#) this Court has reiterated the legal position as under:

"Prior to 1976, conflicting views were expressed by the 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 the 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, the 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 unrepresented 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."

10. Coming to the facts of the present case, the Court has decided the Appeal on merits after noticing

".... On this date a request for adjournment was made on behalf of Mr. Lodh when the matter was adjourned to 18.12.2014 and on 18.12.2014 Mr. Choudhury made a request for adjournment. Today Mr. Choudhury is not even present to argue the matter and no request has been made on his behalf. I, therefore, proceed to decide the Appeal on merits itself."

This order has been made clearly in contravention of Rule 17(1) of Order XLI of the CPC."

6. Therefore, considering the above legal position, this Appeal will have to be allowed subject, no doubt, to payment of suitable costs by the Appellant. Mr Rui Gomes Pereira points out that

several times, the matter was fixed before the Appellate Court. Still, neither the Appellant nor her Advocate appeared; therefore, the First Appellate Court proceeded to dispose of the case on merits after hearing the Advocate on behalf of the Respondents.

7. The record shows that the Appellant was not diligent in pursuing the Appeal before the First Appellate Court. However, considering the provisions of Order XLI, Rule 17(1) of CPC and the law in *Prabodh Choudhury Das (supra)*, the impugned Judgment and Decree made by the First Appellate Court will have to be set aside, subject to the Appellant paying costs to the contesting Respondents No.1 and the legal representatives of Respondent No.2. The matter will now have to be remanded to the First Appellate Court for disposal in accord with the law.

8. The dispute in the suit/Appeal concerns a property admeasuring almost 3000 sq. metres at Penha de Franca (Porvorim). The lack of diligence of the Appellants is apparent from the record. Costs must compensate for the prejudice suffered by the contesting Respondents. Accordingly, it is only appropriate that the costs are quantified at ₹50,000/-. Mr. Agha states that such costs will be paid within two months from today.

9. Therefore, subject to payment/deposit of costs of ₹50,000/- in this Court within two months from today, after giving due intimation to Mr Rui Gomes Pereira, the impugned Judgment and Decree dated 4/12/2019 is set aside. Accordingly, the matter is remanded to the First Appellate Court for disposal of Regular Civil Appeal No. 134/2018, following the law and on its own merits. Mr Agha states that the Counsel for the Appellants will argue the Appeal on the appointed date.

10. Suppose the costs are indeed deposited within two months. In that case, the parties are directed to appear before the First Appellate Court on 13th March 2023 at 10.00 a.m. and file a certified copy of this Judgment and Order, together with proof of deposit of costs. After that, the First Appellate Court to allot appropriate date/dates for disposal of the Regular Civil Appeal No.134/2018, in accordance with the law and on its own merits. Both the parties should, hereafter, not delay the disposal of the Appeal and render full cooperation to the First Appellate Court in the expeditious disposal of the Appeal now restored.

11. However, if the above amount is not deposited within two months from today with prior intimation to Mr Rui Gomes Pereira, then this Appeal shall be deemed to have been dismissed with costs of ₹25,000/-.

12. The Second Appeal is disposed of in the above terms. Accordingly, the civil Application does not survive the disposal of the Second Appeal and the same is also disposed of.

M. S. SONAK, J.

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MHAMAL

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