

[2023 LiveLaw \(SC\) 1032](#)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

B.V. NAGARATHNA; J., UJJAL BHUYAN; J.

NOVEMBER 24, 2023

CIVIL APPEAL NO. /2023 (@ SLP (C) No.23809/2023)

BENNY D'SOUZA & ORS. versus MELWIN D'SOUZA & ORS.

Civil Procedure Code, 1908; Order XLI Rule 17 - If the appellant does not appear when the appeal is called for a hearing, then the same can be dismissed for non-prosecution and not on merits.

(Arising out of impugned final judgment and order dated 26-09-2023 in RSA No. 196/2022 passed by the High Court of Karnataka at Bengaluru)

For Petitioner(s) Mr. S N Bhat, Sr. Adv. Mr. D P Chaturvedi, Sr. Adv. Mr. Tarun Kumar Thakur, Adv. Ms. Parvati Bhat, Adv. Ms. Anuradha Mutatkar, AOR

For Respondent(s) Mr. G. Arudhra Rao, Adv. Mr. Sathvik M.C., Adv. Mr. Aniruddha Purushotham, AOR Ms. Tansi Fotedar, Adv. Mr. Rohan Andrew Naik, Adv. Mr. Mohan Prasad Gupta, Adv. Mr. Kumar Abhishek, Adv.

ORDER

Leave granted.

The appellants herein are the plaintiffs who were the appellant in RSA No.196/2022. The only grievance of the appellants herein is with regard to the dismissal of the said appeal vide order dated 26.09.2023 on merits although the appellants were not represented inasmuch as there was no counsel who appeared for the appellants and the junior counsel for the appellants submitted that the senior counsel engaged in the matter, was not available as his cousin had passed away. Therefore, on account of a bereavement in the family of the arguing counsel there was no representation on behalf of the appellants before the High Court.

Learned senior counsel appearing for the appellants submitted that the High Court could have dismissed the appeal for non-prosecution in terms of the order XLI Rule 17 CPC and particularly the Explanation thereto instead of dismissing the appeal on merits by stating that no substantial question of law was made out. Therefore, the learned senior counsel submitted that the impugned judgment may be set aside and the matter may be remanded to the High Court for consideration on the merits of the appeal.

Per contra, learned counsel appearing for the respondent supported the impugned judgment and contended that the appellants consistently failed to appear before the High Court and therefore, the High Court had no option but to pass the impugned judgment and that there is no merit in the appeal.

Having heard learned senior counsel for the appellants and learned counsel for the respondents, at the outset, we extract Order XLI Rule 17 of the CPC which reads as under:

"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."

The Explanation categorically states that if the appellant does not appear when the appeal is called for hearing it can only be dismissed for non-prosecution and not on merits.

However, the impugned judgment is a dismissal of the appeal on merits which is contrary to the aforesaid provisions and particularly the Explanation thereto. On that short ground alone the appeal is allowed the impugned order is set aside.

The RSA No.196/2022 is restored on the file of the High Court.

The parties are at liberty to advance arguments on the merits of the case.

All contentions are left open.

The appeal is allowed and disposed of in the aforesaid terms.

No costs.

Pending application(s), if any, shall stand disposed of.

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