



AND:

...RESPONDENT

(BY SRI. MAHADEV S. PATIL, ADVOCATE)

THIS RSA IS FILED UNDER SECTION 100 OF CPC, PRAYING TO SET ASIDE THE JUDGMENT AD DECREE DATED: 02.04.2014 PASSED BY THE LEARNED CIVIL JUDGE AT AFZALPUR IN O.S. NO. 83/2012 AND ALSO SET ASIDE THE JUDGMENT AND DECREE DATED: 04.03.2017 PASSED BY THE LEARNED SENIOR CIVIL JUDGE AND JMFC AT AFZALPUR IN R.A. NO.18/2014 CONSEQUENTLY BE PLEASED TO DISMISS THE SUIT FILED BY THE PLAINTIFFS.

THIS APPEAL, COMING ON FOR ADMISSION, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The present appeal is filed by the defendants being aggrieved by the judgment and decree dated 04.03.2017 passed in R.A.No.18/2014 on the file of the Senior Civil Judge and JMFC, Afzalpur, (hereinafter referred to as "First Appellate Court") by which the First Appellate Court dismissed the appeal filed by the defendants and confirmed the judgment and decree dated 02.04.2014



passed in O.S.No.83/2012 on the file of the Civil Judge Afzalpur (hereinafter referred to as 'trial Court').

2. Parties herein are referred to as per their rank and status before the trial Court.
3. The essential facts of the case leading up to this appeal, are as follows.

The suit in O.S.No.83/2012 was filed by the plaintiff for partition and separate possession of the suit properties. The suit was resisted by the defendants. The trial court framed appropriate issues, and after the trial, the suit was decreed by answering issue Nos. 1, 2, 4, and 5 in favour of the plaintiff and issue No.3 against the defendant by declaring that the plaintiff is entitled to half share in the suit properties. Being aggrieved by the said judgment and decree passed by the trial court, the defendants have preferred an appeal before the First Appellate Court in R.A.No.18/2014, which came to be



dismissed. Being aggrieved by the same, the appellant-defendants have preferred this second appeal.

4. Heard the learned counsel appearing for both the parties.

5. This appeal is admitted to consider the following substantial questions of law;

(a) Whether the judgment and decree passed by the First Appellate Court, considering the appeal on merits in the absence of appellant, after hearing the learned counsel for the respondent is perverse and arbitrary?

(b) What order?

Regarding point No.1:

6. I have heard the learned counsel for both the parties and perused the judgment passed by the First Appellate Court.

7. It is clear from the judgment of the First Appellate Court that the learned counsel for the appellants did not



submit any arguments on behalf of the appellants. On this ground, the First Appellate Court considered that there were no arguments on behalf of the appellants and dismissed the appeal. It is well-settled law, in view of the provisions of Order XLI Rule 17 of Code Of Civil Procedure 1908, that when the counsel appearing for the appellant or the appellants are not present, and the counsel for the respondent is present, the only course open to the First Appellate Court is to dismiss the appeal for non-prosecution. The appellate Court should not consider the appeal on merits after hearing the counsel for the respondent/s, as contemplated under Order XLI Rule 17(1) of CPC. The same reads as follows:

"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.

(2) Hearing appeal ex parte. — Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

8. In this regard, I rely on the decision of the Hon'ble Supreme Court in the case of ***Benny D'Souza and Others Vs. Melwin D'Souza and others*** reported in ***2023 LiveLaw (SC) 1032***, wherein it is observed as under;

"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.”

9. The co-ordinate bench of this Court in the case of ***Mallesi and Another Vs. Mallaya and Another*** reported in ***2005 (4) KCCR 2803***, wherein it is held that in view of provisions under Order 41 Rule 17 of Code Of Civil Procedure 1908, when the counsel appearing for appellant/s are not present and counsel for the respondent/s is present, the only course open to the appellate Court is to dismiss the appeal for non-prosecution.

10. In the present case, the First Appellate Court at paragraph 18 of the judgment noted that, despite providing ample opportunities, the counsel for the appellants did not present any arguments. Consequently, the court considered the arguments on behalf of the



appellants as NIL. Furthermore, in paragraph 19, it was observed that the counsel for the respondent had presented arguments and subsequently dismissed the appeal. This order has been made clearly in contravention mandatory provisions under of Rule 17(1) of Order XLI of the Code Of Civil Procedure 1908, which runs counter to the aforementioned decisions. Therefore, I answer the point No.1 in the affirmative.

Regarding point No.2:

For the aforesaid reasons and discussions, I proceed to pass the following:

ORDER

- (a) The appeal is allowed and remanded to give opportunity to the appellant/defendants to advance their arguments;
- (b) The judgment and decree dated 04.3.2017 passed in R.A.No.18/2014 on the file of the Senior Civil Judge and JMFC, Afzalpur is set aside and the appeal is restored to its file;



- (c) The First Appellate Court is directed to dispose of the case in accordance with law as early as possible.
- (d) The parties are directed to appear before the Court of Senior Civil Judge and JMFC, Afzalpur on **27.03.2024** without awaiting for any notice in this regard;
- (e) Registry is directed to send the copy of this judgment along with records to the First Appellate Court forthwith.

Sd/-
JUDGE

MSR
List No.: 1 Sl No.: 41