(1936) 11 AHC CK 0019

Allahabad High Court

Case No: None

Syed Mohammadi Husain		APPELLANT
	Vs	
Mt. Chandro and Others		RESPONDENT

Date of Decision: Nov. 19, 1936

Citation: AIR 1937 All 284

Hon'ble Judges: Niamatullah, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Niamatullah, J.

This is a plaintiff''s second appeal and involves a very short point for decision. The suit was dismissed by the trial Court. The plaintiff preferred an appeal, which came on for hearing before the learned Subordinate Judge of Muzaffarnagar. The pleader, who had been, engaged by the appellant, appeared when, the case was called on for hearing ands presented an application to the effect that the file of the case was very heavy and that owing to other engagements he could not prepare the appeal. For that reason, it was prayed that the appeal be adjourned. The application was rejected The learned Judge recorded the following order:

The appellant''s pleader is not prepared to argue: the appeal. His application for the postponement of the appeal has been dismissed. I therefore dismiss the appeal for want of prosecution with costs.

2. The present appeal is directed against a decree in pursuance of the judgment quoted above. A preliminary objection is taken by the respondents'' counsel that no appeal lies. It is argued that the appeal having been dismissed in default, the only remedy open to the appellant was to apply for restoration of the appeal; and that if such application were refused, he could prefer an appeal from the order refusing to restore the appeal. This argument is based on an erroneous assumption, namely that the appeal was dismissed for "default" or non-appearance. As a matter of fact

there was appearance. The pleader, who had been engaged by the appellant to argue the case, was present and prayed for time. There is nothing in the judgment of the lower appellate Court to suggest that on the application for adjournment being dismissed he retired and there was no appearance thereafter. The learned Judge clearly was of opinion that the refusal or inability of the pleader to argue the appeal amounted to "want of prosecution." He did not treat the case as if no appearance at all had been put in by or on behalf of the appellant. It is perfectly clear to me that it was not open to the appellant to make an application for restoration of the appeal, as if the same had been dismissed for default or non-appearance. The (disposal of the appeal clearly amounted to a "decree," as defined in the Civil Procedure Code, and a second appeal is maintainable. Accordingly I hold that the appeal does lie.

3. It is open to the appellant to impugn the decision of the lower appellate Court on such ground as is permissible u/s 100, Civil P.C. One of the grounds taken in the memorandum of appeal is that in the circumstances of the case the lower appellate Court should have granted the adjournment prayed for. I do not think this ground can be taken in I second appeal. The lower appellate Court had undoubtedly the discretion to refuse the adjournment prayed for. Its exercise of discretion one way or the other is not a matter which can be the subject of second appeal. If this had been the only point in the case I would have dismissed the appeal.

4. There, is, however, a more serious flaw fin the proceedings of the lower appellate Court. After refusing to adjourn the case, the lower appellate Court was bound to decide the appeal before it. The inability of the pleader to argue did not relieve the Court of the necessity of applying its mind y to the facts of the case arid to decide it on its merits. A Court is riot entitled to dismiss an appeal for "want of prosecution" only because the appellant, if he appears personally, or his pleader, who represents him, is, for any reason, unable to argue the appeal. The Court should proceed in the manner laid down by Order 41, Rules 30 and 31, Civil P.C., and is bound to pronounce judgment in open Court, the judgment to contain points for determination, its decision thereon and the reasons for that decision. If the right procedure had been adopted by the lower appellate Court, it would have been open to the plaintiff to appeal to this Court on the merits. Where a party is bound to do something and has failed to do it, the Court may dismiss the appeal for want of prosecution. Where, however, the appellant does not avail himself of a right or privilege conferred by law-in this case the right to argue-he cannot be considered to -have failed to do something which he was bound to do so as to justify the Court in dismissing the appeal for want of prosecution. The law gives an absolute right to the appellant to be heard. This right he may or may not avail himself of. It cannot be converted into a duty, so as to make his failure "to" argue "want of prosecution." In this view the judgment of the lower appellate Court is clearly vitiated. The appeal is accordingly allowed. The decree appealed from is set aside and the case is remanded to that Court for disposal according to law. Costs shall abide the result.

5. Leave to appeal under the Letters Patent is refused. Court-fee paid in this Court shall be refunded.