

(1925) 10 BOM CK 0040**Bombay High Court****Case No:** Appeal from Order No. 68 of 1924

Hanmantbhat Shankarbhat
Nargund

APPELLANT**Vs**

Basappa Chanbasappa Hasabi

RESPONDENT**Date of Decision:** Oct. 8, 1925**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 21

Citation: (1926) 28 BOMLR 738**Hon'ble Judges:** Madgavkar, J; Fawcett, J**Bench:** Division Bench**Final Decision:** Allowed

Judgement

Fawcett, J.

In my opinion, when this appeal was entered on the Court's board as fixed for April 15, 1924, it must be taken that there was in effect an adjournment of the hearing of the appeal to that particular day. The fixing of this notice on the board is no doubt primarily a notice to the appellant's pleader, but it is also accessible to the general public; and that being so, the respondent might thereby get notice that he still had an opportunity of appearing on the 15th. It seems to me that no practice of the Court, such as is relied upon by the District Judge, can avail against the words of Order XLI, Rule 16, by which if the respondent appears on the date to which the hearing may be adjourned he is entitled to be heard. I do not agree with the argument of Mr. Nilmant that the fixing of the notice on the board was merely a matter for the convenience of the Court, and that the respondent not having appeared on the date specified in the notice was not entitled to the benefit of the fixing of the hearing for April 15. In the case of an appeal permission of the Court is not required for a subsequent appearance, whereas it is required in the case of a suit under Order IX, Rule 7.

2. No doubt, Order XLI, Rule 5, authorises a Court's saying that, if the respondent has not appeared on the date fixed, the appeal will be heard ex parts; but, having regard to the subsequent Rules 16 and 17, I think it is clear that the Code does not mean that, if he fails to appear on the day so fixed, he has no right to appear at any other date to which the appeal is adjourned. Consequently, it is, in my opinion, shown that the respondent was prevented by sufficient cause from appearing on April 3, if he had wanted to, because the notice fixing the case for April 15, was an intimation that he might appear on that date. In the circumstances, I think, the District Judge should have allowed the application to reheat the appeal, making the respondent pay the costs up to date on account of his omission to appear, as he should have done, on the date fixed in the notice.

3. I would, therefore, allow the appeal and direct the lower Court to restore Appeal No. 11 of 1923 to the file and re-hear it after giving the respondent an opportunity of appearing according to law. But, the respondent, in the circumstances, should bear the appellant's costs in the lower Court. Costs in this Court to be costs in the appeal to be re-heard.

Madgavkar, J.

4. Under Order XLI, Rule 16, the respondent has a right of audience on the day fixed, or on any other day to which the hearing may be adjourned, including, to use the words of Order XLI, Rule 21, the last day when the appeal is called on for hearing. Although he was undoubtedly in fault in not putting in an appearance at any time subsequent to the service of the notice upon him in August, the act of the Court in calling, the appeal for hearing on April 3, when by public notice the appeal was set down for hearing on April 15, is, in my opinion, sufficient cause within the meaning of Order XLI, Rule 21, to entitle the respondent to a re-hearing with notice. But the appellant's costs in the lower Court must be borne by him.

5. I agree with my learned brother in the order proposed by him.