

MOHAMMAD KHALIL

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v.

KAMARUDDIN

AUGUST 5, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

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*Code of Civil Procedure, 1908 :*

*S.107, Order 42—Appeal from appellate decree—Dismissal of appeal on merits in the absence of one of the appellants—Held, when counsel for one of the appellants was not present, it is not incumbent on court to adjourn the case—Even otherwise, it cannot be said that the appellate court could not dispose of the appeal on merits.*

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10591 of 1996.

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From the Judgment and Order dated 23.1.95 of the Allahabad High Court in Second Appeal No. 1437 of 1980.

Gopal Krushwa, M.K. Choudhary and S.K. Verma for the Appellant.

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Bhat and Mrs. Purnima Bhat Kak for the respondent.

The following Order of the Court was delivered :

Leave granted.

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We have heard learned counsel on both sides. This appeal by special leave arises against the judgment and decree of the High Court of Allahabad made on January 23, 1995 in Second Appeal No. 1437/80. The admitted position is that the appellant was one of the defendants in the suit. The suit for specific performance had come to be filed for execution of the sale deed under an agreement. The trial Court disbelieved the agreement on the ground of interpolation and dismissed the suit. On appeal, the appellate Court reversed the decree. Thus, the appellant and others came to file second appeal in the High Court. There were four appellants before the High Court. The appellant herein had changed the advocate and the other three had not changed the advocate. When the case

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- A was called on for hearing, the counsel who had not changed and filed the appeal initially argued the matter on behalf of the other appellants also. The High Court was not inclined to interfere. The appellant alone had changed the advocate but he did engage other advocate who did not appear nor argued on behalf of the appellant on the date when the case was posted. Accordingly, the High Court came to dispose of the second appeal on merits confirming the decree of the appellate Court.
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- The question raised in this appeal is : whether the High Court was competent to dispose of the appeal on merits when one of the appellants was absent? The learned counsel placed strong reliance on Order 41, Rule 17, sub-rule (1) read with Explanation, CPC and contended that the appeal could not be heard on merits. We find no force in the contention. When the appeal was posted for hearing, it is but the duty of the counsel to appear. When it is contended that the name of the advocate for the appellant was not recorded and he could not notice the case, we asked the counsel whether the counsel has filed any affidavit to that effect. He frankly admits that the affidavit has not been filed but the appellant has asserted that the counsel could not notice the appeal having come up for hearing. It is seen that three of the appellants who had commonly filed the appeal were heard by the learned Judge through the counsel and the High Court was not inclined to interfere with the appeal. When the appellant had changed the counsel, it is but his duty to see that the counsel is ready. When the counsel was not present, the Court is not incumbent to adjourn the case. Even otherwise we are not inclined to accept the contention that the appellate Court could not dispose of the appeal on merits. The appeal was rightly dismissed on merits by the High Court confirming the decree of the appellate Court and it does not warrant interference.
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The appeal is accordingly dismissed. No costs.

R.P.

Appeal allowed.