

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO. 78 of 2010**

Shri Ashok C. Rajadyax, major,  
married, Partner of M/s. Ashwini  
Builders & Engineers, having his office  
at Naina Gracias Plaza Building, Near  
Loyola High School, Margao, Goa. ... Appellant

Versus

Shri Augustin Lobo, major,  
married, businessman,  
r/o Flat No. T-1, Kurtarkar  
Nagar, Fatorda, Margao, Goa. ... Respondent

Mr. V.A. Lawande, Advocate for the Appellant.  
Mr. S. Shet, Advocate for the Respondent.

Coram:- A. P. LAVANDE, J.  
Date:- 28<sup>th</sup> February, 2011.

**ORAL JUDGMENT:**

Heard learned Counsel Mr. Lawande for the  
appellant and Mr. Shet for the respondent. By consent of  
the learned Counsel for the parties, the appeal is taken up  
for final hearing since the appeal is liable to be disposed of  
on a very short point.

2. This second appeal is preferred by the appellant challenging Judgment and Decree dated 07-04-2010, passed by the District Judge-2, South Goa, Margao in Regular Civil Appeal No. 104/2010, dismissing the appeal preferred by the appellant against Judgment and Decree dated 31-01-2005 passed by the 1<sup>st</sup> Additional Civil Judge, Senior Division, Margao in Special Civil Suit No. 206/2000/I.

3. Admittedly, the appeal was decided on merits in the absence of appellant and his Advocate. In view of this factual position, the appeal is admitted on the following substantial question of law:

Whether the lower Appellate Court was justified in disposing of Regular Civil Appeal No. 104/2010 on merits in the absence of the appellant and/or his Advocate ?

4. Order 41, Rule 17 of Civil Procedure Code reads thus:

**“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”.

5. From the perusal of the record, it is clear that when appeal preferred by the appellant against the Judgment and Decree passed by the Trial Court was called out for hearing on merits, neither appellant nor his

Advocate was present. Hence, the Appellate Court was not entitled to dispose the appeal on merits. The Appellate Court had only two options, either to dismiss the appeal for default or adjourn the matter to a future date to hear the appellant and/or his Advocate. Impugned Judgment and Decree is clearly in breach of Order 41, Rule 17 of the Civil Procedure Code. On this ground alone, I am of the considered opinion that impugned Judgment and Decree is liable to be quashed and set aside.

6. In view of the above, Judgment and Decree dated 07-04-2010 passed by the District Judge-2, South Goa, Margao in Regular Civil Appeal No. 104/2010 is quashed and set aside. The lower Appellate Court is directed to decide the appeal afresh in accordance with law. Parties to appear before the lower Appellate Court on 31<sup>st</sup> March, 2011 at 10.00 a.m.

7. Mr. Lawande states that appellant had filed an application under Order 41, Rule 27 of the Civil Procedure Code before the lower Appellate Court and said application has not been decided by the lower Appellate Court. If that is so, lower Appellate Court to decide the said application also, in accordance with law.

8. Mr. Lawande prays for refund of Court fees. Registry to refund the appropriate Court fees if permissible under the Rules.

9. Appeal stands disposed of in aforesaid terms with no order as to costs.

A. P. LAVANDE, J.

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