

direction be issued to the concerned respondent authorities to decide the interim application in the pending suit at an early date.

42. Counsel appearing for the petitioners has no objection to the aforesaid prayer.

43. Learned Additional Chief Standing Counsel for the State-respondents has submitted that efforts would be made to decide the aforesaid interim application in the pending suit at an early date, and that an endeavour would be made to dispose of the application within a period of two months from date.

44. In view of the aforesaid, it may be observed that the court concerned would be expected to make an endeavour to decide the application for interim relief, in the suit stated to be pending before it, in accordance with law, expeditiously and preferably within a period of two months from the date of production of a certified copy of the instant order, without granting any unnecessary adjournments to either of the parties, provided there is no other legal impediment.

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**(2024) 10 ILRA 201**  
**ORIGINAL JURISDICTION**  
**CIVIL SIDE**  
**DATED: LUCKNOW 01.10.2024**

**BEFORE**

**THE HON'BLE ALOK MATHUR, J.**

Writ Tax No. 226 of 2024

**M/S Archita Tour and Travels ...Petitioner**  
**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**

Manish Misra, Bhavini Upadhyay, Dileep Pandey, Gaurav Upadhyay

**Counsel for the Respondents:**

C.S.C.

**Civil Law- Code of Civil Procedure-1908- Order XLI Rule 17-** Deciding a case ex parte on merits without giving reasonable opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits. **(Para 11)** (E-15)

**List of Cases cited:**

1. Benny D'Souza & ors.Vs Melwin D'Souza & ors.; S.L.P. (C) No.23809 of 2023
2. Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India, (1976) 2 SCC 981
3. M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs The Commissioner of Trade Tax, U.P, Lucknow; 2003 NTN (Vol.22)- 341

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Shri Manish Misra, learned counsel for the petitioner as well as Sri Sanjay Sarin, learned Standing Counsel for the respondent and perused the record.

2. By means of the present writ petition, the petitioner has challenged the order dated 18.12.2023 passed by the Additional Commissioner, Grade ? II (Appeal ? 5), Commercial Tax, whereby he has rejected the appeal of the petitioner and upheld the order of adjudicating authority dated 26.07.2021.

3. Learned counsel for the petitioner has submitted that the impugned order dated 18.12.2023 has been passed ex-parte

by the appellate authority on the ground that on the date fixed, the counsel of the appellant could not appear before the appellate authority and neither did anyone appear on behalf of the State and the appeal was decided on merits. The appellate authority has further recorded that despite information and service being sufficient upon the appellant, no one had appeared and accordingly the appellate authority proceeded to decide the case on merits.

4. The question raised by the petitioner in the present writ petition is as to whether in absence of counsel of the appellant, the appellate authority can proceed to consider and decide the appeal 'ex parte' in absence of the appellant. He submits that the principles with regard to appearance of the plaintiff or defendant and order to be passed thereon and as to how the court could proceed in the matter of suits and appeals has been provided under the Code of Civil Procedure.

5. He submits that Order IX, Rule 6(1)(a) of the Code of Civil Procedure provides that, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then when summons duly served, if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte. He submits that it is open for the court to continue the hearing of the proceedings in absence of defendant on the merit of the case and suit may proceed ex parte, but according to the Order IX Rule 8 of the Code of Civil Procedure, where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof.

6. He further placed reliance on the Order XLI Rule 17 of the Code of Civil Procedure, 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.

7. It is in the aforesaid circumstances, it was submitted that in case the appellant does not appear and only the State appeared before the Commercial Tax Tribunal, the Tribunal should have dismissed the appeal in default rather to proceed to pass an order on merits of the case. He further relied upon the judgement of the Supreme Court in the case of Benny D'Souza & Ors. Vs. Melwin D'Souza & Ors.; S.L.P. (C) No.23809 of 2023, wherein though the Supreme Court was interpreting the provisions of Order XLI Rule 17 of the Code of Civil Procedure, and was of the view that where the appellant does not appear, the court can only dismiss the appeal for want of prosecution and not consider the case on merits.

8. The observation of the Supreme Court in the aforesaid judgement is quoted herein-below:

*"Leave granted.*

*The appellants herein are the plaintiffs who were the appellant in RSA No.196/2022. The only grievance of the appellants herein is with regard to the dismissal of the said appeal vide order dated 26.09.2023 on merits although the appellants were not represented inasmuch as there was no counsel who appeared for the appellants and the junior counsel for the appellants submitted that the senior counsel engaged in the matter, was not available as his cousin had passed away.*

*Therefore, on account of a bereavement in the family of the arguing counsel there was no representation on behalf of the appellants before the High Court.*

*Learned senior counsel appearing for the appellants submitted that the High Court could have dismissed the appeal for non prosecution in terms of the order XLI Rule 17 CPC and particularly the Explanation thereto instead of dismissing the appeal on merits by stating that no substantial question of law was made out. Therefore, the learned senior counsel submitted that the impugned judgment may be set aside and the matter may be remanded to the High Court for consideration on the merits of the appeal.*

*Per contra, learned counsel appearing for the respondent supported the impugned judgment and contended that the appellants consistently failed to appear before the High Court and therefore, the High Court had no option but to pass the impugned judgment and that there is no merit in the appeal.*

*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.*

*The RSA No.196/2022 is restored on the file of the High Court.*

*The parties are at liberty to advance arguments on the merits of the case.*

*All contentions are left open. The appeal is allowed and disposed of in the aforesaid terms.*

*No costs.*

*Pending application(s), if any, shall stand disposed of."*

9. With the above principle in mind, we have looked at Section 107 of the UP GST Act. Sub-section (8) of Section 107 requires the Appellate Authority to give an opportunity of hearing to the appellant and sub-section (9) also empowers the Appellate Authority to adjourn the hearing at the request of the appellant, if sufficient cause is shown for the prayer made. The proviso to sub-section (9) ensures that the Appellate Authority has sufficient powers to refuse such adjournment, if it has been granted three times previously. Sub-section (10) empowers the Appellate Authority to permit the appellant to argue any ground, not set forth in the grounds of appeal, if the omission was not willful or unreasonable. We specifically extract sub-section (11) and (12) of Section 107, without the two proviso under sub-section (11) :-

*"(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming,*

*modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:*

xxx xxx

xxx xxx

*(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision."*

10. The specific statutory mandate is that after hearing the appellant, the Appellate Authority is to make further enquiry, if found necessary and pass such orders as it thinks just and proper, *confirming, modifying or annulling the decision or order appealed against*. Such affirmation, modification or annulment shall not be an empty formality nor can it be mechanical, without the consideration of the grounds of appeal. We observe so, specifically when the Appellate Authority is empowered to refuse the prayer for adjournment made by an appellate, if on three prior occasions, such adjournment has been allowed, in which case also the Appellate Authority cannot absolve itself from the obligation to conduct such further enquiry as is mandated under sub-section (11) of Section 107. Sub-section (12), it has to be further emphasized, also requires the order of the Appellate Authority disposing of the appeal to be in writing and specifically stating the points for determination, the decision thereon and the reasons for such decision. When an appeal is dismissed for reason only for absence of the appellant or lack of effective prosecution, then the Tribunal should be found to have abdicated its powers and not followed the statutory mandate.

11. Even otherwise, deciding a case ex parte on merits without giving reasonable

opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits.

12. In this regard, the Supreme Court in the case of **Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India, (1976) 2 SCC 981**, gave directions to the administrative authority and tribunals exercising quasi-judicial powers. The Court observed as under:

*"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process."*

13. The other concern raised before us was that there is no provision for setting aside the ex parte order in such a situation where the Tribunal proceeds to allow the appeal ex parte in absence of the defendant. In this regard, reliance was placed upon a judgement of a Coordinate Bench of this Court passed in **M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs. The Commissioner of Trade Tax, U.P.**

**Lucknow; 2003 NTN (Vol.22)- 341,** wherein interpreting the provisions of Section 22 of the U.P. Value Added Tax Act, 2008, which is *pari materia* with provision of Section 31 of the U.P. Value Added Tax Act, 2008, which provides for rectification, this Court has held that wherein an appeal is decided *ex parte*, it shall be open for moving an application for rectification of such a situation. Accordingly, adequate reasons are given for the defendant for non appearance and judgement is rendered *ex parte*, but recall of order, exercise of rectification has been provided under Section 31 of the U.P. Value Added Tax Act, 2008.

14. In light of the above, the impugned order dated 18.12.2023, whereby the appellate authority has proceeded to decide the appeal preferred by the petitioner in his absence, is held to be illegal and arbitrary and accordingly set aside and the matter is remitted back to the appellate authority to decide the matter afresh after affording an opportunity of hearing to the parties and considering the fact that much time due to pendency of the aforesaid proceedings, has elapsed, the appellate authority is directed to expedite the appeal and decide the same within three months from the date of production of a certified copy of this order, in accordance with law.

15. With the aforesaid observations, the revision is **allowed**.

16. The petitioner undertakes to cooperate in the proceedings before the appellate authority.

**(2024) 10 ILRA 205**  
**APPELLATE JURISDICTION**  
**CIVIL SIDE**  
**DATED: LUCKNOW 24.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**  
**THE HON'BLE OM PRAKASH SHUKLA, J.**

Special Appeal Defective No. 436 of 2024

**Amardeep Kashyap** ...Appellant  
**Versus**  
**State of U.P. & Ors.** ...Respondents

**Counsel for the Appellant:**  
Om Prakash Mani Tripathi

**Counsel for the Respondents:**  
C.S.C.

**(A) Service Law - Compassionate Appointment - Uttar Pradesh Dying-in-Harness Rules, 1974 - Indian Evidence Act, 1872 - Section 107 - Burden of proving death of person known to have been alive within thirty years, Section 108 - Burden of proving that a person is alive who has not been heard of for seven years -Presumption of Civil Death after 7 years of disappearance – A declaration of civil death by the civil court under Section 108 of the Indian Evidence Act, 1872 would not lead to a presumption with regard to date and time of death unless proven with evidence - Compassionate appointment can only be claimed if the death occurred during service.(Para - 12,19,20,24)**

Appellant's father, employed as a peon, went missing on 25.06.2012 - formal complaint was lodged on 27.06.2012 - Despite efforts, he could not be traced - reached age of superannuation on 30.11.2013 - Appellant filed suit for declaration of civil death under Section 108 - civil court declared his father's civil death on 22.04.2022 - but no specific date mentioned - Subsequently appellant sought compassionate appointment - which was rejected by authorities - hence present appeal. (Para 2-7,12)

**HELD:** - Appellant's request for compassionate appointment was rightly rejected since his father, presumed dead only after a seven-year period and a civil court declaration, had already