

# SUPREME COURT OF INDIA

Sarman Singh

Vs.

Kishan Singh

(Arijit Pasayat and L.S.Panta, JJ.)

26.03.2007

## JUDGMENT

**Dr.Arijit Pasayat,J.**

1. Leave granted.
2. Challenge in these appeals is to the order passed by a learned Single Judge of the Punjab and Haryana High Court dismissing the application to recall the order dismissing the Second Appeal.
3. The background facts in a nutshell are as follows:

“Appellant filed Second Appeal No.4802/2003 before the High Court questioning correctness of the order passed by a learned Second Additional District Judge, Kapurthala. By the said order the first Appellate Court affirmed the order of the learned Civil Judge, Junior Division, Kapurthala. The matter was listed on 8.11.2004. On that day there was no appearance on behalf of the appellant. The High Court referred to the merits of the case and dismissed the appeal noting that none appeared for the appellant. It is to be noted that the appeal was filed by the defendants. An application in terms of Order XLI Rule 19 of the Code of Civil Procedure, 1908 (in short the 'Code') read with Section 151 of the Code was filed to restore the appeal for deciding the same on merits. It was indicated in the application for restoration as to why there was non- appearance on the date fixed. In the application it was categorically stated that the matter was listed at item No.260 before the learned Single Judge. When the matter was called learned counsel for the appellant was arguing another matter before a Bench of Hon'ble the Chief Justice. In the case at hand respondents were yet to put appearance. So the assisting counsel was instructed to attend the Court to note the next date. By the time the assisting counsel reached the Court, the matter had already been taken up and dismissed for want of prosecution. It is submitted that the High Court did not take note of the aforesaid factual aspects and on the contrary dismissed the application for restoration on the ground that the matter was decided on merits.

Learned counsel for the respondents submitted that since the matter had been decided on merits there was no scope for recalling the order.

4. It is to be noted that in the application for restoration the reasons for non appearance at the time when the matter was taken up had been indicated. It was noted that the matter was fixed for filing of the vakalatnama of the respondents. There was unintentional absence and the reason for the same was indicated. The High Court has not found the reason indicated to be in any manner incorrect or untrue. Merely because the appeal has been dismissed on merits that could not have been a ground to refuse restoration of the appeal.

5. As rightly contended by learned counsel for the appellant the reason for non appearance when the matter was taken up had been indicated. There is no dispute that the factual scenario as projected by the appellant was the correct one. Mere fact that the appeal was dismissed on merits could not have been a ground to refuse restoration. Accordingly, we set aside the impugned order of the High Court and direct restoration of the Second Appeal.

6. The appeals are allowed. There will be no order as to costs.