offer appointment to the petitioner on the basis of the merit to the Post of Junior Engineer (Civil). The needful be done within a period of two months from the date of receipt of certified copy of this order.

(37) It is made clear that the petitioner shall be entitled to all the benefits from the date he joins the service.

(38) However, the respondents would be at liberty to adjust respondent No.5 against the posts, if any, lying vacant.

A. Aggr.

Before Rajiv Narain Raina, J

SAWINDER KAUR —*Appellant*

versus

KANSO AND OTHERS — *Respondent*

RSA No. 554 of 2011

April 30, 2015

Code of Civil Procedure, 1908 — S. 100, O. 9 Rl. 3, O. 41 Rls. 11 & 17, O. 42 — Dismissal of appeal — Repeated adjournment motion — Appellant sought repeated adjournment and kept appeal in adjournment motion for an inordinately long time of about 4 to 5 years — Held, appellant could not assert an absolute right to hearing on merits — Present appeal not against an original decree or first appeal where merits might have to be gone into certifying fitness of admission of appeal; present appeal against an appellate decree limited to examination of substantial question of law — Complexion of two jurisdiction is vastly different; first appeal is plenary but not second appeal and, therefore, standards of admission and dismissal are disparate and dissimilar — Appeal was to be dismissed when no one appeared to press appeal.

Held, that Justice Syed Mahmood, the great Indian judge, was the first to introduce the concept of 'statute of repose' in the Indian law when he adorned the Bench of the Allahabad High Court at the turn of the 19th Century. I have no reason not to introduce the sound principle to second appeals languishing in the dockets of this Court for many years, litigants expecting that one day a miracle might happen or manna might fall from heaven. This is impermissible gambling and stretching luck too far. The elasticity of litigation must snap within some reasonable time, giving an assurance of litigation coming to an end.

The basic rule of jurisprudence is that litigation must end. Then, the Court may not be unjustified in denying a hearing on merits, gauging the conduct of party in the present case, and permit the appellant to take chances yet another time by an adjournment granted in the interest of justice, a convenient phrase to cure absence of appearance, as the absence of the counsel appears to suggest. As a prudent litigant the appellant must be assumed to know the fate of his appeal and the darkness beyond the end of the tunnel. Justice is a relative question in the confines of jurisdiction this court exercises in second appeal under section100, Civil Procedure Code where only substantial questions of law are open to debate. This Court would normally assume that justice was dispensed in two courts below unless it is shown to the contrary. That benign opportunity was not availed by the appellant and not denied by this Court. But then as I said earlier, enough is enough. If I were to dismiss the appeal in default as normally done, it will give yet another opportunity to the appellant to seek restoration of the case and continue with his plot. Non-appearance of counsel for the appellant on the date fixed for hearing entails dismissal of the appeal, in which case the sting of present order is not possible to be passed since the consideration on recall application would change to examination of sufficient cause for failure to appear and be confined to prescriptions akin to Order 9 Rule 3 in case of a suits or Order 41 Rule 17 CPC in cases of appeals against original decrees. The provisions of Order 41 Rule 11 CPC have come into play.

(Para 5)

Further held, that however, the present not an appeal against an original decree or first appeal where merits might have to be gone into certifying fitness of admission of the appeal. This is an appeal against an appellate decree limited to examination of substantial question of law. The procedure is prescribed in Order 42 CPC. The procedure of Order 41 CPC applies to appeals under section 100 CPC, as far as may be, by virtue of Rule 1 of Order 42 CPC. Therefore, Order 41 Rule 11 applies. The complexion of the two jurisdictions is vastly different. First appeal is plenary but not second appeal and therefore standards of admission and dismissal are disparate and dissimilar. Looking to the conduct of the appellant she cannot assert an absolute right to hearing on merits. The appeal is accordingly dismissed when no one appears to press the appeal.

(Para 6)

None for the *appellant.*

RAJIV NARAIN RAINA, J. (Oral)

(1) Notice has not been issued in this appeal so far despite long lapse of time and an opportunity of effective hearing denied to this Court by seeking successive adjournments with gay abandon.

(2) This appeal came up for hearing on 12th July, 2011 when a request for adjournment was made. Thereafter, the appellant has done little better than seeking adjournments after adjournments. No one has appeared today to cause appearance on behalf of the appellant. In similar circumstances, I had passed the following order in RSA No.197 of 2011 :-

> "No one has caused appearance for the appellant. This is insufficient reason which is neither found fair nor proper in an appeal pending motion hearing since the year 2011 adjournments are being sought for the last so many dates. But the precious time of this Court cannot be squandered or reduced to a farce by keeping afloat the appeal for 4 years without just cause or reasonable justification. Seeking adjournments after adjournments is not a good thing and presently by not appearing before the court which is highly improper and shows complete disrespect to the Court. The Court does not demand but expects grace and common courtesy for parties to ensure appearance of the learned counsel and to press such a prayer in dire necessity by counsel engaged, or by asking a colleague to do put in appearance when the case is called to make a request. An adjournment has not been sought today by reason of non availability of the learned counsel for a valid cause or that he is in personal difficulty which disables him to put in appearance. No further accommodation is called for in the matter. This conduct either shows that there is nothing in the appeal or the appellant is no longer interested in pursuing the case. Four years having gone by the respondents must have settled down without fear of further litigation. It is too late to even consider disturbing the stasis. I, however, refrain from dismissing the appeal on this score alone today. But if a recall application is filed, this Court would not be precluded from dismissing the application and the main appeal at the threshold for the reasons already stated above unless extraordinary reasons exist but which do not touch upon the merits of the case. The stage of merits I think is long over to be considered. The High Court is not a conveyor belt of regular second appeals shunted from the Court room to the storehouse for listing and relisting at the asking of

> slumbering litigants waking up to seek unnecessary adjournments, then dozing off again as though a game of chess is being played out in Court with the players missing. Enough is enough."

(3) I find no reason why I should depart from the view taken with respect to rights of respondents which have long settled by the unjustified inactivity of the appellant who has virtually abandoned the present appeal without sufficient reason or cause and may have lost her right to sue. It is one thing that an appeal is filed within limitation or with an application for condonation of delay in case the limitation for preferring a second appeal has expired, but it is another thing to keep an appeal in adjournment motion and animated suspension for an inordinately long time of say 4 to 5 years and then expect interference on merits. Principles of limitation law are based on the statute of repose where the right may remain but the remedy is taken away by effluxion of time. To that extent both the situations deserve, to my mind, the same treatment. The respondents may not even know that an appeal was filed in 2011 and has been lying dormant since then, with numerous listings caused by seeking adjournments time and again or that they may be surprised by summons issued by this Court. The status of execution proceedings, if any, taken out by the decree holder are also not known or the Court apprised of them.

(4) The meaning of statute of limitations was so felicitously put as "a statute of repose" by the celebrated Justice Joseph Story of the US Supreme Court in **Bell v. Morrison**[1]. The Judge spoke:

> "The statute of limitations, instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended, emphatically, to be—a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from laps uo afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation..."

(5) Justice Syed Mahmood, the great Indian judge, was the first to introduce the concept of "statute of repose" in the Indian law when he adorned the Bench of the Allahabad High Court at the turn of the 19th Century. I have no reason not to introduce the sound principle to

[1] 26 U.S. 351 (1828)

second appeals languishing in the dockets of this Court for many years, litigants expecting that one day a miracle might happen or manna might fall from heaven. This is impermissible gambling and stretching luck too far. The elasticity of litigation must snap within some reasonable time, giving an assurance of litigation coming to an end. The basic rule of jurisprudence is that litigation must end. Then, the Court may not be unjustified in denying a hearing on merits, gauging the conduct of party in the present case, and permit the appellant to take chances yet another time by an adjournment granted in the interest of justice, a convenient phrase to cure absence of appearance, as the absence of the counsel appears to suggest. As a prudent litigant the appellant must be assumed to know the fate of his appeal and the darkness beyond the end of the tunnel. Justice is a relative question in the confines of jurisdiction this court exercises in second appeal under Section 100, Civil Procedure Code where only substantial questions of law are open to debate. This Court would normally assume that justice was dispensed in two courts below unless it is shown to the contrary. That benign opportunity was not availed by the appellant and not denied by this Court. But then as I said earlier, enough is enough. If I were to dismiss the appeal in default as normally done, it will give yet another opportunity to the appellant to seek restoration of the case and continue with his plot. Non-appearance of counsel for the appellant on the date fixed for hearing entails dismissal of the appeal, in which case the sting of present order is not possible to be passed since the consideration on recall application would change to examination of sufficient cause for failure to appear and be confined to prescriptions akin to Order 9 Rule 3 in case of a suits or Order 41 Rule 17 CPC in cases of appeals against original decrees. The provisions of Order 41 Rule 11 CPC have come into play. They read:-

> "**11. Power to dismiss appeal without sending notice to lower court.-**
>
> (1) The Appellate Court, after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal;
>
> (2) If on the day fixed or 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.
>
> (3) The dismissal of an appeal under this rule shall be notified to the court from whose decree the appeal is preferred.

> (4) Where an Appellate Court, not being the High court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment."

(6) However, the present is not an appeal against an original decree or first appeal where merits might have to be gone into certifying fitness of admission of the appeal. This is an appeal against an appellate decree limited to examination of substantial question of law. The procedure is prescribed in Order 42 CPC. The procedure of Order 41 CPC applies to appeals under Section 100 CPC, as far as may be, by virtue of Rule 1 of Order 42 CPC. Therefore, Order 41 Rule 11 applies. The complexion of the two jurisdictions is vastly different. First appeal is plenary but not second appeal and therefore standards of admission and dismissal are disparate and dissimilar. Looking to the conduct of the appellant she cannot assert an absolute right to hearing on merits. The appeal is accordingly dismissed when no one appears to press the appeal.

(7) A copy of this order be sent by the office to the appellant for her information. The lower appellate court be notified by the office of the dismissal of the appeal.

S. Sandhu

Before K. Kannan, J

KARTAR SINGH CONTRACTOR —*Petitioner*

versus

STATE OF HARYANA — *Respondent*

CR No. 8784 of 2014

April 21, 2015

Arbitration and Conciliation Act, 1996 — Ss. 34 & 43 — Limitation Act, 1963 — Ss.5 & 29 — Limitation period in case of Arbitration — Arbitration award was passed in favour of contractor — State instituted petition under Section 34 of 1996 Act to set aside said award along with an application filed under section 5 to condone delay of 342 days in filing said petition — Held, that a specific period of limitation is prescribed under Section 34 of Arbitration Act by operation of Section 29(3) of Limitation Act — Thus, applicability of Section 5 of Limitation Act, in respect of condonation of delay would