



declaration of their title, recovery of possession and for *mesne* profits. The Trial Court dismissed the suit on 19.08.2002. Feeling aggrieved, the plaintiffs filed an Appeal No. 2 of 2003 before the Additional District Judge, West Tripura, Khowai. The District Judge allowed the appeal on 30.06.2006. The judgment and decree of the Trial Court was set aside and the plaintiffs were declared as owners of the suit land. Further, it was held that the plaintiffs are also entitled for recovery of possession of the suit property. This judgment of the First Appellate Court has been challenged by the defendants before the Guwahati High Court in R.S.A No.45 of 2006.

**4.** It is evident from the materials on record that the appeal was listed for hearing several times. When the matter was taken up for hearing on 21.01.2015, learned counsel for the appellants/defendants was not present to argue the matter and no request was made on his behalf. Therefore, the High Court proceeded to decide the appeal on merits itself. After consideration of the materials on record, the High Court dismissed the appeal on merits.

**5.** We have heard the learned counsel for the parties.

6. The only contention raised by the learned counsel for the appellants is that the High Court was not justified in dismissing the appeal on merits in the absence of the learned counsel for the appellants. In support of his contention, learned counsel has pressed into service the provisions of Order XLI Rule 17(1) of the Code of Civil Procedure, 1908 ('CPC' for short). On the other hand, learned counsel for the respondents has supported the judgment of the High Court.

7. It is not disputed that the matter was listed for hearing on 21.01.2015 on which date learned counsel for the appellants was not present in the Court to argue the matter and no request was made on his behalf. Therefore, the High Court proceeded to decide the appeal on merits itself.

8. Order 41 Rule 17(1) of the Code of Civil Procedure is as under:

**“R.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.

<sup>1</sup>[*Explanation.*- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]”

**9.** Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976. Prior to 1976 conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 of CPC. Therefore, the explanation was introduced w.e.f 01.02.1977, to clarify the law by making an express provision that where the appellant does not appear, the Court has no power to dismiss the appeal on merits. Thus, Order 41 Rule 17(1) read with its explanation makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the appellant does not appear, the Court may if it deems fit dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.

**10.** This position has been clarified by this Court in **Abdur Rahman and others v. Athifa Begum and others**<sup>2</sup> wherein it was held that High Court cannot go into the merits of the case when

<sup>1</sup> Ins. by CPC (Amendment) Act 104 of 1976, s 87, (w.e.f. 1-2-1977)

<sup>2</sup> 1996 (6) SCC 62

there was non-appearance of the appellant. In **Ghanshyam Dass Gupta v. Makhan Lal**<sup>3</sup> this Court has reiterated the legal position as under:

“Prior to 1976, conflicting views were expressed by the different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for the appellant’s default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, the Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.”

**11.** Coming to the facts of the present case, the Court has decided the appeal on merits after noticing “.... On this date a request for

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<sup>3</sup> 2012 (8) SCC 745

adjournment was made on behalf of Mr. Lodh when the matter was adjourned to 18.12.2014 and on 18.12.2014 Mr. Choudhury made a request for adjournment. Today Mr. Choudhury is not even present to argue the matter and no request has been made on his behalf. I, therefore, proceed to decide the appeal on merits itself.” This order has been made clearly in contravention of Rule 17(1) of Order XLI of the CPC.

**12.** Therefore, we set aside the impugned judgment and decree of the High Court and remit the matter to the High Court for fresh disposal in accordance with law. Appeal is disposed of accordingly. However, there will be no order as to costs.

.....**J.**  
**(S. ABDUL NAZEER)**

.....**J.**  
**(SANJIV KHANNA)**

**New Delhi;**  
**December 13, 2019.**