A THE SECRETARY, DEPARTMENT OF HORTICULTURE, CHANDIGARH & ANR.

v.

RAGHU RAJ

(Civil Appeal No. 6142 of 2008)

B OCTOBER 17, 2008

[C.K. THAKKER AND D.K. JAIN, JJ.]

Code of Civil Procedure, 1908 – O. XLI, rr 17 and 19 r/w C *O. XLII r. 1 – Appeal from Appellate Decree – Second appeal – Dismissal of, on merits in absence of counsel for the appellant – Propriety of – Held: Not proper – Appeal can be dismissed for default but cannot be decided on merits in absence of appellant or his advocate – On facts, appeal which was admitted in 1980 came up for final disposal in 2006 – Also* D *substantial question of law framed for the first time in 2006 – In view thereof, High Court ought to have granted opportunity to the counsel for appellant to make his submissions by adjourning the matter – Thus, order of High Court dismissing Second Appeal as also recall application set aside – Matter remitted* E *to High Court for fresh disposal.*

Advocate – Absence/Non-appearance of – Held: Cannot be excused if sufficient cause not shown – Advocate is duty bound to appear and argue the case as and when it is F *called out for hearing or make alternative arrangement – Failure to do so would be unfair to the client and discourteous to the Court and must be severely discountenanced – However, when advocate fails to appear, party should not suffer on account of default or non-appearance of advocate.*

G **Aggrieved, by the decree passed by the lower appellate court re-instating the respondent-workman, appellant-employer filed second appeal. The appeal was admitted in year 1980 and was pending for final disposal. In year 2006, the High Court dismissed the appeal on merits**

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in absence of the counsel for the appellant. Application for recalling the said order was also dismissed. Hence, the present appeal.

Allowing the appeal and remitting the matter to the High Court, the Court

HELD: 1.1 It cannot be gainsaid that an advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without 'sufficient cause' cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to appear, *normally,* a party should not suffer on account of default or non-appearance of the advocate. [Paras 27 and 28] [589-D-F]

1.2 It is clear that this Court has always insisted advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the Court and must be severely discountenanced. At the same time, the Court has also emphasized doing justice to the cause wherein it is appropriate that both the parties are present before the Court and they are heard. Once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and Court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel. [Para 34] [592-D-F]

Rafiq & Anr. V. Munshilal & Anr. (1981) 2 SCC 788; *Smt. Lachi Tewari & Ors. v. Director of Land Records & Ors,* 1984 Supp. SCC 431; *Mangi Lal & Ors. v. State of M.P.,* (1994) 4 SCC 564; *Tahil Ram Issardas Sadaranganj & Ors. v.*

A *Ramchand Issardas Sadaranganj & Anr.*, 1993 Supp (3) SCC 256 – referred to.

2.1 In the instant case, the advocate, appearing for the appellants, has filed an affidavit in support of the recall application. It is clear from the order dated April 19, B 2006 that at the time of hearing of arguments, the counsel for the appellant was not present. The arguments on behalf of the respondent-workman were heard and the order was reserved. But, in the subsequent order dated April 25, 2006, the Judge who had heard the matter on April 19, C 2006 noticed that a substantial question of law had not been framed while admitting the appeal. Therefore, the Judge ordered listing of the appeal for rehearing on April 26, 2006 and accordingly, the matter was posted for hearing on April 26, 2006. On that day, the Judge framed substantial question of law and heard the counsel for the D respondent-workman. The counsel for the appellant was not present. It is thus clear that substantial question of law was framed by the Court during the course of hearing of Second Appeal for the first time on April 26, 2006. E On the facts and in the circumstances in their totality, even though the counsel for the appellant was not present, it would have been appropriate, had the High Court granted an opportunity to the counsel for the appellant to make his submissions by adjourning the matter. [Paras 36, 38, F 39 and 40] [592 D-F,H]

2.2 It is true that in the instant case, the appeal before the High Court was not an Appeal from Original Decree (First Appeal), but an Appeal from Appellate Decree (Second Appeal). But Rule 1 of Order XLII which deals with G Appeals from Appellate Decrees (Second Appeals) lays down procedure and expressly states that the Rules of Order XLI shall apply so far as may be to Appeals from Appellate Decrees. *Prima facie*, therefore, it appears that once an appeal is admitted and is placed for hearing i.e. H hearing on merits, it can be dismissed for default but can-

not be decided on merits in absence of appellant (or his advocate). [Para 44] [596 G-H, 597 A]

2.3 In view of the fact, however, on the facts in their entirety, the High Court ought not to have proceeded to decide the appeal, it is held that the impugned order of the High Court is liable to be set aside. Thus, the orders passed by the High Court dismissing the Second Appeal as also dismissing the Recall Application are hereby set aside and the matter is remanded to the High Court for fresh disposal in accordance with law. It is clarified that this Court may not be understood to have expressed final opinion one way or the other as regards interpretation of Rule 17 of Order XLI read with Rule 1 of Order XLII. No opinion is expressed one way or the other on merits of the matter as well. [Paras 45, 46 and 47] [597 B-E]

CASE LAW REFERENCE

(1981) 2 SCC 788	**Referred to**	**Para 29**
(1984) Supp. SCC 431	**Referred to**	**Para 31**
(1994) 4 SCC 564	**Referred to**	**Para 33**
(1993) Supp (3) SCC 256	**Referred to**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6142 of 2008

From the final Judgment and Order dated 26.4.2006 and 1.9.2006 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 2473 of 1980 and C.M. No. 8706-C of 2006 in RSA No. 2473 of 1980 respectively

Kamini Jaiswal and Shomila Bakshi for the Appellants.

S.M. Sarin and P.N. Puri for the Respondent.

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is filed by the Department of Horti-

A culture, Chandigarh and another (appellants herein) against the judgment and the decree passed by the Court of Senior Sub Judge with Enhanced Appellate Powers, Chandigarh on January 30, 1980 in Civil Appeal No. 41 of 1979 and confirmed by the High Court on April 26, 2006 in Second Appeal No. 2473 of
B 1980 as also an order, dated September 01, 2006 rejecting an application to recall the said order.

3. Shortly stated the facts of the case are that Raghu Raj-respondent herein, was appointed by the Executive Engineer, Horticulture Division, Chandigarh as '*beldar*' on purely tempo-
C rary basis. Initial appointment was made in 1969 and after sometime, he was discontinued. Again, fresh appointment was given in 1972. It was expressly stated when the respondent was appointed that his services were liable to be terminated at any time without notice or reason. According to the appellant, the
D services of the respondent were not found to be satisfactory and accordingly his services were terminated on September 18, 1976.

4. The respondent raised an industrial dispute. The parties, however, settled the matter on February 15, 1977 pursuant
E to which the respondent was reinstated in service with effect from February 19, 1977. The respondent-workman was placed on probation for a period of six months. According to the appellants, again the services of the respondent were found to be unsatisfactory. His services were, therefore, terminated by an
F order dated August 12, 1977.

5. This time, the respondent-workman, instead of moving Industrial Forum, approached a Civil Court by instituting a suit in the Court of Sub Judge, Chandigarh. It was registered as
G Case No. 153 of 1977. The learned Judge, by a judgment and decree, dated May 25, 1979, dismissed the suit filed by the plaintiff. The Court held that the impugned order of termination of services of the plaintiff was "perfectly valid and legal" and that the order was passed in accordance with terms and conditions of the appointment order.
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6. Being aggrieved by the decree passed by the trial Court, the respondent-workman preferred Civil Appeal No. 41 of 1979. The Court of Sub-Judge with Enhanced Appellate Powers(appellate Court) allowed the appeal, set aside the decree passed by the trial Court and held that what was stated in the order of termination was that the work as well as conduct of the respondent was unsatisfactory. Imputation of unsatisfactory conduct would amount to 'stigma'. Since no notice was issued to the employee, nor any explanation was sought from him, nor an opportunity of being heard was afforded, the order was liable to be set aside being violative of principles of natural justice. Accordingly, the order was declared null and void and inoperative and a decree was passed holding that the respondent-plaintiff was deemed to be in service and was entitled to all benefits of salary, increments and other allowances. The amount comes to few lakhs of rupees.

7. Aggrieved and dissatisfied with the decree of the lower appellate Court, the appellants herein preferred a second appeal under Section 100 of the Code of Civil Procedure, 1908. The appeal was registered as Regular Second Appeal No. 2473 of 1980 and was admitted on November 11, 1980. By a judgment and order dated April 26, 2006, the appeal was dismissed on merits.

8. The judgment itself recites;

"None for the appellants".

9. On behalf of the respondent, however, an advocate appeared. The appeal was dismissed with costs and the judgment and the decree passed by the learned Senior Sub-Judge (appellate court) was confirmed.

10. The appellants, on September 13, 2006, filed an application for recall of the order, dated April 26, 2006 dismissing the appeal with a prayer to rehear the matter. But the said application was also dismissed by the High Court on October 1, 2006. Both the orders are challenged in the present appeal.

A 11. On January 19, 2007, the Special Leave Petition was posted for admission hearing. Notice was issued. In the notice itself it was stated that it was issued on the limited question as to why the order passed by the High Court should not be set aside and the matter be remitted to the High Court for fresh B disposal in accordance with law after hearing both the parties. The respondent was served who appeared through an advocate and also filed a counter-affidavit. The matter was ordered to be placed for final hearing and accordingly it has been placed before us.

C 12. We have heard learned counsel for the parties.

13. The learned counsel for the appellant submitted that the High Court committed an error of law and of jurisdiction in dismissing the appeal filed by the appellants herein in absence of the advocate and without hearing him. It was submitted that D the Second Appeal was filed in 1980. It was admitted and was pending for final disposal. For more than two decades, it did not come up for hearing. In 2006, the appeal was placed for final disposal. The learned advocate for the appellants could not remain present and the High Court dismissed the appeal E on merits. As soon as the appellant came to know about *ex-parte* dismissal of appeal, an application to recall the order was filed but it was also rejected by the Court. It was, therefore, submitted that the orders passed by the High Court deserve to be set aside.

F 14. It was also contended that the High Court could not have dismissed the appeal on merits in absence of the advocate. The appeal was admitted in 1980. In accordance with the provisions of the Code, at the most, the appeal could have been G dismissed "for appellants' default" and not on merits. On that ground also, the impugned orders are vulnerable.

15. It was submitted by the learned counsel, that the appellants had engaged an advocate. They were, therefore, under the impression that the lawyer will take care of the case and H will appear as and when the appeal will be called out for hear-

ing. Even if it is assumed that there was default on the part of the advocate in not appearing at the time of hearing, the appellant should not suffer. For that reason also, the appeal should be allowed and rehearing should be ordered.

16. The counsel also submitted that Civil Court had no jurisdiction in the matter and the case, could not have entertained, dealt with and decided by granting reinstatement and payment of back-wages which was really an 'industrial dispute'. The decrees passed by the Courts below are, therefore, without jurisdiction.

17. The counsel submitted that even on merits, the order terminating the services of the respondent-workman was legal, valid and lawful. The workman was not found 'suitable' and, hence, his services were terminated in accordance with terms and conditions of the order of appointment and no fault can be found against it.

18. On all these grounds, the counsel submitted that the orders passed by the High Court against the appellants are liable to be set aside by remitting the matter to the High Court for fresh disposal in accordance with law.

19. The learned counsel for the respondent-employee, on the other hand, supported the decree passed by the lower appellate Court and confirmed by the High Court. It was urged that the appeal was ordered to be placed for final hearing and it was on Board. Appearance of the learned advocates for the parties was shown. The counsel for the appellant did not remain present. The High Court was, therefore, fully justified in proceeding with the matter and in dismissing it.

20. The respondent has filed an affidavit in this Court wherein it was mentioned that the arguments were heard on April 19, 2006 and the judgment was reserved which was pronounced after one week *i.e.* on April 26, 2006. There was inaction, negligence and carelessness on the part of the appellant for which the respondent-workman should not suffer. Since no

A ground, much less sufficient ground, was made out for recalling of the order, the application was rightly rejected by the High Court.

21. Even on merits, the lower appellate Court was right in allowing the appeal filed by the respondent-employee and in B declaring the order null and void being stigmatic in nature. It was, therefore, submitted that the appeal deserves to be dismissed.

22. Having heard learned counsel for the parties and giving anxious considerations to the rival contentions, in our opinC ion, the appeal deserves to be allowed. We had called for the records and proceedings of the case and perused them. From the record, it is clear that the second appeal was admitted on November 11, 1980 and was pending for final hearing. Orders were passed from time to time between 2004 and 2006.
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23. The order dated April 19, 2006, passed by the Court reads as under;

R.S.A. No. 2473 of 1980

Present:- *None for the appellant.*
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Ms. Alka Sarin, Advocate for the respondent

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Arguments heard.

F Order reserved.

April 19, 2006 Sd/-

Judge

(emphasis supplied)

G 24. From the above order, it is amply clear that on 19th April, 2006 when the arguments were heard, none was present for the appellants.

25. Then, on April 25, 2006, the Court passed the following order:
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R.S.A.No. 2473 of 1980

Present : *None.*

In this RSA, which was put up before the undersigned for the first time on 19th April, 2006, *it has transpired that the substantial question of law had not been framed.*

List the appeal for re-hearing for 26.4.2006.

April 25, 2006 Sd/-

Judge

(emphasis supplied)

26. On April 26, 2006, again the matter was placed on the board and as stated above, it was dismissed in absence of the appellants or their counsel.

27. Now, it cannot be gainsaid that an advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without 'sufficient cause' cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced.

28. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, *normally,* a party should not suffer on account of default or non-appearance of the advocate.

29. In *Rafiq & Anr. V. Munshilal & Anr.,* (1981) 2 SCC 788, the High Court disposed of the appeal preferred by the appellant in absence of his counsel. When the appellant came to know of the fact that his appeal had been disposed of in absence of the advocate, he filed an application for recall of the order dismissing the appeal and to permit him to participate in the hearing of the appeal. The application was, however, rejected by the High Court, *inter alia,* on the ground that there was

A no satisfactory explanation why the advocate remained absent. The aggrieved appellant approached this Court.

30. Allowing the appeal setting aside the order passed by the High Court and remanding the matter for fresh disposal in accordance with law, this Court stated;

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"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose

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interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, *we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law."*

(emphasis supplied)

31. In *Smt. Lachi Tewari & Ors. v. Director of Land Records & Ors,* 1984 Supp. SCC 431, *rule nisi* was issued by the High Court in the petition filed in 1976. After seven years, the matter was placed for hearing of *rule nisi* in 1983. It was the first day of reopening of Courts after holidays. The petitioner had engaged three advocates. None of them, however, was available when the matter was called out. The High Court dismissed the petition and discharged *rule* since none appeared to press the petition for the petitioner. An application was moved on behalf of the petitioner for recalling of the order and restoration of the petition which was rejected. The petitioner came to this Court.

32. Setting aside the order and remanding the matter to the High Court for fresh disposal and reiterating the law laid down in *Rafiq,* this Court said;

"The mere narration of facts would suffice to focus attention on what point is involved in this appeal. The petitioner obtained rule nisi in 1976 and waited for seven years for its being heard. Suddenly one day the High Court consistent with its calendar fixed the matter for hearing on

A April 21, 1983. The petitioner had taken extra caution to engage three learned Counsels. We fail to see what more can be expected of him. Further we fail to understand what more steps should have taken in the matter to avoid being thrown out unheard".

B 33. In *Mangi Lal & Ors. v. State of M.P.,* (1994) 4 SCC 564, an appeal against conviction recorded by the trial Court was dismissed by the High Court for non-appearance of counsel for the appellant due to 'strike' by lawyers. This Court held that dismissal of appeal by the High Court was improper. The C appeal was directed to be restored to file and be heard on merits. [see also *Tahil Ram Issardas Sadaranganj & Ors. v. Ramchand Issardas Sadaranganj & Anr.,* 1993 Supp(3)SCC 256].

D 34. From the case law referred to above, it is clear that this Court has always insisted advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the Court and must be severely countenanced. At the same time, the Court has also emphasized doing justice to the cause wherein it is E appropriate that both the parties are present before the Court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the Court calls upon the counsel to make submissions. It is keeping in F view these principles that the Court does not proceed to hear the matter in absence of the counsel.

35. In the circumstances, in our opinion, the submission of the learned counsel for the appellants has substance that the G High Court ought not to have decided the appeal in absence of the appellants' counsel.

36. In the present case, the learned advocate, appearing for the appellants, has filed an affidavit in support of the recall application. In para 1, it was stated;

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"That the above named Regular Second Appeal was pending before this Hon'ble Court for regular hearing and was listed on various dates from time to time but could not be decided for one reason or the other and was thereafter even de-listed. Lastly, on perusal of the cause list, it has been noticed that the aforesaid Regular Second Appeal was added in the regular matters on 17.04.2006 at Serial No.304 before the Hon'ble Bench of Mr. Justice S.D. Anand at page 240 of the Regular Cause List. Alongwith the case at page 240 of the cause list, the names of the earlier counsels for the appellants as well as of the respondent were mentioned and the name of the present counsel for the appellant was mentioned on the next page i.e. at page 241 of the cause list and therefore, the listing of the matter escaped the notice of the counsel for the appellant. Consequently, the matter was heard by this Hon'ble Court in the absence of the counsel for the appellant on 19.04.2006. Even on 19.04.2006 (Wednesday), it is only the serial number of the aforesaid case i.e. Sr. No.304 was mentioned in the Cause List for taking up for hearing and therefore even on 19.04.2006, it escaped the knowledge of the counsel for the appellant in the absence of giving of details of the case and the name of the counsel. It is only when the respondent asked for the implementation of the judgment passed by this Hon'ble Court that the counsel for the appellant immediately thereupon inspected the cause list and noticed the aforesaid facts and applied for the certified copy of the judgment on 07.09.2006 which is yet to be received and after getting the un-certified copy of the judgment, is filing the present application for the recalling of the same."

37. In para 2, the deponent stated;

"That the non appearance of the appellants/applicants and their counsel before this Hon'ble Court when the matter was taken up for regular hearing was totally un-intentional and for the reasons explained above which are totally bona

A fide. Otherwise, the appellants have a good case on merits as the Regular Second Appeal is against the judgment of reversal and in view of the law settled on the point to the effect that the Civil Court has no power to grant back wages with reinstatement as the specific remedy for the B grant of the same is provided under the Industrial Disputes Act, 1947. Although, a specific issue to this effect was framed before the courts below yet the same some how escaped the knowledge of this Hon'ble Court and the counsel for the respondent also failed to point out the C same in the interest of justice and for fair play. In fact this was the substantial question of law before this Hon'ble Court which remains undecided. Even under Order 41 Rule 17, the appeal in the absence of the appellant ought to have been dismissed in default instead of being D decided on merits. Therefore, it would be in the interest of justice, if the judgment dated 26.04.2006 is recalled and the appeal is readmitted for hearing."

38. We have already extracted, various orders passed by the High Court from time to time. It is clear from the order dated E April 19, 2006 that at the time of hearing of arguments, the learned counsel for the appellant was not present. The arguments were heard, i.e., the arguments on behalf of the respondent-workman were heard and the order was reserved. But, in the subsequent order dated April 25, 2006, the learned Judge F who had heard the matter on April 19, 2006 noticed that a substantial question of law had not been framed while admitting the appeal. The learned Judge, therefore, ordered listing of the appeal for rehearing on April 26, 2006 and accordingly, the matter was posted for hearing on April 26, 2006.

G 39. On that day, i.e. on April 26, 2006, the learned Judge framed substantial question of law and heard learned counsel for the respondent-workman. Learned counsel for the appellant was not present. It is thus clear that substantial question of law was framed by the Court during the course of hearing of Sec- H ond Appeal for the first time on April 26, 2006.

40. On the facts and in the circumstances in their totality, in our opinion, even though the learned counsel for the appellant was not present, it would have been appropriate, had the High Court granted an opportunity to the learned counsel for the appellant to make his submissions by adjourning the matter.

41. It was also urged that the appeal was admitted in 1980 and was pending for final hearing. Such appeal could not have been dismissed on merits in absence of learned counsel for the appellant. In this connection, reference may be made to Order XLI of the Code which lays down procedure for hearing of 'Appeals from Original Decrees'. Rules 1 to 4 deal with 'Form of Appeal', grounds to be taken in 'Memorandum of Appeal' 'Application for Condonation of Delay', etc. Rules 5 to 8 relate to 'Stay of Proceedings and of Execution'. Whereas Rules 9 to 15 provide for 'Procedure on Admission of Appeal', Rules 16 to 29 deal with 'Procedure on Hearing'. Once an appeal is admitted, Rules 16 onwards of Order XLI would apply. Rule 17 provides for 'Dismissal of Appeal for Appellant's Default'. It reads thus;

> 17. *Dismissal of appeal for appellants' default*
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> (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.
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> 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.
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> (emphasis supplied)

42. Explanation to Rule 17 of Order XLI was inserted by the Code of Civil Procedure (Amendment) Act, 1976. Before

A insertion of Explanation to Rule 17, there was difference of opinion among various High Courts whether an appellate Court had right to dismiss an appeal on merits if the appellant fails to appear. Taking note of cleavage of opinion, the provision of amended and Explanation was added.

B 43. In Objects and Reasons it was stated;

Clause 90—Sub-clause (viii).—When an Appellate Court does not dismiss an appeal summarily, it should fix a date for the hearing of the appeal. The procedure therefore is
C provided in Rule 17 which provides that 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 is dismissed. In this rule the word 'may' shows
D that apart from dismissal of the appeal for default, the Court can pass other orders. One such order could be adjournment of the appeal. There is, however, a conflict of decision on the question whether, if the appellant does not appear, the Appelalte Court can dispose of the appeal on the merits. The Allahabad High Court has held that a
E decision on the merits is permissible. But the other High Courts have taken a different view. – *Having regard to the conflict of decisions, Rule 17 is being made more explicit by adding an Explanation thereto to the effect that dismissal of an appeal on merits would not be*
F *permissible".*

(emphasis supplied)

44. It is true that in the instant case, the appeal before the High Court was not an Appeal from Original Decree (First Ap-
G peal), but an Appeal from Appellate Decree (Second Appeal). But Rule 1 of Order XLII which deals with Appeals from Appellate Decrees (Second Appeals) lays down procedure and expressly states that the Rules of Order XLI shall apply so far as may be to Appeals from Appellate Decrees. *Prima facie*, there-
H fore, it appears that once an appeal is admitted and is placed

for hearing *i.e.* hearing on merits, it can be dismissed for default but cannot be decided on merits in absence of appellant (or his advocate). A

45. In view of the fact, however, that in our opinion, on the facts in their entirety, the High Court ought not to have proceeded to decide the appeal, we hold that the impugned order of the High Court is liable to be set aside. In view of this conclusion, we clarify that we may not be understood to have expressed final opinion one way or the other as regards interpretation of Rule 17 of Order XLI read with Rule 1 of Order XLII. B C

46. Since the order passed by the High Court deserves to be set aside on a short ground and the matter is remitted to the High Court for fresh disposal in accordance with law, we refrain from expressing any opinion one way or the other on merits of the matter as well. As and when the matter will be placed for hearing before the High Court, the Court will pass an appropriate order after hearing the parties. D

47. For the foregoing reasons, the appeal is allowed. The orders passed by the High Court dismissing the Second Appeal as also dismissing the Recall Application are hereby set aside and the matter is remanded to the High Court for fresh disposal in accordance with law after hearing the parties. E

48. Since the respondent-workman was required to appear in this Court pursuant to the notice issued by the Court and had to incur expenses, in our opinion, ends of justice would be met if the appellants are directed to bear costs of the respondent-workman which is quantified at Rs.20,000/-. The said amount will be paid by the appellants herein by a crossed bank draft in favour of the respondent-workman within four weeks from today. The said fact will then be brought to the notice of the High Court by the appellant and only thereafter the High Court will proceed to hear the matter. F G

49. The appeal is allowed to the extent indicated above.

N.J. Appeal allowed. H