Present:-
Mr. Justice Mahmudul Hoque

Civil Revision No.2091 of 2018

Srimati Sukhi Bala Chowdhury being dead her legal heirs; 1(a) Amina Chowdhury and others
... Petitioners
-Versus-
Mridul Basu and others
...Opposite-parties
Mr. Shasti Sarker, Senior Advocate
…For the petitioners
Mr. Samiran Das Gupta, Advocate
...For the opposite-party Nos.1-6.

Judgment on 2nd December, 2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioner calling upon the opposite party Nos.1-6 to show cause as to why the impugned judgment and decree dated 15.07.2010 passed by the learned Additional District Judge, 4th Court, Chattogram in Title Appeal No.526 of 1986 disallowing the same and thereby affirming the judgment and decree dated 19.08.1986 passed by the learned Assistant Judge, Anowara (Previously Anowara Munsif Court), Chattogram in Other Suit No.50 of 1985 dismissing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of this Rule, in short, are that the present petitioner, as plaintiff, filed Other Suit No.50 of 1985 in the Court of Assistant Judge, Anowara (Previously Anowara Munsif Court), Chattogram against the opposite parties, as defendant, for declaration of title and confirmation of possession and in the alternative for partition claiming that the suit land originally belonged to 3(three) brothers namely, Ramesh Chandra, Purna Chandra and Nillamber in equal share who were in a joint family. Ramesh Chandra died leaving behind the defendant Nos.1 and 2 as his successors. Purna Chandra died leaving behind the plaintiff as his only successor. Nillamber died leaving behind the defendant Nos.3 and 4 as his successors. The plaintiff became owner and possessor of $\frac{1}{3}$rd share of the suit land and Ramesh Chandra as eldest brother used to look after the suit land. Ramesh Chandra got R.S. khatian wrongly prepared in respect of the suit land showing Purna Chandra as landlord and Nillamber and Ramesh Chandra as tenants under Purna Chandra. For taking away the paddy cultivated from the suit land by the defendants the plaintiff filed a case before Union Parishad for compensation which was decided in his favour.

Against the decision of the Union Parishad the defendants filed appeal and then filed Writ Petition No.579 of 1967 in the High Court Division in which the Rule was made absolute and the decision of the Union Parishad was set aside. P. S. and B. S. khatians were prepared wrongly on the basis of R.S. khatian. The defendants threatened to dispossess her from the suit land. Hence, the present suit.

The defendant Nos.1-4 contested the suit by filing written statement denying all the material allegations made in the plaint contending, inter alia, that the suit is not maintainable. The plaintiff has got no cause of action to file the suit; suit is barred by limitation; suffers from defect of parties. As per C.S. record the suit land belonged to Ramesh Chandra in rayati right. Purna Chandra was a monied man who purchased the Zamindary right of the suit land from Annar Ali Khan and his successors. The suit land never belonged to Mahesh Chandra, the father of Ramesh Chandra, Purna Chandra and Nillamber Chandra. Ramesh Chandra relinquished his claim in half portion of the suit land in favour of his brother Nillember. Accordingly, R.S. khatian stood recorded in equal share

in respect of the suit land in the names of Ramesh Chandra and Nillember. P.S. and B.S. khatians in respect of the suit land have already been prepared correctly in the names of the defendants and they have been enjoying and possessing the same beyond the statutory period of limitation. The suit land described in the schedule 4 belonged to Gopal Krishna Dey as permanent raiyat under Purna Chandra. Ramesh Chandra and Nillember Chandra purchased the land in equal share from Gopal Krishna Dey. The purchased documents have been lost in the year 1971 during the liberation war and since then the defendants have been enjoying and possessing the said purchased land. P.S. and B.S. khatians in respect of the purchased land correctly prepared in their names. Purna Chandra and the plaintiff or their predecessors had no right, title and possession in the suit land. Purna Chandra gifted all his property in favour of the plaintiff by executing a deed of gift dated 10.05.1957. If Purna Chandra had right, title and possession over the suit land he would certainly be gifted away the suit land, as well to the plaintiff. The plaintiff has collusively got the decision in his favour in the above mentioned Union Parishad case which was set

aside by the High Court Division by its judgment passed in the above mentioned writ petition. The defendants are owners and possessors of the suit land and they have been enjoying and possessing the same more than statutory period of limitation and the suit is liable to be dismissed.

The trial court framed 6(six) issues for determination of the dispute. In course of hearing, the plaintiff examined 3(three) witnesses as P.Ws and the defendants also examined 3(three) witnesses as D.Ws. Both the parties submitted series of documents in support of their respective claim, most of the documents are common which were duly marked as exhibits on both the sides. The trial court after hearing by its judgment and decree dated 19.08.1986 dismissed the suit.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the plaintiff preferred Other Appeal No.526 of 1986 before the District Judge, Chattogram. Eventually, the said appeal was transferred to the Court of learned Additional District Judge, 4th Court, Chattogram for hearing and disposal who after hearing by the impugned judgment and decree dated

15.07.2010 disallowed the appeal and thereby affirmed the judgment and decree passed by the trial court. At this juncture, the petitioner, moved this Court by filing this revision and obtained the present Rule and order of status-quo.

Mr. Shasti Sarker, learned Senior Advocate appearing for the petitioners at the very outset submits that the appellate court earlier heard the appeal and after hearing allowed the appeal by its judgment and decree dated 11.06.2002 and sent back the suit on remand to the trial court for fresh hearing. Against the judgment and decree of the appellate court, the defendants moved this Court by filing Civil Revision No.5564 of 2002 in which Rule was made absolute and sent the appeal on remand to the appellate court for hearing afresh and disposal of the same on merit. The appellate court after receipt of records did not issue summon upon the appellant and without any notice fixed the appeal for hearing again and in the absence of the appellant and respondents passed the judgment on merit in violation of provisions in Order 41 Rule 17 of the Code of Civil Procedure which provides that in the absence of the appellant the appellate court had only option to dismiss the

appeal for default and it cannot decide the appeal on merit. But in the instant case, the appellate court passed the judgment on merit dismissing the appeal without affording any opportunity to the appellant to place her case before the appellate court. In support of his submissions he has referred to the case of ***Bangladesh Vs. Waqer Ahmed and others*** reported in ***4 MLR (AD) 305***.

He further argued that under the plain text of Rule 17 and consistant jurisprudence, an appeal normally cannot be disposed of on merit if the appellant or her counsel does not appear. It is argued that had the appellate court informed the appellant after receipt of record and allowed an opportunity to place her case, the result of the appeal would have been otherwise. Because of refusal of opportunity by the appellate court, the court decided the issues wrongly in the absence of the appellant.

He submits that the remand was expressly for fresh hearing affording opportunity to the parties to place their respective cases and passed judgment in accordance with law, it did not suggest disposal of appeal on merit in absentia. It is argued that the plaintiff filed the suit claiming title and confirmation of the possession in the

suit property on the averment that the property belonged to 3(three) brothers namely, Ramesh Chandra, Purna Chandra and Nillamber. But R.S., S.A. and B.S. khatians wrongly stood recorded in the names of Ramesh and Nillamber. It is also claimed that Ramesh Chandra was eldest brother of Purna Chandra and Korta of a joint family, as per Hindu Law any property acquired by Korta of a family has equal right of other brothers, as such, the plaintiff as daughter of Purna Chandra entitled to get $\frac{1}{3}$ rd share in the suit property. Accordingly, she has been possessing the same with the knowledge of all. Because of wrong record of right the defendants denied title of the plaintiff, consequently, she filed the present suit. The trial court while dismissing the suit failed to appreciate the concept of Korta of a joint family and misled and misconstrued both oral and documentary evidence and wrongly came to a finding that the predecessor of the plaintiff Purna Chandra was not owner of the property, but he was zamindar having superior interest in respect of the suit property which entitled him to receive rents only. He submits that Purna Chandra was never zamindar, his eldest brother Ramesh Chandra used to take care of all the property of the

joint family who very cunningly got the name of Purna Chadra recorded in R.S. khatian showing him superior landlord, as such, the trial court committed illegality in dismissing the suit.

He submits that the appellate court for the first time allowed the appeal and remanded the suit to the trial court for fresh hearing by judgment and decree dated 11.06.2002, wherein, the appellate court rightly held that the trial court failed to consider the respective cases of the parties and evidence led in support of their respective claim which was subsequently set aside by this Court in Civil Revision No.5564 of 2002 and remanded the appeal to the appellate court for fresh hearing. He submits that disputed R.S. Khatian Nos.62, 63, 47 and 48 ought to have been stood recorded including the names of Purna Chandra Dey along with Ramesh Chandra and Nillamber as raiyat. But for wrong record of right Purna Chandra Dey being member of a joint family cannot be deprived from getting his share in the suit property.

It is also argued that the plaintiff filed a case before the local Union Prarishad, Arbitration Court against the defendants claiming compensation of Tk.325/- which was allowed but the said judgment

was set aside by this Court in Writ Petition No.579 of 1967 meaning thereby, the plaintiff has been in possession of the suit property at least from 1965. The appellate court and the trial court failed to consider the fact and unfortunately both the courts below dismissed the suit and disallowed the appeal, as such, they have committed illegality and error of law in the decision occasioning failure of justice.

Mr. Samiran Das Gupta, learned Advocate appearing for the opposite party Nos.1-6 submits that after disposal of Civil Revision No.5564 of 2002 and sending the appeal on remand to the appellate court for fresh hearing, the plaintiff-appellant was aware of all the facts. Moreover, after receipt of records by the appellate court below, the court itself passed an order directing the Sheresta to inform both the parties to the appeal and fixed the appeal for hearing on 01.03.2010. The respondents learned Advocate duly seen the order, but learned Advocate for the appellant did not see the order in writing when asked by the Sherestadar on the plea of non-communication of the appellant. Thereafter, the appeal was again fixed for hearing on 19.04.2010. On the date fixed the

appellant took no step, again fixed on 06.06.2010 and the appellant also did not take any step, subsequent dates was fixed on 20.06.2010 and 05.07.2010, but on all those dates appellant and respondents both found absent. Consequently, the court fixed on 15.07.2010 for delivery of judgment and on the date fixed the appeal was disposed of on merit. He submits that Rule 17 of Order 41 of the Code of Civil Procedure permits the appellate court to dismiss the appeal for default when the appellant found absent. But in the instant case, the appellate court was sitting on the appeal not contemplated under Order 41 Rule 17 of the Code which permits the court to dismiss the appeal for default when the appellant alone is absent in hearing and appeal pending in normal course of procedure. But in the instant case, the appeal was not pending before the appellate court for hearing in normal course, but the appeal was remanded by the High Court Division directing the appellate court for fresh hearing and disposal on merit, as such, the situations in Rule 17 is not attracted in the instant appeal.

It is also argued that recently, considering suffering of the parties Code of the Civil Procedure has been amended which

published in the official gazette on 8 May, 2025. By the said amendment a sub-rule (2) under Rule 30 of Order 41 of the Code has been added empowering the appellate court to dispose of an appeal on merits in the absence of the parties.

Apart from this when a superior court remanded an appeal for fresh hearing, the lower court must decide it on merit irrespective of parties appearance, as such, in disposing the appeal in absentia the appellate court committed no error of law in the decision occasioning failure of justice. He submits that from exhibits of both the sides in particular R.S. khatian shows that Purna Chandra Dey had superior interest as zamindar, Ramesh and Nillamber were permanent raiyat under Purna Chandra Dey. Accordingly, all the subsequent khatians stand recorded in the names of the defendants.

He argued that Purna Chandra Dey during his life time gifted all his property to the plaintiff as his daughter. Recital of the deed of gift disclosed that the plaintiff is daughter by his second wife. While deposing before the court it has came out that Purna Chandra had 2(two) sons by his first wife, but they are not made party in the

instant suit, as such, both the courts rightly held that the suit suffers from defect of parties. He submits that had Purna Chandra Dey title in the suit property he would have been a raiyat as his 2(two) brothers Ramesh and Nillamber, but the khatian shows that Purna Chandra Dey was superior landlord who had rent receiving interest only. Since Purna Chandra Dey had no title in the property except rent receiving interest, the plaintiff as daughter of Purna Chandra Dey did not inherit the suit property. Both the courts below while dismissing the suit and the appeal rightly held that unless the plaintiff could prove that Purna Chandra Dey was owner of the property as per R.S. record or any other documents she cannot claim the same to be inherited as heir of Purna Chandra Dey, moreover, in the presence of male heirs the plaintiff cannot inherent the property. He argued that the plaintiff in the year 1966 filed a complaint before the Village Court where compensation for Tk.325/- was awarded on the allegation of cutting away paddy from the suit land by the defendants which was upheld by the S.D.O Chattogram. Thereafter, the defendants filed Writ Petition No. 579 of 1967 in which the judgment and order of Village Court and

S.D.O. were knocked down making the Rule absolute. Therefore, whatever proceeding started by the plaintiff has become non-est and in the judgment passed in writ petition, this Court held that the question of possession of plaintiff remain disproved as she claimed that the opposite parties took away paddy from the suit land, meaning thereby, the plaintiff is out of possession since 1966, as such, without consequential relief the present suit is not maintainable. It is finally argued that the plaintiff failed to prove title of her father in the suit property and also failed to prove her possession in the suit land, as such, the courts below committed no illegality or error in the decision occasioning failure of justice in dismissing the suit and appeal.

Heard the learned Advocates of both the sides, have gone through the application under Section 115(1) of the Code of Civil Procedure, plaint, written statement, evidence both oral and documentary available in lower court records and the impugned judgment and decree of both the courts below.

Legal question raised by the learned Advocate for the petitioner is whether the appellate court in the absence of the

appellant can decide an appeal on merits in violation of Order 41 Rule 17 of the Code of Civil Procedure. To appreciate the submissions of the learned Advocate for the petitioner, fact of the case may be looked into.

The petitioner filed Other Suit No.50 of 1985 in the Court of Assistant Judge, Anowara, Chattogram against the opposite parties for declaration of title and confirmation of possession which was dismissed by the trial court. Against the judgment and decree of the trial court, the plaintiff preferred Title Appeal No.526 of 1986 before the learned District Judge, Chattogram. Eventually, the appeal was transferred to the court of learned Additional District Judge, 4th Court, Chattogram for hearing and disposal. Learned appellate court by its judgment and decree dated 11.06.2002 allowed the appeal and remanded the suit to the trial court for fresh hearing by setting aside the judgment and decree of the trial court. Against the order of remand the respondents moved this Court by filing Civil Revision No.5564 of 2002 in which Rule was made absolute and this Court sent back the appeal to the appellate court directing to hear the appeal afresh and pass judgment on the basis

of evidence available in records. After receipt of records by the appellate court, order was shown to the learned Advocate for both the parties. The learned Advocate for the respondents has seen the record on 28.02.2010, but in Order No.122 dated 01.03.2010 it has been noted that when the learned Advocate for the appellant was shown the record and asked to sign the same, he informed the court that the appellant did not communicate him and refrained himself from signing the order as seen. However, subsequently, 4(four) dates were fixed for hearing appeal, finally both the appellant and respondents were found absent. Consequently, the appellate court disposed of the appeal on merits in the absence of both the parities. Rule 17 of Order 41 provides as follows:

> *"17.(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."*

Under Order 41 Rule 17 of the Code an appeal may be dismissed for default when the appellant does not appear on the date for hearing. However, the said provisions applied only to the

initial jurisdiction of the appellate court. In the present case, the appellate jurisdiction has not been exercised in its original manner, but pursuant to a specific mandate of remand by the High Court Division for fresh hearing and disposal on merits. Judgment of the High Court Division contain no direction to afford the appellant or the respondents to get their plaint suitably amended or to afford opportunity to adduce further evidence, but the revisional court simply directed the appellate court to dispose of the appeal on merits on the basis of evidences both oral and documentary available in the record. Once the High Court Division directs for a fresh decision on merits, the appellate court is bound to act according to such mandate and it cannot dispose of the appeal for default.

It is settled principle that when a superior court sent the matter on remand with a specific direction, the Sub-ordinate Court is under a legal duty to comply with that direction and cannot invoke provisions inconsistent with the remand order. Therefore, provisions of Order 41 Rule 17 of the Code cannot over-ride the binding direction for a decision on merits. The appellate court

including the High Court Division have consistently held that after remand the appeal must be decided on merits even if parties remain absent, as the matter remanded with directives to adjudicate afresh according to law and evidence on record. Considering the above legal provisions and the binding nature of the remand order, this Court finds that the appeal must be decided on the merits of the case, in the absence of the parties. After remand, the appellate court cannot invoke dismissal for default under Rule 17, because the remand order changes the procedural status of the case. It no longer stands as something merely to be taken up regularly, rather, it is a mandatory rehearing directed by the higher court. Non-appearance of parties does not relieve the court from its duty to decide the matter judicially on materials available on record. Since both the parties were found absent and the materials on record are sufficient the appeal was taken up by the appellate court for final disposal. Despite the legal error, considered to be committed by the appellate court, the record demonstrated that the appellate decision although irregular in form does not suffer, from any substantive illegality affecting the merits of the case. Accordingly, I think that for

passing the judgment in the absence of the appellant on merits, the appellate court has committed no error of law in the decision occasioning failure of justice.

Now, I am to delve upon the facts and evidences of the instant case, available in record. Both the parties admitted that R.S., S.A. and B.S. khatians stand recorded in the names of Ramesh and Nillamber, 2(two) brothers, as permanent raiyat under zamindar Purna Chandra Dey. No question raised by Purna Chandra Dey during his life time or before execution and registration of a deed of gift in favour of the plaintiff regarding wrong R.S. record stood in the names of Ramesh and Nillamber. The plaintiff came to know about the record of right at least in the year 1966 when he filed complaint before the Village Court which went upto the High Court Division in writ jurisdiction. But she came with the claim of title alleging that R.S. khatian wrongly recorded in the names of Ramesh and Nillamber excluding the name of the her father and also claimed that Ramesh being korta of a joint family managed to get the R.S. record prepared in the names of Ramesh and Nillamber showing Purna Chandra Dey superior landlord of the property. But

at the time of hearing, the plaintiff could not substantiate her such claim by any evidence both oral and documentary, rather R.S. khatian has a strong presumption about its correctness. In the instant case, the plaintiff utterly failed to prove that her father was owner of $\frac{1}{3}$ rd property of the suit land. The trial court when dismissing the suit rightly held that in the absence of any evidence that Ramesh was korta of a joint family and name of Purna Chandra Dey has been shown as landlord wrongly, the plaintiff's father had no title in the property to be inherited by her. Both the courts below concurrently held that the plaintiff failed to prove her possession in the suit property quoting an observation made by this Court in judgment in writ petition. Unless further relief in the form of recovery of possession is made making all the co-sharers and heirs of the original owner party in the suit, the present suit is not maintainable.

Apart from this, if the judgment of the appellate court is construed as dismissed for default, the petitioner had an opportunity to file a miscellaneous case under Order 41 Rule 19 of the Code of Civil Procedure, wherein he could have explained the fact of non

appearance when the appeal was sent back to the appellate court on remand for hearing and dismissed by the appellate court, but the petitioner did not take any step under that provisions of law.

However, in Sanatan Nessa Bewa Vs. Haipat Ullah Sarker case reported in 1989 BLD (AD) 01 our apex court held that if the court found that the petitioner has no merit in the appeal or revision to be succeeded, if the appeal is readmitted or restored in its original number and position in that case the court should be reluctant in restoring the appeal or suit giving life to a fruitless litigation.

It is to be noted that the suit was filed in the year 1985, the appeal for the first time disposed of in the year 2002, then civil revision was disposed of in the year 2009. The appellate court received the records on remand in the year 2010 and the appeal was disposed of on 15.07.2010. Against the judgment and decree of the appellate court, the plaintiff-appellant-petitioner moved this Court by filing this revision in the year 2018 at a delay of 2433 days. However, the said delay was condoned by this Court. A practice has been developed in the process of hearing of suits or appeals that

almost every cases the plaintiff, appellant or petitioner in revisions found absent on repeated calls when taken up for hearing, consequently, the court finding no other alternatives dismissed the suit, appeal or revision for default. After awaiting for long time, the plaintiff-appellant or the petitioner in revision came with an application praying for restoration on the plea of not knowing or communicating the date of hearing by the learned Advocate which creates backlog long in the judiciary and thousands of cases remain pending and for this reason other parties put into unnecessary harassment, expenses and in hanging on a long rope for years together. Considering this situations and dilatory tactics adopted by the litigants either in allowing dismissal of the appeal for default or taking repeated adjournment, to prevent such activity of the litigants and to save other parties from harassment the government amended some provisions of the Code of Civil Procedure by Ordinance No.18, 2025 published in the official gazette on 8 May, 2025. By the amendment a sub-rule has been added in Rule 30 of Order 41 of the Code of Civil Procedure which run as follows;

> *"(2) Notwithstanding anything contained in sub-rule (1), if neither party nor his pleader appears when the appeal is called on for hearing, the Appellate Court may, for reasons to be recorded in writing, if considers the materials on record are sufficient to dispose of the appeal on merits, pronounce judgment in open Court immediately or on a date to be fixed by it"*

The sub-rule quoted above clearly provided that an appeal may be heard and disposed of by the appellate court in the absence of parties and can pronounce judgment in open Court immediately or on a date to be fixed by it. Though, this appeal in question was heard by the appellate court in the year 2010 and disposed of on merits, I think that it has committed no error of law in the decision occasioning failure of justice as the judgment is based on all the evidences led by the parties both oral and documentary available on records. Moreover, the petitioner had sufficient notice of hearing but repeatedly remained absent. The remand order did not mandate that the court must wait indefinitely for the parties when they remain deliberately absent. Section 115 of the Code does not permit interference unless the order impugned affects the merits of the case or results in failure of justice. Significantly, this revision was

filed after 8(eight) years of passing judgment by the appellate court which also indicates that this is for harassing the opposite parties for no fault of them.

Taking into consideration of the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioners calling for interference by this Court.

In the result, the Rule is discharged, however, without any order as to costs.

The order of status-quo stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.

Helal/ABO