CASE NO.:
Appeal (civil) 2268-2269 of 2002

PETITIONER:
AJIT KUMAR SINGH & ORS.

Vs.

RESPONDENT:
CHIRANJIBI LAL & ORS.

DATE OF JUDGMENT: 20/03/2002

BENCH:
Syed Shah Mohammed Quadri & S.N. Variava

JUDGMENT:

SYED SHAH MOHAMMED QUADRI, J.

Leave is granted.

These appeals are from the judgments and orders of the High Court of Judicature at Patna dismissing appellants' Second Appeal No.24 of 1996, on August 12, 1998 and the Review Petition in MJC No.2463 of 2000 on February 2, 2001.

The appellants were the defendants in the suit in which their eviction was sought by the respondents-plaintiffs from an area of 47 Kari comprising of house and Golla situated in Plot Nos.797 and 798 appertaining to khata No.131 under Tauzi No.414 Thana No.239 in Arrah Municipal Area (for short, 'the suit premises') on the grounds of bona fide personal necessity and default in payment of rent under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (for short, 'the Act'). The suit was decreed by the Trial Court and the First Appeal filed by the appellants was dismissed on September 6, 1995. The appellants then filed Second Appeal No.24 of 1996 in the High Court of Judicature at Patna. When the case came up before the High Court on August 12, 1998, nobody was present on behalf of the appellants. However, the High Court dismissed the Second Appeal on merits. The appellants then filed the aforementioned review petition which was also dismissed on February 2, 2001. The said judgments and orders are brought under challenge in these appeals by special leave.

On July 27, 2001, this Court issued notice limited to the question as to why the order under challenge should not be set aside and the matter remitted to the High Court for fresh disposal.

Mr.Akhilesh Kumar Pandey, the learned counsel for the appellants, contended that the High Court had erred in disposing of the Second Appeal on merits in the absence of the counsel for the appellants and not reviewing the order passed in the Second Appeal. A perusal of the judgments under challenge discloses that the High Court dismissed the Second Appeal on merits in the absence of the appellants and their advocate. The High Court interpreted the phrase "hearing the appellant or his pleader" in Rule 11(1) of Order 41 of the Code of Civil Procedure ('for short, 'CPC') as to give adequate opportunity to the appellant or his counsel. As the counsel

for the appellants did not appear even though they had adequate opportunity, the High Court held that it was open to it to deal with the Second Appeal on merits and therefore it dismissed the review petition.

It will be useful to refer to sub-rules (1) and (2) of Rule 11 of Order 41 of C.P.C. which read as under :

"11. Power to dismiss appeal without sending notice to Lower Court --

(1) The Appellate Court, after sending for the records if it thinks fit so to do, and 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, without sending notice to the Court from whose decree the appeal is preferred and without sending notice on the respondent or his pleader.

(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."

A plain reading of the provisions shows that Rule 11 deals with the procedure which the Appellate Court ought to follow before ordering notice to the respondents. Sub-rule (1) empowers the Court to dismiss the appeal if it thinks fit so to do after hearing the appellant or his pleader. To comprehend the correct import of the phrase "after fixing a day for hearing the appellant or his pleader and hearing him" it will be necessary to read sub-rule (2) also which says that if on the date fixed or any other day to which the hearing may be adjourned, the appellant (which means appellant or his pleader) does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. The dismissal postulated under this sub-rule is dismissal for non-prosecution or dismissal for default as is commonly called. This import of Order 41 Rule 11(1) and (2) is also fortified from a perusal of Rule 17(1) and (2) read with the explanation added by Act 104 of 1976 and provision of Rule 19 of Order 41 which provides for re-admission of appeal dismissed for default. It says, inter alia, that where an appeal is dismissed under Rule 11, sub-rule (2), or rule (17) or rule (18), the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

There can be no doubt that the High Court erroneously interpreted Rule 11(1) of Order 41, CPC. The only course open to the High Court was to dismiss the appeal for non-prosecution in the absence of advocate for the appellants. The High Court ought not to have considered the merits of the case to dismiss the Second Appeal. [See : Rafiq & Anr. vs. Munshi Lal & Anr. [1981 (2) SCC 788]. The same view was reiterated in Abdur Rahman & Ors. vs. Athifa Begum & Ors. [1996 (6) SCC 62].

The next question that arises is whether the case should be remanded to the High Court for fresh disposal in accordance with law.

Mr.S.B.Sanyal, the learned senior counsel appearing for the respondents, argued that the appellants were inducted into possession of the premises as tenants. They, however, denied the title of the respondents and the courts below found that the relationship of

landlord and tenant between the parties existed. He further contended that the possession of the premises was taken by the respondents on execution of the decree as long back as in 1986, therefore, the case need not be remanded to the High Court as it would only prolong the litigation. However, Mr.Pandey submitted that under the Bihar Land Reforms Act, 1950, the land in question vested in the State as held by this Court in Mst.Bibi Sayeeda & Ors. vs. State of Bihar & Ors. [1996 (9) SCC 516], therefore, the respondents could not be said to be the landlords and that by virtue of the patta granted by the erstwhile landlord before coming into force of the Act, the appellants became patta holders and the respondents did not get any title from the erstwhile landlord as by that time the Act had come into force and the land vested in the State so erstwhile landlord had no title to transfer the land in favour of the respondents. We do not want to express any opinion on this controversy.

In our view, under Section 116 of the Evidence Act, a tenant is estopped from denying the title of the landlord. Having regard to the finding of the First Appellate Court that the appellants executed a registered Kabuliyat (Ex.8) in favour Chandmati Devi (mother of the plaintiffs) as well as in favour of other co-sharers having patta (Ex.7) in respect of the suit premises and that the relationship of landlord and tenant existed between the parties and taking note of the fact that the possession of the premises was taken by the respondents as long back as in 1986 and long before filing of the appeal, in our view, it is not a fit case to exercise jurisdiction under Article 136 of the Constitution to remand the case to the High Court for fresh disposal which would only prolong the litigation without any useful purpose. In the result while correcting the error of law committed by the High Court, we do not disturb the conclusion arrived at by the High Court.

We make it clear that this judgment will not preclude the appellants from claiming any rights, if they are otherwise entitled to, under the Bihar Land Reforms Act.

The appeals are disposed of accordingly. No costs.

.....J.
[Syed Shah Mohammed Quadri]

.....J.
[S.N.Variava]

March 20, 2002.