

GAHC010008742012



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : RSA/199/2012

NAVAJIT PATHAK

ON THE DEATH OF JOYKRISHNA PATHAK HIS LEGAL HEIR, S/O-LATE
JOYKRISHNA PATHAK, R/O- METUAKUCHI, B B ROAD, BARPETA, DIST-
BARPETA

VERSUS

NILKANTA DAS

S/O- LATE MUKUNDA RAM DAS, R/O- METUAKUCHI, B B ROAD,
BARPETA, DIST- BARPETA

Advocate for the Petitioner : MR.A DAS, MS M BORAH,MS. M DEVI,MR. N C DAS,MR.J DAS,MR.S K MEDHI

Advocate for the Respondent : MR.P CHETIA, MR. P NEOG,MR.K DAS,MS. N BORAH,MR S KHOUND

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

ORDER

12.09.2024

Heard Mr. N.C. Das, learned Senior counsel assisted by Mr. A. Das, learned counsel for the appellant and also heard Mr. S. Khound, learned counsel for the sole respondent.

2. This regular second appeal, under Section 100 of the Code of Civil Procedure, 1908, is preferred by the appellant against the judgment and decree dated 31.03.2012 passed by the learned Additional District Judge (FTC), Barpeta, in Title Appeal No.12/1997. It is to be noted here that vide impugned judgment and decree dated 31.03.2012, the learned First Additional District Judge (FTC), Barpeta, has affirmed the judgment and decree dated 02.09.1997, passed by the learned Civil Judge (Senior Division), Barpeta, in Title Suit No.48/1994.

3. Mr. Das, learned Senior counsel for the appellant, referring to Order XLI Rule 17 of the Code of Civil Procedure, submits that the said Rule provides that on the day fixed or on any other day, to which hearing may be adjourned, if the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. Referring to the explanation of Rule 17, Mr. Das further submits that nothing in the sub-rule shall be construed, as empowering the Court to dismiss the appeal on the merit, but, Mr. Das submits that the learned First Appellate Court instead of resorting to the provision of Order XLI Rule 17 of the CPC, proceeded to hear and dispose of the matter on merit when the appellant remained absent on the date fixed for hearing and on such count, the impugned judgment and decree passed by the learned First Appellate Court is not at all sustainable. Mr. Das, in support of his submission, referred two decisions of the Hon'ble Supreme Court in the case of **Abdur Rahman & Ors. v. Athifa Begum & Ors.**, reported in **(1996) 6 SCC 62** and in **Ajit Kumar Singh & Ors. v. Chiranjibi Lal & Ors.**, reported in **(2002) 3 SCC 609** and as such, Mr. Das submits that the impugned judgment and decree dated 31.03.2012 passed by the learned First Appellate Court is illegal and arbitrary and therefore, it is contended to allow this appeal by setting aside the same.

4. Per contra, Mr. Khound, learned counsel for the sole respondent also fairly submits that the learned First Appellate Court has committed illegality in hearing the matter on merit and disposing of the same in absence of the appellant and therefore, Mr. Khound submits that the impugned judgment and decree of the learned First Appellate Court may be set aside and the matter may be remanded to the learned First Appellate Court to hear

and dispose of the matter in accordance with law.

5. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the memo of appeal and also the grounds mentioned therein and also perused the impugned judgment and decree dated 31.03.2012, passed by the learned First Appellate Court.

6. It appears from the impugned judgment and decree of the learned First Appellate Court that the learned First Appellate Court had heard the argument advanced by learned counsel for the respondents. But, the learned Court could not hear the arguments of appellant's side, as none had appeared at the time of hearing and in spite of that the learned First Appellate Court chose to discuss the appeal on merit. The course of action so adopted by the learned First Appellate Court when examined in the light of the provision under Order XLI Rule 17 of the CPC and explanation thereto, this Court is clearly of the view that the impugned judgment and decree so passed is not legally sustainable. The same fails to withstand the legal scrutiny.

7. In that view of the matter, this Court finds no substantial question of law in this appeal and accordingly, the impugned judgment and decree dated 31.03.2012 stands set aside and quashed and the matter is remanded back to the learned First Appellate Court to decide the matter afresh after affording opportunities of hearing to both the parties. It is further provided that both the parties shall remain present before the learned First Appellate Court on 21.10.2024.

8. In terms of above, the appeal stands disposed of.

Sd/- Robin Phukan
JUDGE

Comparing Assistant