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rule (2) requiring the Court to record its reasons is only directory, and that failure to issue a notice in the present case was not necessarily fatal to the validity of the proceedings. It would of course ordinarily be open to the appellant to ask us to consider the Court's use of its discretion on its merits. But firstly there is, as already observed, the finding of the lower Court that no substantial loss resulted against which nothing has been said, and secondly it is not difficult with reference to the facts mentioned in paragraph 24 of the lower Court's judgment, to infer the reasons on which it acted.

The result is that the Appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922, March 23.

MUHAMMAD ALIAS BAVA (FIFTH DEFENDANT), APPELLANT AND PETITIONER,

v.

MANAVIKRAMA AND THIRTEEN OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 4 AND NOS. 6 TO 13), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XLI, r. 17—Absence of appellant at hearing—Pleader instructed only to ask for adjournment—Withdrawal of pleader on refusal of adjournment—Court dismissing appeal on merits, legality of.

Where the pleader of an appellant who was absent represented to the Court at the hearing of the Appeal that he had instructions only to apply for an adjournment and withdrew from the appeal when the adjournment was refused.

Held that the Court had thereafter no jurisdiction to dismiss the Appeal on the merits, but should have dismissed it for "default" both of the party and of his pleader within the meaning of Order 41, rule 17, Civil Procedure Code; *Satish*

* Second Appeal No. 1499 of 1920 and Civil Revision Petition No. 682 of 1920.

Chandra Mukerjee v. *Ahara Prasad Mukerjee* (1907) I.L.R., 34 Calc., 403 (F.B.), followed. *Patuhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon* (1903) I.L.R., 26 Mad., 267, explained.

SECOND Appeal against and Revision Petition praying the High Court to revise the decree of T. V. NARAYANA NAYAR, in Appeal Suit No. 72 of 1919, on the file of the Subordinate Judge's Court of South Malabar at Palghat, preferred against the decree of T. V. KRISHNAN NAYAR in Original Suit No. 354 of 1917, on the file of Additional District Munsif of Tirur.

The facts are given in the judgment of the High Court.

K. P. M. Menon for appellant.

D. A. Krishna Varaiar for *C. Madhavan Nayar* and *K. P. Ramakrishna Ayyar* for respondents.

JUDGMENT.

AYLING, J. AYLING, J.—Appellant (and petitioner before us) was the fifth defendant in Original Suit No. 354 of 1917 on the file of the Court of the Additional District Munsif of Tirur, which was decreed in favour of plaintiff. He preferred an appeal which was posted for disposal before the Subordinate Judge of Palghat on 10th February 1920. On that date, as appears from the record, appellant was not present but a vakil Mr. V. Sivarama Panikkar holding vakalat from him was present in Court and applied for an adjournment (M.P. No. 378 of 1920). This was refused. As far as I can gather, he seems to have then simply informed the Court that, as he had no instructions or papers, he could not argue the appeal and to have taken no further part in the proceedings. In these circumstances the Subordinate Judge instead of at once dismissing the appeal for default under Order XLI, rule 17, considered the evidence bearing on appellant's claim with reference to his appeal memo. (I use his own words) and dismissed the appeal with costs.

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Mr. K. P. M. Menon contends that it was not competent to the Court to inquire into the merits of the case in the absence of appellant and his pleader; but only to deal with it under Order XLI, rule 17, against an order under which he would have right of application for readmission under rule 19.

I think in the circumstances set out above, we cannot distinguish the case from one in which the appellant was absent and entirely unrepresented. To all intents and purposes he was unrepresented, for it is clear that Mr. Sivarama Panikkar was only instructed to apply for an adjournment and was in no position to proceed to argue the merits of the appeal. As appears from the order on M.P. No. 378 of 1920, he had not studied the appeal and had been given no papers. The case is precisely similar to that in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee*(1) in which a Full Bench of the Calcutta High Court held that the party must be deemed to be unrepresented.

Our attention was drawn to a case of this Court *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon*(2) in which in somewhat similar circumstances a Bench of this Court held that the Court was bound to write a judgment and apparently to dispose of the appeal on its merits. The effect of this case has been discussed at page 414 of the report of the Calcutta Case; and it has been treated as merely a pronouncement as to the correct course to be adopted where it is found as a fact that there was no default. The judgment starts off by saying that in that case there was no default, and lays stress on the fact that the vakil did not withdraw from the case. I think we are justified in declining to treat it as an authority on what constitutes default; and I observe

(1) (1907) I.L.R., 34 Calc., 403 at 414 (F.B.).
(2) (1903) I.L.R., 26 Mad., 267.

that in a later case *Venkatarama Aiyar* v. *Nataraja Aiyar*(1), another Bench of this Court has held, without reference to it, that where the vakil was not instructed to argue the case but only to apply for an adjournment there was no appearance.

Proceeding then on the footing that appellant was unrepresented, was it competent to the Subordinate Judge to go into the merits of the case ?

It seems to be clear law that under the Codes preceding the present Code an Appellate Court in such circumstances had no power to go into the merits :—Vide *Mohesh Chunder Bose* v. *Thakoor Dass Gossamee*(2) quoted with approval in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee*(3).

For respondent it is contended that the law is different under the present Code, because the wording of section 556 of the old Code "shall be dismissed" has been changed in Order XLI, rule 17, into "the Court may make an order that the appeal be dismissed." The question is whether this change of language was intended to throw open the door to a course which the Courts had held under the preceding enactment to be undesirable apart from its legality—vide *Mohesh Chunder Bose* v. *Thakoor Dass Gossamee*(2).

It is quite possible to give effect to the change from "shall" to "may" without going to this length. Under the old Code, the Court apparently had no power to adjourn the appeal in order to give the absent appellant a further opportunity to put in an appearance. Under the present Code that course is certainly open to it; and I can see no reason why this latitude should not have been the object of the change.

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(1) (1913) 24 M.L.J., 235. (2) (1873) 20 W.R., 425.
(3) (1907) I.L.R., 34 Calc., 403 (F.B.).

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The objections to allowing an appeal to be rejected on its merits without hearing the appellant remain the same as when Sir RICHARD COUCH wrote his judgment in *Mohesh Chunder Bose* v. *Thakoor Dass Gossamee*(1), and it seems to me that to allow it might expose an appellant to a prejudice which could hardly have been contemplated. What remedy is open to an appellant who has been unavoidably prevented from appearing at the hearing, but whose appeal has been gone into and decided against him on its merits? If the Court's order is not to be treated as one under Order XLI, rule 17, rule 19 which provides for readmission can have no application. The only possible remedy for such an appellant that is suggested is an application for review. But it is by no means clear that such an application would lie in view of the provisions of Order XLVII, rule 1: and in any case it could only be entertained by the same Judge as dismissed the appeal. Moreover, there would be no appeal against the rejection of the application for review, such as is provided for in the case of an application under Order XLI, rule 19.

There is very little authority on this point, probably because it is most unusual for an Appellate Court to go into the merits of an appeal liable to be dismissed for default. We have only been referred to two decisions, each by a single Judge of the Patna High Court, one on each side. These are *Mangar Singh* v. *Bharat Prasad*(2) and *Daulat Singh* v. *Siriviras Prasad Singh*(3). Neither, if I may say so with respect, contains much discussion of the point.

For the reasons above indicated I think the Subordinate Judge had no power to go into the merits of the appeal as he has done in this case.

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(1) (1873) 20 W.R., 425. (2) (1919) 51 I.C., 46.
(3) (1920) 57 I.C., 75.

The last point for determination is what order we should pass in the matter. It has been suggested on the authority of the Calcutta Cases quoted above, that we must treat the order as one passed under Order XLI, rule 17, and refer the appellant-petitioner to his remedy under rule 19. It is by no means certain that after this lapse of time that remedy would be effective. The time for application under rule 19 (one month) has of course long expired and it is doubtful whether, if an application were filed now, either sections 5 or 14 of the Limitation Act would enable a Court to excuse the delay. We think we are not precluded from taking another course. The order of the Subordinate Judge is on the face of it an order dictated by a consideration of the merits of the case and as we hold, an illegal order. Such consideration of the merits would be irrelevant to an order under Order XLI, rule 17. We therefore set aside the order of the Subordinate Judge, dated 10th February 1920, as *ultra vires* and direct him to restore the appeal to file and dispose of it according to law. Costs in this Court will be costs in the cause.

ODGERS, J.—The question in this appeal is whether the Subordinate Judge was right in discussing the case on its merits and dismissing it thereon instead of merely passing an order of dismissal of the appeal for default under Order XLI, rule 17. This would entitle the unsuccessful appellant to apply for readmission of the appeal under rule 19 of the same Order. In this case the appeal was not argued as the appellant had given no instructions to his vakil though the appeal is said to have come on "in the presence of Mr. V. Sivarama Panikkar, vakil, for the appellant." The vakil was therefore certainly present and I must assume that he informed the Judge (as appears from the judgment)

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that he had no instructions and could not proceed further. In *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee*(1) a Full Bench of the Calcutta High Court held that an application by a pleader who is instructed to apply for an adjournment which is refused is not an appearance within the meaning of the Civil Procedure Code and that a dismissal in such cases is for default. In *Venkatarama Aiyar* v. *Nataraja Aiyar*(2) it was held there was no appearance where the pleader only applied for an adjournment. In *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon*(3) the pleader for appellants appeared and asked for an adjournment which was refused. He did not withdraw from the case. It was held by the High Court that the Judge was bound to write a judgment and could not dismiss the case for default. This appears to me to be an entirely different case and is not applicable to the facts of the case before us as the Court there held there had been an appearance. In *Mangar Singh* v. *Bharat Prasad*(4) a single Judge of the Patna High Court held that where a pleader intimates he has no instructions, the proper course is to dismiss for default. In *Daulat Singh* v. *Sirinivas Prasad Singh*(5) a single Judge of the same High Court held that when appellant fails to appear the Court has power to decide on the merits. The earlier case is not referred to and in neither of these Patna cases are any convincing reasons for the decision given. With respect, I do not think they carry the matter further and I think it must be taken that an appellant represented by a pleader who says he has no instructions and cannot proceed has not appeared. Under section 556 of the Code of 1882 the

(1) (1907) I.L.R., 34 Calc., 403 (P.C.). (2) (1913) 24 M.L.J., 235.
(3) (1903) I.L.R., 26 Mad., 267. (4) (1919) 51 I.C., 46.
(5) (1920) 57 I.C., 75.

Court was bound to dismiss an appeal if the appellant did not attend; the word used in Order XLI, rule 17, is "may." Does this mean that the Court may decide the case on the merits? If it does, the decision if against the appellant is only open to review under Order XLVII, rule 1, and the only clause applicable would be "any other sufficient" reason. I think it very doubtful if the Court would apply this clause, in which case the appellant who (or whose pleader) might have some quite legitimate ground for failing to appear at the hearing of the appeal would be left without remedy, there being no appeal from a refusal to review. In my opinion it cannot be said that the word "may" was inserted in the present Code in order to bring about these serious consequences; but more likely in order that the Court might exercise its discretion whether or not to dismiss the appeal forthwith if the appellant or his pleader for one reason or other was not present when the appeal was called on, and therefore does not mean that the Court is entitled to decide the case on the merits under such circumstances. The point is apparently almost a novel one, and naturally so as it would only be rarely that a Judge under such circumstances would feel called upon to deal with the case on its merits which under the present circumstances the Subordinate Judge was not entitled to do. I therefore think that the judgment of the Subordinate Judge must be treated as one without jurisdiction.

I agree with the order proposed by my Lord.

N.R.