

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.268 of 2021**

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Rajesh Kumar Gadiya, Son of Late Ashok Kumar Gadiya, resident of Patel Nagar, Ward No. 6, Main Road, Godda, P.S. Godda, District - Godda.

... .. Petitioner/s

Versus

1. Sajjan Prasad Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.
2. Hari Prasad Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.
3. Rajendra Prasad Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.
4. Shankar Lal Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.
5. Mostt. Gyami Devi, Wife of Om Prakash Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.
6. Mostt. Shakuntala Devi, Wife of Late Shyamal Sah, Resident of Village, P.O. and P.S. Hanwara, District Godda.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Waliur Rahman, Advocate Mr. Pankaj Majwar, Advocate
For the Respondent/s	:	Mr. Harshwardhan Sahay, Advocate Mr. Rajeev Kumar Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA

ORAL JUDGMENT

Date : 07-12-2023

Let the defects pointed by the stamp reporter be removed within four weeks.

2. Today, a counter affidavit has been filed on behalf of the respondents, which is taken on record.

3. Heard learned counsel for the petitioner and learned counsel for the respondents on the point of admission and I intend to dispose of this petition at this stage itself with the



consent of learned counsels for the parties.

4. The learned counsel for the petitioner submits that the petitioner/appellant/defendant has challenged the order dated 22.01.2021 passed by the learned Additional District Judge-IX, Bhagalpur in Misc. Appeal No.18 of 2019, arising out of Title Suit No.153 of 2018 whereby and whereunder the learned first appellate court dismissed the Misc. Appeal No.18 of 2019 filed by the petitioner/appellant/defendant under Order 43 Rule 1 (r) of the Code of Civil Procedure.

5. The learned counsel for the petitioner further submits that the respondents/respondents/plaintiffs filed Title Suit No.153 of 2018 for partition of the suit land claiming that the parties to the suit were the heirs of one Chiman Ram and there was partition of the properties of Chiman Ram, but some of the properties remained joint. The petitioner/appellant/defendant appeared and contested the suit claiming that suit was not maintainable as the suit land has been recorded in the name of grandfather of the petitioner/appellant/defendant namely, Radhe Shyam Agarwal and the same was acquired by him during family partition. The petitioner/appellant/defendant further claimed that the respondents/respondents/plaintiffs have got no right, title and interest in the suit property as the suit



property was the exclusive property of the petitioner/appellant/defendant. In Title Suit No.153 of 2018, an application has been filed under Order 39 Rule 1 & 2 of the Code of Civil Procedure on behalf of the respondents/ respondents/ plaintiffs claiming that petitioner/ appellant/ defendant no.2 in collusion with the defendant nos. 1 and 3 was negotiating to sell out the part of the suit land and even one sale deed has been executed on 30.03.2019 in favour of one Sudhanshu Kumar Mishra and a prayer has been made to direct the defendants to maintain *status quo* over the spot. The said application was allowed vide order dated 23.05.2019 with a direction to the parties not to transfer the suit land without permission of the court.

6. The learned counsel for the petitioner further submits that being aggrieved by the order dated 23.05.2019, the petitioner/appellant/defendant preferred Misc. Appeal No.18 of 2019 under Order 43 Rule 1 (r) of the Code of Civil Procedure. The said appeal was fixed for hearing on 26.02.2020 before the court of learned Additional District Judge-VI, Bhagalpur and it was the period of 'Covid Pandemic' and the record of Misc. Appeal No.18 of 2019 got transferred to the court of learned Additional District Judge-IX, Bhagalpur on 31.10.2020.



Thereafter, on 02.12.2020, which was the next date, judicial work was hampered due to Corona and next date fixed was on 06.01.2021. On that date, the learned appellate court without giving any opportunity to the petitioner/appellant/defendant closed his argument, heard the respondents/respondents/plaintiffs and fixed the case for orders and, thereafter, on 22.01.2021, order was passed dismissing the appeal filed by the petitioner/appellant/ defendant.

7. The learned counsel for the petitioner further submits that both the courts have passed the orders without appreciating the facts as to whether any *prima facie* case was made out in favour of the respondents/respondents/plaintiffs or not. The petitioner/appellant/defendant has made specific submission before the learned court that the plaintiffs have nothing to do with the suit land and despite the clear averments made on behalf of the petitioner/appellant/defendant, the learned court below proceeded in the matter and passed the order restraining the parties not to transfer the suit land without permission of the court.

8. The learned counsel for the petitioner stressed on the fact that it is clear from the record that on 06.01.2021, the petitioner, who was appellant before the learned appellate court,



was not present. So the option before the learned appellate court was either to dismiss the appeal in default or to adjourn the matter. It could not have heard the appeal on merit in absence of the appellant and pass the order without hearing the appellant. The learned counsel referred to Order 41 Rule 17 of the Code of Civil Procedure in support of his contention that the appeal was either to be dismissed in default or was to be adjourned. The learned counsel further submits that the learned appellate court has specifically mentioned that the appellant was not present at the time of hearing and the opportunity of hearing of the appellant was closed. However, the respondents/respondents/plaintiffs appeared and was heard. This course was not open to the learned appellate court while hearing the miscellaneous appeal of the petitioner/appellant/defendant. Thus, the learned counsel submits that the impugned order is not sustainable and the same may be set aside.

9. The learned counsel appearing on behalf of the respondents counters the argument made on behalf of the petitioner. The learned counsel for the respondents submits that the impugned order is quite sustainable as the contention of the appellant was taken into consideration by the learned appellate court even in his absence. Further, the petitioner/ appellant/



defendant has not assailed the initial order on which the miscellaneous appeal was filed. Even after 06.01.201, the petitioner/appellant/defendant did not make any prayer to hear him though the fact was in his knowledge that the matter has been listed for orders. It was incumbent upon the petitioner/appellant/defendant to move before the learned appellate court to recall its order dated 06.01.2021, but the petitioner/appellant/defendant did not do so. The learned counsel further submits that moreover, this order of the learned trial court or the learned appellate court is not exactly restraining orders since the parties have already been given liberty to sell the suit land after taking permission of the court. The learned counsel further submits that even on merits, the learned appellate court below has discussed the aspects of the case regarding *prima facie* case, balance of convenience and irreparable loss. So the order could not be said to be suffering from any irregularity or illegality.

10. Perused the records.

11. Having regard to the facts of the case, it is admitted fact that the matter was heard before the learned appellate court below and the petitioner/appellant/defendant was not heard.



12. Order 41 Rule 17 of the Code of Civil Procedure reads as under :

“Order XLI

17. Dismissal of appeal for appellants’ default.—

(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.

[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”.

13. From bare reading of the aforesaid provision, it is clear that in case the appellant does not appear and the appeal is called out for hearing, the court may make an order for dismissal of the appeal and, at the same time, it has been clarified that in this Rule 17 (1) nothing should be construed as empowering the Court to dismiss the appeal on the merits.

14. Evidently, the learned appellate court below has not considered this provision while passing the order. The learned appellate court could not have passed the order on merits in absence of the appellant. So, on this limited point, the order of the learned appellate court is not sustainable.



15. Accordingly, the order dated 22.01.2021 passed by the learned Additional District Judge-IX, Bhagalpur in Misc. Case No.18 of 2019 is set aside and the matter is remanded to the learned court below for passing the order afresh after giving ample opportunity of hearing to the petitioner/appellant/defendant within a period of one month from the date of receipt/production of a copy of this judgment.

16. With the aforesaid observations/directions, the instant petition is allowed.

17. However, it is made clear that this Court has not expressed any opinion on the merit of the case and whatever has been discussed is only for the purpose of disposal of the present petition.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	08.12.2023
Transmission Date	NA

