

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.223 of 2018**

Shankar Pandey, S/o late Nag Narain Pandey, Resident of Village P.O. Sahuli,
P.S. M.H. Nagar, District- Siwan.

... .. Petitioner/s

Versus

1. Triloki Nath Pandey
2. Mukund Chand Pandey, both S/o Late Gorakh Nath Pandey.
3. Upendra Nath Pandey.
4. Shambhu Nath Pandey, S/o late Nag Narain Pandey, All are Resident of Village P.O. Sahuli, P.S. M.H. Nagar, District Siwan.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Chandra Kant, Advocate
For the Respondent/s : Mr. Ajay Kumar Tiwary, Advocate

**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT**

Date : 19-07-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous application has been filed under Article 227 of the Constitution of India against the order dated 06.06.2016 passed by learned Sub-Judge 1st, Siwan in Miscellaneous Case No. 34 of 2002 whereby and whereunder the learned Court has dismissed the said Miscellaneous Case on merit in absence of the parties.

3. The brief facts of the case are that the plaintiffs/ respondents filed partition suit bearing no. 122 of 1997 for declaration claiming that 8 years ago they had been partitioned but due to some reasons parties are not obeying the said



partition. The plaintiffs compromised the case with the defendant. The case of the petitioner is that the plaintiffs played fraud and got the suit compromised. Accordingly, Miscellaneous Case No. 34 of 2002 has been filed under Order 23 Rule 3 and 151 of the Civil Procedure Code for setting aside the compromise decree passed on 22.04.1997 in title suit no. 122 of 1997. The learned court below dismissed the said Miscellaneous Case on merit without hearing the petitioner and respondents who were absent on the relevant date and the case was fixed for hearing on objection petition against the hand writing expert report.

4. Learned counsel for the petitioner submits that after completion of the evidence of the parties, the petitioner filed petition for appointment of handwriting expert which was allowed by the Court and the handwriting expert submitted his report on 15.04.2014. Against the said report, respondents filed objection petition on 27.11.2014, and the case was posted for hearing on the said objection petition. The case was adjourned time to time and on 25.05.2016, the learned Court below in absence of the parties fixed the case for order without hearing arguments on behalf of the petitioner or respondents who were absent, which is against the settled principle of law. He has



submitted that when the case was posted for hearing on objection petition then the Court had to hear the parties on the objection petition and either allow the objection petition or dismiss the same.

5. Learned counsel for the petitioner has further submitted that learned court below failed to appreciate that when both parties were not present then Court had option to dismiss the case for non-appearance. Further, it is submitted that unless argument of the petitioner is heard, no final order can be passed in the case.

6. He has further submitted that law is well settled that if the appellant is absent, the Appellate Court has no power to dismiss the appeal on merits. The court may either adjourn it or dismiss it for default. So that the appellant may get an opportunity to establish sufficient cause, if any, under Order 41, Rule 19 of the Code. Further, he was submitted that the said principles of law is also applicable in the present case also.

7. On the other hand, learned counsel for the respondents submits that there is no illegality in the impugned order and the same has been passed considering all the facts and circumstances, no one has appeared in the case, accordingly, the petitioner cannot take advantage of its own wrong. Further, he



has submitted that there is no illegality in the impugned order for interference by this Court in its supervisory jurisdiction under Article 227 of the Constitution of India.

8. It appears from the record that on 27.11.2014, a protest petition against the expert report was filed and the date was fixed for hearing of the said objection matter and the case was adjourned time and again and it was not fixed for hearing of the case. The court should have disposed of the objection matter and committed mistake in disposing of the case on merit even though the defendant/ O.P. was not present in the court. It is surprising that the Court totally forgot to dispose of objection petition and it was duty of the court to dispose of the objection petition before the Court dispose of the case. In fact, the case should not have been disposed of, as the objection petition was yet to be disposed of.

9. It is now well settled that only remedy available to a party to a consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. No appeal is maintainable against a consent decree and also no independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not



lawful in view of the bar contained in Rule 3 A.

10. Section 141 of the CPC deals with Miscellaneous proceedings and according to it the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of Civil Jurisdiction.

11. Under Order 17 Rule 3 CPC the court is empowered to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such order as it think fit.

12. It was the mistake of the Court to take up the case and dispose it of on the date not fixed for hearing of the suit. The only matter which was to be disposed of was the objection matter on the said date and the date fixed was not the hearing of the case.

13. In a given case, this may cause serious prejudice and result in injustice. The proper course in such case, would be to dismiss the interlocutory application rather than the case itself.

14. The Civil Miscellaneous application is, therefore allowed, the order dated 06.06.2016 of the learned court below is set aside and the Miscellaneous Case No. 34 of 2002, is restored to its file.



15. The learned court below will now proceed firstly to dispose of the objection petition and after disposing the objection petition will proceed with the case form the stage as it was on 25.05.2016 before the court passed the order dated 06.06.2016. The learned court below is directed to expedite the disposal of the case in accordance with law and shall not grant any unnecessary adjournment to any party. Both the parties are also directed to cooperate the learned court below in disposal of the Miscellaneous Case No. 34 of 2002.

16. This Civil Miscellaneous Application is disposed of with the aforesaid observation and direction.

(Sunil Dutta Mishra, J)

khushbu/-

AFR/NAFR	NAFR
CAV DATE	03.05.2023
Uploading Date	19.07.2023
Transmission Date	

