

**(2008) 07 PAT CK 0213**

**Patna High Court**

**Case No:** LPA No. 239 of 2008

Kedar Nath Tripathi

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

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**Date of Decision:** July 2, 2008

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 141
- Constitution of India, 1950 - Article 226

**Citation:** (2008) 3 PLJR 470

**Hon'ble Judges:** R.M. Lodha, C.J; Kishore K. Mandal, J

**Bench:** Division Bench

**Advocate:** K.N. Chaubey, A.N. Chaubey and G.S. Dubey, for the Appellant; Sunil Kumar Mandal, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

1. We heard Mr. Kamal Nayan Choubey, Senior Counsel for the appellant. He vehemently contended that when the petitioner or his counsel did not appear, the Single Judge had two options viz.; (i) adjourn the case; or (ii) dismiss the case for default. He would, thus, contend that because of non-appearance of the petitioner or his counsel, the Single Judge could not have considered the matter on merit. He placed heavy reliance upon a Division Bench decision of this Court in the case of [Kishori Prasad Vs. The State of Bihar and Others](#), , more particularly, paragraph 3 of the report. That reads thus:-

"We have also earlier made it clear and we again make it clear that where the learned counsel for the petitioner is not present, the ordinary course is either to postpone the hearing or to dismiss it for want of prosecution but in no circumstances it is to be decided on merit. The same view has also been taken by the Hon"ble Supreme Court in number of matters."

In our view, the aforesaid observations cannot be said to laying down an absolute proposition that in absence of the party or his counsel, writ petition cannot be decided on merits. It could not have been because there is no such fetter imposed upon the Single Judge exercising high prerogative jurisdiction under Article 226 of the Constitution of India. It needs no elaboration that the proceedings under Article 226 of the Constitution are not governed by the Code of Civil Procedure, 1908. Section 141 of the CPC excludes the applicability of the provisions contained in the CPC to the proceedings under Article 226 of the Constitution. No judgment of the Supreme Court has been brought to our notice holding otherwise in so far as writ jurisdiction under Article 226 of the Constitution of India is concerned.

2. We are, thus, of the view that in writ jurisdiction, even in absence of the party or his counsel, it is open to the Court to proceed with the matter on merits and decide accordingly.

3. Mr. Kamal Nayan Choubey then submitted that the impugned order is bad in law on merit as well. He would submit that the Single Judge misread annexure-4, appended to the writ petition, since earlier writ petition did not relate to promotion. He is right to the extent that the earlier writ petition did not relate to promotion but an issue of inter se seniority vis-a-vis private respondents was raised therein but the question is that if there were persons already senior to the petitioner (appellant herein), question of any promotion to him to the post of Headmaster would not arise.

4. Moreover, we are informed that the appellant has already retired from service long back. For all these reasons, we are satisfied that the appeal does not deserve to be admitted. It is dismissed in limine.