

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Jurisdiction Case No.4738 of 2014

In
SA 73 of 1985

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Madho Yadav & Ors.

.... Respondents- Petitioners

Versus

Ram Chandra Sharma & Ors.

.... Appellants- Opposite parties

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Appearance :

For the Petitioner/s : Mr. T. N. Maitin, Sr. Advocate
Mr. Ajay Kumar, Advocate with him.

For the Opposite Party : Mr. Rai Shiva Jee Nath, Sr. Advocate
Mr. Alok Anand, Advocate with him.

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Dated : 9th day of August, 2017

P R E S E N T

CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV O R D E R

- 11 09-08-2017 **1.** This MJC application has been filed under Order 41 Rule 21 of the Code of Civil Procedure by the respondents of Second Appeal No.73 of 1985 praying for re-hearing of the Second Appeal No.73 of 1985 after setting aside ex.-parte judgment against the petitioners.
- 2.** It appears that Second Appeal was heard and disposed of by this Court on 27.11.2013 after hearing the appellants of the



Second Appeal. Nobody appeared on behalf of the respondent.

3. The MJC application is barred by law of limitation. Therefore, separate limitation application has been filed for condoning the delay being I.A. No.6558 of 2015. From perusal of the MJC application as well as the limitation application, it appears that the grounds are same.

4. The learned senior counsel, Mr. T.N. Maitin appearing on behalf of the petitioner submitted that Karu Yadav the father of petitioner No.1 and 2 was doing Pairvi in the Second Appeal. After notice, the petitioner No.1 and 2 along with their father Karu Yadav had appeared through the learned counsel, Mr. Bindeshwari Prasad Sinha. The Vakalatnama was signed by the other two junior Advocate of Bindeshwari Prasad Sinha, namely, Chitragupta Prasad and Prabhat Kumar Sinha. Prabhat Kumar Sinha shifted his practice to Gaya and Bindeshwari Prasad Sinha died. The other Advocate Mr. Chitragupta Prasad was not engaged by the petitioners or their father and also he neither appeared in the second appeal nor ever informed the petitioners or their father about the death of Bindeshwari Prasad Sinha or about the hearing of the Second Appeal, therefore, the petitioners were prevented by sufficient cause from not appearing before the Court



when the Second Appeal was heard in absence of the respondents petitioners.

5. The learned senior counsel further submitted that Karu Yadav, the respondent No.3 also died but the other sons of Karu yadav were never substituted. The learned counsel further submitted that the appellant also did not file substitution application for substitution of legal representatives of appellant No.1(a) and 1(c). Noticing the fact that the respondents are not represented through any one after the death of Mr. Bindeshwari Prasad Sinha, direct notice was issued to the respondents but no notice was ever served on them, therefore, they had no knowledge about the death of Bindeshwari Prasad Sinha or about the hearing of the Second Appeal, therefore, they were also unaware of the disposal of Second Appeal. Thus, there was delay in filing the MJC application for re-hearing of the Second Appeal. On this ground, the learned senior counsel submitted that the MJC application be allowed after condoning the delay and the judgment passed in Second Appeal by the High Court be set aside and opportunity of hearing be granted to the petitioners.

6. On the other hand, the learned senior counsel, Mr. Rai Shiva Jee Nath appearing on behalf of the appellant respondent



submitted that the petitioners have not approached this Court with clean hand and in fact they have sworn false affidavit to the effect that Karu Yadav died on 5.1.2005. In fact Karu Yadav has died on 04.11.2007. With a view to support the falsehood, the petitioners have got the date of death registered on 05.12.2014 after filing this MJC application. In fact Karu Yadav has died on 4.11.2007 which would be evident from Annexure 'A' to the counter affidavit. The two of the heirs of Karu Yadav were already on record, therefore, also it is not necessary to substitute the other legal representatives. Further appellant No.1(c) died on 5th February, 2015 after disposal of Second Appeal and not on 05.08.2012, therefore, also affidavit filed by the petitioner is incorrect. The learned senior counsel further submitted that the other Advocates were on record and in fact when the appeal was called on for hearing, Mr. Chitragupta Prasad did not appear on behalf of the respondent. The learned counsel is still practicing in Patna High Court. There is no provision for issuance of direct notice to the respondent on the death of one of the Advocate but in the present case, notices were issued and Court recorded in the order-sheet that in spite of notice, the respondents did not appear and moreover subsequently, the Vakalatnam of the two other Advocates were accepted by the Court, therefore, it is incorrect to



say that the petitioners have no knowledge about the hearing of the appeal and disposal of the appeal. The petitioners are guilty of laches and negligence and likewise their Advocate is also guilty of laches and omission. On these grounds, it cannot be said that the petitioners were prevented by sufficient cause from not appearing before the Court when the Second Appeal was heard. Further since the petitioners are not approaching the Court with clean hand, the MJC is liable to be dismissed on this ground alone.

7. From perusal of the order dated 20.05.1993, it appears that direct notice were issued to the respondent No.1 to 3 for engaging another Advocate on the ground that their Advocate Mr. Bindeshwari Prasad Sinha had died. It appears that pursuant to this order, notices were issued but there is no service report. However on 12.5.1998, it was recorded by the Court that despite notice, the respondents have not appeared. It further appears that on 12.07.2001, order was passed to the effect that there are two other Advocates who have signed the Vakalatnama on behalf of the respondent and the Court accepted the Vakalatnama signed by other Advocates. Now, it becomes clear from the record that there is no notice served on the respondent No.1 and 2 nor any substitution application was filed regarding the death of respondent No.3 for bringing on record the other sons who are the



petitioners. It is not denied that Bindeshwari Prasad Sinha had died who was engaged by the petitioner. One of the Advocate shifted his practice to Gaya and the other Advocate did not turn up, therefore, notice was issued in the year 1993.

8. So far submission of the learned senior counsel for the opposite parties that the petitioners are not approaching the Court with clean hand as false affidavit has been sworn is concerned, it may be mentioned here that this point raised by the opposite parties are disputed question of fact and moreover that question do not go to the real controversies between the parties in this present MJC application. Whether the petitioners were prevented by sufficient cause or not is to be decided in this case, therefore, the question as to whether the affidavit is false or incorrect is not relevant at all. Even if there is incorrect statement regarding facts then also on this ground alone, the MJC application cannot be dismissed.

9. Order 41 Rule 21 of the CPC provides that “Whether an appeal is heard ex.-parte and judgment is pronounced against the respondent, he may apply to the appellate Court to re-hear the appeal and if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing



when the appeal was called on for hearing, the Court shall re-hearing the appeal on such terms as to cost or otherwise as it thinks fit to impress upon him.”

10. In the present case at our hand, earlier notice was duly served, the respondents of the Second Appeal also engaged their Advocates, Mr. Bindeshwari Prasad Sinha. The other two Advocates are junior to Mr. Sinha, who had also signed Vakalatnama. Therefore, the first part of Order 41 Rule 21 will not apply. They had the notice of the Second Appeal but so far second part of Order 41 Rule 21 is concerned, in the present case according to the petitioners, the Advocate, Mr. Chitragupta Prasad, who had signed the Vakalatnama never appeared as he was not engaged by the petitioners and, therefore, direct notice was issued. But prior to service of notice, the Vakalatnama of Mr. Chitragupta Prasad was accepted and the appeal was heard. According to the learned senior counsel, Mr. T. N. Maitin, this is sufficient cause within the meaning of Order 41 Rule 21 CPC second part.

11. The Hon’ble Supreme Court in the case of *Rafique & Ors. Vs. Munsilal and Ors AIR 1981 SC 1400* has held that “**the disturbing feature of the case is that under our present**



adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.”

12. In view of the above settled proposition of law, in my opinion, this is the case wherein the fact of the case before Supreme Court entirely fits in and thus, in my opinion, the petitioners were prevented by sufficient cause from not appearing before the Court when the Second Appeal was heard and disposed of. Therefore, they have no knowledge about the disposal of the



Second Appeal.

13. In the result, the limitation application is allowed, the delay in filing the MJC application is condoned and this MJC application is allowed. The Judgment and order dated 27.11.2013 passed by this Court is hereby set aside and the Second Appeal No.73 of 1985 is restored to its original file.

(Mungeshwar Sahoo, J)

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