

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Jurisdiction Case No.304 of 2014

In
First Appeal No.420 of 1978

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1. Ravi Kant Verma
 2. Shashi Kant Verma @ Neel
 3. Uma Kant Verma @ Santu
 4. Mani Kant Sinha
 5. Vikrant Kumar
All Sons Of Late Ashok Kumar Verma,
All Are Resident At Present Mohalla Amber Kachahari Road,
P.S. Bihar, P.O. Biharsharif, District- Nalanda.
 6. Kanchan Verma @ Kanchan Srivastav, D/O Late Ashok Kumar Verma, W/O Late Deepak Srivastav, Resident Of P.K. Viswas Road, P.O. + P.S. Khardha, District- 24 North Pargana, West Bengal.
 7. Indrani Sinha, W/O Aditya Prakash Sinha, Resident Of A-17 Rabindra Nagar, Kolkata-81.
 8. Sweta Sinha, D/O Late Ashok Kumar Verma, Resident Of Mohalla Amber Kachahari Road, P.S. Bihar, P.O. Biharsharif, District- Nalanda- 803101.

... .. Petitioner/s

Versus

1. Hulas Mahato, Son Of Late Nanhku Mahto, resident of Village- Bhainsasur, P.S. Biharsharif, District- Nalanda.
2. Srimati Rameshwari Devi. W/O Late Bodh Ram Mahto (since dead and her name deleted vide order dated 09.12.2015).
3. Kedar Prasad Mahato
4. Smt. Saroj Devi W/O Late Sushil Kumar
5. Rahul Kumar @ Jaiki Kumar
6. Khushboo Kumari
Minors Are Under The Guardianship Of Their Mother Mostt. Saroj Devi
7. Sudhir Kumar
8. Kamal Kant Kushwaha
All Are Sons Of Late Bodh Ram Mahto
All Are Residents Of Village Bhainsasur, P.S. Biharsharif, District- Nalanda.
9. Surender Singh, husband of Late Kiran Devi, resident of Warsaliganj Main Bazar, P.O. + P.S.- Warsaliganj, District- Nawada.
10. Usha Devi, W/O Surender Singh, resident Of Warsaliganj Main Bazar, P.O. + P.S.- Warsaliganj, District- Nawada.
11. Rina Devi, W/O Birender Kumar, Resident Of Village Shankardih, P.S. Parwalpur, P.O. Parwalpur, District- Nalanda.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Rajendra Narayan, Senior Advocate Mr. Sanjay Kumar Sharma, Advocate
For the Respondent/s	:	Mr. Bal Bhushan Choudhary, Advocate



CORAM: HONOURABLE THE CHIEF JUSTICE

CAV JUDGMENT

Date : 21-03-2018

This application has been filed by the applicants under Order XLI Rule 21 of the Code of Civil Procedure (hereinafter referred to as 'the Code') read with Section 151 of the Code seeking recall of a judgment rendered by a Bench of this Court on 12.08.2013 in First Appeal No.420 of 1978.

The applicants herein claim to be the legal heirs and successors of late Smt. Kaushalya Kumari, who was respondent no.1 in the First Appeal in question. Smt. Kaushalya Kumari is said to have filed Title Suit No.146 of 1976 seeking her right to the property in question acquired vide registered sale deeds executed on 14.11.1955. The facts of the case with regard to acquisition of right to title of the property need not be, for the present, discussed in detail. However, it is suffice to indicate for deciding this application that the Title Suit of Smt. Kaushalya Kumari was decreed by the Additional Subordinate Judge-II, Biharsharif, vide judgment and decree dated 05.05.1978, and the respondents herein, who are legal heirs and representatives of the original defendants, namely Bodh Ram Mahto and others, filed the First Appeal challenging the judgment and decree of the trial Court. Apart from Smt. Kaushalya Kumari, one Maro



Devi, daughter of Paro Kuer, was also a respondent in the First Appeal and it may be suffice to indicate that Paro Kuer was the original owner of the property from whom, based on sale deeds and succession, the parties herein claimed the right to the property.

Be that as it may be, after filing of the First Appeal in which plaintiff Smt. Kaushalya Kumari was respondent no.1, it is the case of the applicants that the First Appeal was admitted, Smt. Kaushalya Kumari also filed a cross objection in the First Appeal which was admitted on 09.05.1985 and on 21.04.1993, the counsel representing Smt. Kaushalya Kumari, one Sri Chitra Gupt Prasad informed the Court that Smt. Kaushalya Kumari has died. Thereafter, on 15.01.1999, it seems that the counsel representing Smt. Kaushalya Kumari pleaded no instructions in the matter. Accordingly, the Court directed for issuing notice to the legal heirs of respondent no.1 Smt. Kaushalya Kumari, whose names and details were given in a substitution petition filed by the appellants.

From the narration of various proceedings available in the records of the First Appeal, it is seen that the Court was informed about the death of Kaushalya Kumari and it was indicated that she had died in the year 1993, i.e. on 21.03.1993,



during the pendency of the First Appeal which was instituted in the year 1978. The substitution was allowed, the name of Kaushalya Kumari was expunged and her legal heirs were brought on record. The legal heirs, who were brought on record were one Ashok Kumar Verma, husband of Kaushalya Kumari, and her children. It is also a fact that during the pendency of the matter, Ashok Kumar Verma also died, but as the legal heirs of Kaushalya Kumari, who was known as Kaushalya Verma, was already available on record after death of Ashok Kumar Verma, no substitution was necessary.

Be that as it may be, the applicants herein, who claimed to the sons and daughters of late Kaushalya Kumari and Ashok Kumar Verma, contend that in the application filed for the substitution, the persons, who were substituted, were indicated as Ashok Kumar Verma, husband, Suraj Kumar, Neeraj Kumar, Gaurav Kumar, Saurav Kumar, Deepak Kumar, all minor sons of the deceased, and Baby Kumari, Dazy Kumari, Khusbu Kumari, all minor daughters of Kaushalya Kumari. It is stated that none of these persons were the children of Kaushalya Kumari or her legal heirs. That apart, it is stated that even respondent no.2 Maro Devi died during the pendency of the First Appeal and, therefore, her legal heirs, namely Kiran Devi,



Usha Devi and Rina Devi, were not brought on record and even after death of one of her daughters, namely Kiran Devi, nothing was done to bring legal heirs on record. It is, therefore, stated that in view of these facts, as neither correct legal heirs of Kaushalya Kumari was impleaded nor legal heirs of Maro Devi was impleaded, the First Appeal stood abated.

It is further case of the applicants in this case that when the First Appeal came up for hearing on 19.12.2012, the legal heirs of Kaushalya Kumari, the original respondent no.1 was shown to be represented by one Sri Bindeshwar Prasad and Chitra Gupt Prasad It is stated that after death of Kaushalya Kumari, the power given to these counsels ceased, in spite thereof, name of the counsel continued to appear in the order sheets. It is also stated that in the meanwhile, the advocate Bindeshwar Prasad also died and the First Appeal continued to proceed without impleading actual legal heirs of Kaushalya Kumari and without noticing them or without permitting representation in the matter. It is stated that in the fraudulent way, behind the back of the present applicants, who are legal heirs of late Kaushalya Kumari, proceedings went on, counsel representing them Sri Chitra Gupt Prasad also did not appear and as a result, the appeal has been heard behind their back and,



therefore, this application has been filed for re-hearing of the matter in view of the provisions of Order XLI Rule 21 of the Code *inter alia* on the ground that a case for re-hearing at the appellate stage is made out as the applicants have produced sufficient ground to show that they have not been served with notice and were prevented by sufficient cause from appearing when the First Appeal was called for hearing.

Learned senior counsel appearing for the applicants took me through various facts and argued that a case for re-hearing of the First Appeal is made out.

However, learned counsel appearing for the respondents-appellants in the original First Appeal pointed out that they have filed a counter affidavit to say that the application has been filed in a misconceived manner. It is a misuse of the process of law and by not stating the correct facts, advantage is being tried to be obtained for re-hearing of the matter. It is the case of the respondents, the original appellants, that Kaushalya Devi, the sole plaintiff, appeared in the First Appeal No.420 of 1978, she executed a Vakalatnama in favour of Bindeshwari Prasad Sinha and Shashi Shekhar Verma, which is available on record. During the pendency of the appeal, Bindeshwari Prasad Sinha, Advocate, died and therefore, she engaged Sri Chitra



Gupt Prasad, who was working in the office of late Bindeshwari Prasad Sinha, and was junior to him and in various stages, Sri Chitra Gupt Prasad represented Kaushalya Kumari.

It is further stated that as far as respondent no.2 Maro Devi is concerned, she did not appear in the First Appeal in spite of notice. She was defendant no.4 in the Trial Court. In the Trial Court also after service of notice, she did not appear in the suit, nor did she file any written statement. It is also pointed out that none of the legal heirs of Maro Devi have filed any application for re-hearing or setting aside *ex parte* order passed by the Trial Court or the Appellate Court.

It is further emphasized by the respondents by referring to the conduct of Sri Ashok Kumar Verma, husband of Kaushalya Kumari, his litigating habit and various other factors to highlight the question about deliberate act in not participating in the proceedings in spite of engaging a counsel. Finally, it is pointed out that when the matter was listed before this Court on 17.12.2012, the advocate representing the present applicants did not appear in spite of orders passed by this Court and intimation given by the counsel representing the appellants on instructions and directions of the Court. It is thereafter stated that Sri Chitra Gupta Prasad appeared on 18.12.2012 when the appeal was



being heard on the second day and sought for a month's adjournment to enable him to seek instructions and inform his client. This was refused and the case proceeded for hearing and during the hearing Sri Chitra Gupt Prasad showed his inability to participate in the hearing and thereafter, the Court proceeded to re-hear the matter and finally after adjourning it on various dates between 17.12.2012 to 12.07.2013, the judgment was pronounced on 12.08.2013. It is stated that during all these periods, when the matter was being heard, Sri Chitra Gupt Prasad, advocate, appeared and was aware of the proceedings.

It is further case of the respondents in the application that the contention of the applicants herein that the correct names of the applicants were not reflected in the substitution petition is not correct. In para 20 of their affidavit filed in these proceedings, they mention the following facts:-

“It will not be out of place to mention that call name of Ravikant Verma is Suraj and similarly Gaurav of call name is Shashikant and Surav is Umakant whereas Deepak is Manikant. Similarly Kanchan Verma is known as Baby, Indrani as Dezi and Sweta as Khushboo. It further transpires that before filing the substitution petition the surviving appellant after inquiry from the neighbouring persons of the respondent no.1 gathered the aforesaid name and



accordingly substitution petition was filed. But now in order to derive undue advantage the substituted respondents have taken a wrong plea regarding the correctness of the name much after disposal of the appeal on the basis of which no relief can be granted to them.”

It is, therefore, the case of the respondents in this application is that the ingredients necessary for invoking the jurisdiction of this Court under Order XLI Rule 21 of the Code are not made out. It is the case of the respondents that the applicants have failed to establish before this Court that they had no notice of the First Appeal, which is one of the requirements for maintainability of a proceeding under Order XLI Rule 21 of the Code, and they have also failed to show sufficient cause which prevented them from appearing at the time of hearing.

Learned counsel for the respondents invites my attention to the vakalatnama filed by Sri Chitragupta Prasad, Advocate, who represented the present applicants after substitution and pointed out that the applicant no.1 Ravi Kant Verma is the eldest son of Kaushalya Kumari and Ashok Kumar Verma. He was dealing with the case and it is he who gave Vakalatnama to Chitra Gupt Prasad and even in these



proceedings, he is the person, who has sworn the affidavit in support of the application under Order XLI Rule 21 of the Code and Ravikant Verma was representing the legal heirs of Kaushalya Kumari as eldest member of the family after the death of Sri Ashok Kumar Verma. It is stated that the applicants were sitting in the fence, watching the proceedings going on before this Court, therefore, their counsel Chitra Gupt Prasad did not appear in the same, permitted the judgment to be delivered and now want to re-open the entire matter only to delay the proceedings.

While hearing the matter, this Court found that available on record are three vakalatnamas, photo copies of which have been filed by respondent Nos.1 and 3 to 8 on 1st of March, 2016 along with their supplementary counter affidavit and the three vakalatnamas filed are Annexures A, B and C and out of these, three vakalatanamas, Annexure-C is signed by Sri Ashok Kumar Verma, husband of late Kaushalya Kumari, Sri Manikant Verma, Sri Vikrant Verma, Pinki, Shashi Kant Verma, Uma Kant Verma and Ravi Kanti Verma and these vakalatanamas were filed authorizing Sri Chitra Gupt Prasad to appear on behalf of these applicants in First Appeal No.420 of 1978 and the Vakalatnama was filed and executed on 15th of



May, 2000, i.e. much before the judgment was rendered in the First Appeal on 12.08.2013. It was found that the vakalatnama has been executed and the executants of the vakalatna Sri Ravi Kant Verma, Sri Shashi Kant Verma and Sri Uma Kant Verma now say that they have never executed this vakalatnama and they were not aware of the pendency of the First Appeal before this Court. Taking note of all these factors, this Court passed a detailed order on 06.10.2017 which reads as under:-

“Having heard learned counsel for the parties at length today with regard to reopening of the matter and rehearing of First Appeal No. 420 of 1978, this Court finds that in the supplementary counter affidavit filed on behalf of respondent Nos. 1, 3 to 8 on 1st of March, 2016 three Vakalatnamas have been brought on record vide Annexures- A, B and C. As far as Vakalatnama Annexure-C is concerned, this is signed by Sri Ashok Kumar Verma, Sri Mani Kant Verma, Sri Vikrant Verma, Pinki, Shashi Kant Verma, Uma Kant Verma and Ravi Kant Verma. Most of these applicants have put in their appearance in First Appeal No. 420 of 1978 allegedly through this Vakalatnama through an Advocate Sri Chitra Gupta Prasad and the Vakalatnama is said to have been executed on 15th of May, 2000.

According to the applicants herein, which include Sri Shashi Kant Verma, Sri Ravi Kant Verma and Sri Uma Kant Verma, they have never executed this Vakalatnama. They were not



aware of the pendency of First Appeal No. 420 of 1978 and behind their back the entire appeal was heard and decided.

However, once in the original record of First Appeal No. 420 of 1978 the Vakalatnamas said to have been executed by most of the applicants are available on record, it is necessary to cause an inquiry as to how and in what circumstances the aforesaid Vakalatnama came into record and whether the executant of the Vakalatnama are the correct persons mentioned therein or on the basis of forge and fabricated Vakalatnama they are shown to have been represented in the matter.

For proceeding further in the matter, it would be appropriate to issue notice to Sri Chitra Gupta Prasad, Advocate and ask him to give his say with regard to filing of the Vakalatnama as are indicated hereinabove.

Office to issue notice to Sri Chitra Gupta Prasad, Advocate along with a copy of the supplementary counter affidavit filed on behalf of Respondent Nos. 1, 3 to 8 on 1st of March, 2016 along with the enclosures Annexures- A, B and C and Sri Chitra Gupta Prasad may be requested to explain the position as is made out hereinabove. A copy of the M.J.C. petition along with all other supplementary affidavits and counter affidavits filed be also made over to Sri Chitra Gupta Prasad for giving his say in the matter.

List the matter after four weeks."



Notice was issued to Sri Chitra Gupt Prasad and he was directed to give his say in the matter. After sometime being granted, Sri Chitra Gupt Prasad, 71 years old Advocate, appeared and he filed his affidavit on 7th of December, 2017 and from what has been stated by him in the affidavit, the following facts emerge:-

He is a practising advocate of this High Court. He has received the notice issued by this Court along with order passed on 06.10.2017. He has gone through the record and the record also shows that he personally appeared before this Court on 24.11.2017 and wanted to narrate certain facts when this Court directed him to bring everything on record by way of an affidavit. It is stated that it is in view of the aforesaid direction issued on 24.11.2017 that the affidavit is being filed. He further says in the affidavit that he was junior to Mr. Bindeshwari Prasad Sinha, Advocate, since 1984 and initially it was Sri Bindeshwari Prasad Sinha, who was appearing and representing Kaushalya Kumari Verma in the First Appeal on the basis of the vakalatnama executed by her on 27.11.1978. Along with Sri Bindeshwari Prasad Sinha, his junior one Sri Shashi Shekhar Verma was representing Kaushalya Kumari. It is stated that his senior Sri Bindeshwari Prasad Sinha died on 17.06.1991 and



thereafter, Smt. Kaushalya Kumari signed a fresh vakalatnama executed by her through her *pairvikar* which had been filed by him in this Court on 29.10.1991 which is Annexure-B to the supplementary affidavit, which is already available on record. After having said so, he goes on to say that thereafter sometimes in April, 1993, applicant no.1 in the present case Sri Ravi Kant Verma informed him that her mother died and based on this information, counsel Sri Chitra Gupt Prasad informed this Court on 21.04.1993 that his client Kaushalya Kumari Verma has expired and it is because of this reason that he refused to accept the substitution petition filed on 15.01.1999 for want of instruction and this Court directed issuance of notice on the substitution petition to the legal heirs of Kaushalya Kumari. It is further stated by him that vakalatnama, Annexure-C to the supplementary affidavit signed by applicant no.1 Ravi Kant Verma, the eldest son of Kaushalya Kumari, was given to him on 15.05.2000 and he says in para 5 of the affidavit that it is Ravi Kant Verma, the eldest son of Kaushalya Kumari and Ashok Kumar Verma, who came along with fresh vakalatnama on 15.05.2000. This vakalatnama was executed by Sri Ashok Kumar Verma and Sri Ravi Kant Verma for themselves and the minor sons Mani Kant Verma and Vikrant Verma and minor



daughter Pinki. It also bore the signatures of Shashi Kant Verma and Uma Kant Verma. The counsel in para 5 further says that he, namely Ravi Kant Verma, signed the vakalatnama in the presence of Sri Chitra Gupt Prasad. He received the vakalatnama from Sri Ravi Kant Verma, one of the executants and accepted the same. Thereafter, he filed the vakalatnama in the Court on the same day i.e. on 15.05.2000. The counsel further says in the affidavit that after the filing of the vakalatnama, he was keeping a watch over the matter in good faith, but being a patient of sciatica and bleeding piles since 1991 and due to personal difficulty, on 17.08.2012 as he was under treatment of a doctor, as is indicated in para 7, he could not appear. Thereafter, in para 8, he speaks about the case being listed before a particular Bench on 17.12.2012 notifying his name along with Sri Bindeshwari Prasad Sinha and the fact that he informed the Hon'ble Court about his illness and unability to contact his client and inform them about the proceedings.

From the detailed affidavit filed by the counsel, it is clear that he appeared on the basis of vakalatnama given to him by Ravi Kant Verma, applicant no.1 and executed and bearing the signatures of various other applicants, who have filed this application, namely Shashi Kant Verma, Uma Kant Verma, Sri



Mani Kant Verma, Sri Vikrant Verma, so also one Pinki. It is in the backdrop of these facts that a decision is to be taken as to whether the application has to be allowed and re-hearing permitted and further as to whether the grounds for re-hearing contemplated under Order XLI Rule 21 of the Code are made out.

The case of the applicants as made out in the application is very simple. That after death of Kaushalya Kumari, her correct legal heirs were not impleaded, so called persons, who were impleaded by allowing the substitution application, were only their father Ashok Kumar Verma, who had died before hearing of the matter and other persons impleaded are not legal heirs of Kaushalya Kumari, they are fabricated and fictitious names and, therefore, without impleading the legal heirs of Kaushalya Kumari, the matter has been heard *ex parte*. Even though in para 12 of their application, the applicants herein speak about the persons named therein not being the legal heirs of Kaushalya Kumari, but interestingly, they do not rebut the counter affidavit filed by respondent nos. 1 and 3 to 8 and the averment made in para 20 reproduced hereinabove, wherein they categorically say that applicant no.1 Ravi Kant Verma is known as Suraj, Shashi Kant Verma is



known as Gaurav, Kanchan Verma is known as Baby, Saurav Kumar is known as Uma Kant, Deepak Kumar is known as Mani Kant Verma and Indrani as Dezi and Sweta as Khushboo. The specific averments in para 20 to say that the names of the legal heirs of Kaushalya Kumari had been gathered by the appellants in the original First Appeal based on the names given by them which they have indicated in the substitution application is not denied by the applicants. In fact, with regard to the specific averments made in para 20 as indicated by respondent nos. 1 and 3 to 8, the applicants have maintained a complete silence and do not whisper a word about it in the subsequent supplementary affidavit filed by them in reply to the counter affidavit filed by respondent no.1, 3 to 8 on 04.02.2016. On 04.02.2016, the applicants herein have filed a reply to the counter affidavit of the respondents and with reference to the averments made in para 20 as reproduced hereinabove, in para 12 of their reply filed on 4th February, 2016, they only say that the averments made in para 19, 20 and 29 of the counter affidavit are misleading and wrong and the petitioners are not known by the names as indicated therein. Except for making this vague allegation on the basis of the affidavit of Sri Ravi Kant Verma, no cogent evidence or material or affidavit of any



independent person is available on record in this regard.

Even if the aforesaid aspect of the matter is kept aside for the present, it would be seen that this Court while hearing the matter on 16.10.2017 found that vakalatnamas had been filed on behalf of the applicants in the pending First Appeal on 15th of May, 2000 and it was because of this reason that Sri Chitra Gupt Prasad was directed to give his say in the matter. Now, if the averments made by Sri Chitra Gupt Prasad in his affidavit are taken note of, he categorically says that on 15.05.2000, the applicant no.1 Ravi Kant Verma met him, handed over the vakalatnama to him and, in fact, Ravi Kant Verma executed the vakalatnama in his presence. It was Ravi Kanti Verma, who came and gave vakalatnama, Annexure-C on 15.05.2000 which he filed in the record. He further says that the vakalatnama given to him by Ravi Kant Verma was signed by various persons, as are indicated in para 5 of the application, and all these persons are none other than the present applicants in this case. That apart, in the affidavit, he also speaks about vakalatnama being executed by late Ashok Kumar Verma for himself and as guardian of the minor sons and daughter which includes Pinki.

Now, after this affidavit was filed by Sri Chitra



Gupt Prasad on 7th December, 2017, the matter was listed before this Court on various dates, a copy of the affidavit filed by Sri Chitra Gupta Prasad on 7th December, 2017 was handed over to the counsel representing both the parties and they were granted time to file further rejoinder, if advised. Thereafter, the matter was listed on 21.02.2018 when it was directed to be listed on 7th of March, 2018. On 7th of March, 2018 it was adjourned to 14th of March, 2018 and was heard on 14th of March, 2018. During all these periods, the applicants have not filed any rejoinder or counter affidavit rebutting the facts stated by Chitra Gupta Prasad, Advocate practising in this Court and who is shown to be 71 years of age. There is nothing to indicate that the facts stated by Sri Chitra Gupta Prasad with regard to Vakalatnama executed in his favour by the applicants, particularly applicant no.1 Ravi Kant Verma are incorrect.

That being so, the contentions of the petitioners that they were not aware of the pendency of the First Appeal or that they were not noticed cannot be accepted. The same is found to be totally incorrect in view of the materials that have come on record and the discussions made hereinabove.

That being the factual position, if the prayer made in the application under Order XLI Rule 21 of the Code is now



examined in the backdrop of the aforesaid facts with reference to the requirement of Order XLI Rule 21 of the Code, it is seen that if an appeal is heard *ex parte* and a judgment is pronounced against the respondent, as is the case here, the respondents have a right under the aforesaid statutory provision to apply to the appellate Court for re-hearing of the appeal and what is precisely, what has been done by the applicants in this application. However, the law mandates the applicants to satisfy this Court that notice was not duly served upon them or that they were prevented by sufficient cause from appearing when the appeal was called for hearing. In fact, if the conduct of the applicants, the fact about filing of the vakalatnama by them and the affidavit of Sri Chitra Gupt Prasad, Advocate, is taken note of, it cannot be said that the applicants had no notice about the matter. Their case seems to be that they were prevented from sufficient cause from appearing when the appeal was called for. Once they were aware of the pendency of the matter and when they were represented by a counsel, it cannot be said that a case is made out to hold that the applicants did not have noticed or they were prevented by sufficient cause from appearing.

In my considered view, in the facts and circumstances of this case, as has been discussed in detail



hereinabove, twin ingredients needed for permitting re-hearing the appeal under Order XLI Rule 21 of the Code are not made out in the present case and, therefore, this Court finding no case for permitting re-hearing of the appeal dismisses the application.

(Rajendra Menon, CJ)

Sunil/-

AFR/NAFR	NAFR
CAV DATE	14.03.2018
Uploading Date	22.03.2018
Transmission Date	

