

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1701 of 2019

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1. Rajiv Ranjan @ Satendra Kumar son of Late Chandeshwar Prasad @ Chandeshwar Prasad Sinha resident of- Gavtal, Danapur, P.S.- Danapur, District- Patna.
2. Ashwani Kumar son of Late Chandeshwar Prasad @ Chandeshwar Prasad Sinha resident of- Gavtal, Danapur, P.S.- Danapur, District- Patna.

... .. Petitioner/s

Versus

1. Shakuntala Kumari Verma wife of Late Satyapal Verma @ Surendra Kumar resident of Nakhas Pind, P.S. Malsalami, District- Patna.
2. Ashok Kumar son of late Chandeshwar Prasad Sinha resident of Gavtal Danapur, P.S.- Danapur, District- Patna.

... .. Respondent/s

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Constitution of India---Article 227--- Code of Civil Procedure--- section 151, Order IX Rule 4, Order 17 Rule 2—petition for quashing the order passed by learned trial court whereby and whereunder petition to restore the Revocation Case, after setting aside the order of dismissal for default, has been dismissed--- argument on behalf of Petitioners that a suit or application should not be dismissed on technical grounds and endeavour should be made to decide the case on merit especially when the parties have already led their evidence and the matter was pending for hearing on final arguments—further argument that the petitioners have brought sufficient material on record to explain the circumstances in which they were prevented from taking proper steps when the revocation case was called out for hearing on its merit---argument

on behalf of respondent that since revocation case of the petitioners is not maintainable, no useful purpose would be served in restoring the same---Held: maintainability of the revocation case could not be an issue for the simple reason that respondent has not challenged the initiation and further proceeding of the revocation case in learned court below--- court could proceed with the case when the evidence of any party has already been recorded and such party fails to appear on any date on which the hearing of the suit is adjourned--- evidence of both the sides have been recorded and arguments were heard and written notes of arguments were submitted, the proper course for the learned trial court was to pass an order on merits or at least had given an opportunity to the applicant/petitioners and not to dismiss the case for default---impugned order set aside---petition allowed. (Para 1, 3, 9, 11, 12)

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Appearance :

For the Petitioner/s	:	Mr. Vikash Kumar Sharma, Advocate Mr. Jitendra Kumar, Advocate Mr. Abneesh Kumar, Advocate
For the Respondent/s	:	Mr. J.S. Arora, Sr. Advocate Mr. Ravi Bhatia, Advocate Mr. Himanshu Shekhar, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 10-04-2024

The petitioners have filed the present petition under Article 227 of the Constitution of India for quashing the order dated 30.08.2019 passed by learned Additional District Judge- XIV, Patna in Miscellaneous Case No. 04 of 2013, whereby and whereunder the restoration petition filed under Order IX Rule 4 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as ‘Code’) to restore the Revocation Case No. 238 of 2006 to its original file, after setting aside the



order of dismissal for default on 15.06.2013, has been dismissed on contest.

02. Briefly sated, the case of the petitioners is that the maternal grandfather of petitioners namely, Churamani Verma died long ago leaving behind his wife Mehta Devi Kuer, a son Om Prakash and a daughter Om Prabha Devi. The son Om Prakash died prior to 1950 leaving behind two married daughters. OM Prabha Devi was married with one Chandeshwar Prasad and they have four sons Satyapal Verma (since dead), Ashok Kumar (respondent no. 2), Rajiv Ranjan @ Satyendra Kumar (petitioner no. 1) and Ashwani Kumar (petitioner no. 2) besides four daughters. In 1962, Mehta Devi Kuer bequeathed her properties through a registered Will in favour of her daughter Om Prabha Devi and Mehta Devi Kuer died in 1995. In 1999, wife of Satyapal Verma filed Probate Case No. 226 of 1999 for grant of probate with regard to an unregistered Will dated 15.05.1993 purportedly executed in her favour by Mehta Devi Kuer. Satyapal Verma died in the year 2004 leaving behind two sons and one daughter and after his death, they got substituted in his place in probate case as opposite parties. Further Om Prabha Devi, Ashok Kumar, Rajiv Ranjan and Ashwani Kumar were already impleaded as party along with



Satyapal Verma by respondent no. 1 in the probate case. Further case of the petitioners is that Shakuntala Kumari Verma got the summons/notices issued against Om Prabha Devi, Ashok Kumar, Rajiv Ranjan and Ashwani Kumar suppressed and without their consent managed to file a forged vakalatnama on their behalf. Thereafter, the substituted opposite parties, i.e., her two sons and daughter admitted her claim regarding Will and on that basis probate was granted to her. On getting information about the order granting probate, the petitioners along with their brother Ashok Kumar and mother Om Prabha Devi filed Revocation Case No. 238 of 2006 for setting aside the order granting probate in favour of respondent no. 1 Shakuntala Kumari Verma. Om Prabha Devi died in the year 2008. On notice of revocation case, Shakuntala Kumari Verma, respondent no. 1 herein, put in her appearance and contested the matter by filing objection petition. Evidence was led by both the parties who also advanced their arguments and filed their written notes of arguments. In the meantime, the Presiding Officer of the court was transferred so no final order could be passed. The case record was transferred from one court to another for more than one and half years and during that period the matter was not taken up for hearing. Further case of the



petitioners is that ultimately the matter was transferred to the present court below. The proper pairvi was being made on behalf of the petitioners on each and every date but due to the absence of the opposite parties, the matter was not being taken up. By order dated 20.04.2013, the learned court below, directed the office to inform the learned counsel appearing for the opposite parties. Even the opposite parties were not present on the day when the case was dismissed for default on 15.06.2013. Further case of the petitioners is that in the year 2013, respondent no. 1's son Amit Kumar Verma, lodged Danapur P.S. Case No. 281 of 2013 against the petitioners Rajeev Ranjan and Ashwani Kumari and got them arrested in case on 06.06.2013. They were released from custody on 10.07.2013 after the bail was granted to them on 08.07.2013 in B.P. No. 2678 of 2013 by the learned Additional Sessions Judge-X, Patna. While the petitioners were in police custody, Revocation Case No. 238 of 2006 was dismissed for default vide order dated 15.06.2013, the learned trial court recorded a finding that one Mr. Ram Kumar (acutually Mr. Raj Kumar), Advocate though appeared on behalf of the petitioners in Revocation Case No. 238 of 2006 but he did not hold power on their behalf. This finding was erroneous as a duly executed vakalatnama of the petitioners appointing Mr. Raj



Kumar, Advocate was already on record of Revocation Case No. 238 of 2006 since 2008. The petitioners, while impleading their full brother Ashok Kumar as opposite party 2nd set, filed a petition under Order IX Rule 4 read with Section 151 of the Code for setting aside the dismissal of Revocation Case for default vide order dated 15.06.2023 mainly on the ground that on 15.06.2013, the petitioners were in custody and as such they were not able to either instruct their lawyer for taking proper steps or they were themselves not in a position to take proper steps when the case was called out for hearing. The petitioners also filed a supplementary petition on 12.08.2013 in continuance of their main petition. Further case of the petitioners is that is that Ashok Kumar, brother of the petitioners, respondent no. 2 herein, had gone into collusion with respondent no. 1 and he deliberately did not attend the court on the date fixed. The respondent no. 1/opposite party no. 1 opposed the prayer of the petitioners by filing objection on 23.01.2024, although she was absent on the day when revocation case was dismissed for default. However, the prayer of the petitioners for setting aside the dismissal of their Revocation Case No. 238 of 2006 for default was erroneously turned down vide impugned order dated 30.08.2019.



03. Mr. Vikash Kumar Sharma, learned counsel for the petitioners submitted that the learned trial court committed a grave error of law when it failed to take notice of settled principle of law that a suit or application should not be dismissed on technical grounds and endeavour should be made to decide the case on merit especially when the parties have already led their evidence and the matter was pending for hearing on final arguments. Learned counsel further submitted that the learned trial court has failed to take notice of the fact that the petitioners have brought sufficient material on record to explain the circumstances in which the petitioners were prevented from taking proper steps when the revocation case was called out for hearing on its merit. The learned trial court also erred in fact and on law, by passing the impugned order on the basis of past conduct of the petitioners while ignoring the settled principles of law that a party is required to only explain the cause/reason which prevented him from appearing in the court or taking proper steps, when matter was called out for hearing. Learned trial court further failed to take notice of the settled principles that the petitioners were only required to explain the circumstances which prevented them from responding when the case was called out for hearing on final



arguments in the matter. Learned court below also failed to take notice of the fact that the petitioners were in custody at the relevant point of time when the case was called out and dismissed for default. Learned trial court also misdirected itself by considering the facts alleged in the probate case as well as in the revocation case and passed the order impugned on the basis of surmises and conjecture. Learned counsel further submitted that the probate petition itself was barred under the laws of limitation still it was allowed in favour of the applicant Shakuntala Kumari Verma on 17.12.2005. After the registration of Misc. Case No. 04 of 2013 it proceeded and respondent no. 1 appeared and opposed the prayer for restoration by filing her objection. However, Misc. Case No. 04 of 2013 was dismissed for default on 15.10.2014 when both the parties were absent. Another application under Section 151 of the Code was filed and Misc. Case No. 01 of 2014 was instituted for setting aside the order of dismissal dated 15.10.2024 and restoring Misc. No. 04 of 2013 to its original file. The prayer was allowed on 22.02.2019 and Misc. Case No. 04 of 2013 was restored to its original file after more than four years. The learned trial court while considering the Misc. Case No. 04 of 2013 on merit, considered the previous conduct of the petitioners in causing



delay for negating their case regarding their absence when the revocation case was called out for hearing. Learned counsel further submitted that such consideration of condoned facts is impermissible under law and referred a decision of this Court in the case of ***Smt. Ramgati Devi & Ors. Vs. Chandra Shekhar Rai & Ors.*** reported in ***2007(3) PLJR 503***, wherein this Court observed as under:-

“6. Having appreciated the rival submission, I find substance in the submission of the learned counsel for the petitioner. True it is that the plaintiffs’ suit was earlier dismissed by order dated 22.05.2001 but the plaintiffs’ showing sufficient cause, by order dated 12.09.2001 passed in Misc. Case No. 9 of 2001, same was restored. In that view of the matter, I am of the opinion that the learned Judge ought not to have been swayed by the aforesaid fact, while passing the impugned order.

9. On consideration of the rival submission, I am of the opinion that the court below was harsh in passing the order of dismissal of the suit on the ground of non-compliance of its order. As stated earlier, plaintiffs, in fact, had filed the requisites and the court had directed for issuance of summons and reiterated for its compliance on several dates, but



all of a sudden, the office puts up a note that the postal stamp was not filed and thereafter, without giving sufficient opportunity to the plaintiffs, the suit has been dismissed.”

Learned counsel also stressed on the doctrine of condonation that earlier or past conduct may be looked into but it cannot be made the ground for rejection of prayer for restoration if petitioner proves sufficient ground for his absence when his case was called out. It has further contented that the court has also not taken into consideration the provisions of Order 17 Rule 2 of the Code, the explanation of which says the court may proceed further even if plaintiff is absent, if substantial part of evidence has already been recorded.

04. Learned counsel for the petitioners further contented that the petitioners never participated in the probate proceedings and some impostor appeared and a forged *vakalatnama* of petitioners Rajiv Ranjan and Ashwani Kumar were filed. Learned counsel further submitted that in the probate case, respondent no. 1 got a collusive report submitted regarding service of notice on Om Prabha Devi while getting the processes issued against her at the address of her ‘Naihar’ instead of her current address at Danapur. Further, respondent no. 1 managed to get a vakalatama purportedly executed by Om Prabha Devi



filed in the court and time petitions were also purportedly filed on her behalf on subsequent three dates but respondent no. 1 never took pains to get the notice issued to the sons and daughters of Om Prabha Devi. On 12.05.2005 a petition was filed to recall the order issuing notices against the sons of Smt. Om Prabha Devi, i.e., against the husband of respondent no. 1 and his brothers but the prayer was rejected on 24.05.2005. Even then notices were not issued against them. However, on very next day, i.e., on 09.06.2005 a vakalatnama purportedly executed jointly by the petitioners was filed. Another vakalatnama purportedly executed by Ashok Kumar, respondent no. 2 was filed on 24.06.2005. Thereafter, the respondent no. 1 has filed a petition on behalf of her sons and daughters to grant probate in her favour with their consent on 17.12.2005. It was also admitted by respondent no. 1 that neither the petitioners nor respondent no. 2 nor mother-in-law of respondent no. 1 filed any written objection and they did not cross-examine the witnesses of the probate petitioner. Thus, it was out and out a collusive case playing fraud upon other legal heirs. However, the learned trial court failed to take into consideration these facts and dismissed the petition of the petitioners for restoration of revocation case on the past conduct of the petitioners and



hence, the said order needs to be reversed and quashed.

05. Mr. Sharma further submitted that the probate case itself was not maintainable as it was time barred since it was not filed within three years of death of the testator and referred to the decision in the case of *Kunvarjeet Singh Khandpur Vrs. Kirandeep Kaur* reported in *(2008) 8 SCC 463* wherein the Hon'ble Supreme Court held that Article 137 of the Limitation Act is applicable even to the petition for grant of probate or letters of administration. Thus, Mr. Sharma submitted that the impugned order is not sustainable and the same be set aside.

06. Mr. J.S. Arora, learned senior counsel appearing on behalf of the respondents submitted that the instant Civil Misc. Petition is completely devoid of merit and the same needs to be rejected in limine. Learned senior counsel further submitted that even the revocation proceeding being Revocation Case No. 238 of 2006 was not maintainable and in view of that matter, the further proceeding pursued by the petitioners amounts to beating a dead horse. Mr. Arora further submitted that in the probate case, petitioners and respondent no. 2 being the brothers of deceased husband of respondent no. 1 and also their mother Om Prabha Devi appeared, participated in the proceeding opposing the grant of probate in favour of



respondent no. 1. Mr. Arora further submitted that the probate case was allowed in favour of respondent no. 1 and against the grant of such probate, the remedy lies under Section 299 of the Indian Succession Act but no appeal was filed by the petitioners and respondent no. 2 though it was an appealable order. In the year 2006, after expiry of 10 months from the date of grant of probate, Revocation Case No. 238 of 2006 was filed by the petitioners and their mother since deceased, whereas the probate was granted in presence of the petitioners and respondent no. 2 despite their objection and therefore, there was no occasion for them to file objection and the said revocation itself was completely misconceived and not maintainable. Learned senior counsel further submitted that one Partition suit bearing No. 112 of 1986 is going on between the parties in Danapur Civil Court and is presently pending in the court of learned Sub-Judge I, Danapur. In the said case petitioner no. 1 appeared as witness and in the cross-examination he has categorically admitted that in the probate case they along with their mother had appeared and objected the grant, but in spite of that probate had already granted in favour of respondent no. 1. As such, the petitioners and respondent no. 2 had no occasion to file revocation and only option left with them was to prefer appeal against the order of



probate. Mr. Arora further contended that in the Misc. Case the petitioners had taken plea that they were in jail and for this reason, no pairvi could be made by the petitioners and petitioners also took plea that respondent no. 2, Ashok Kumar came in the collusion with respondent no. 1 which is completely false and has been taken only to cover up their absence in the case. Respondent no. 2, Ashok Kumar was never arrested nor had gone to jail and there was common vakalatnama filed in their Misc. Case. So the plea that no pairivi could be made on their behalf on account of the arrest of the petitioners is completely wrong and vexatious. For this reason, the petitioners have designedly filed the present Civil Misc. Petition making Ashok Kumar as respondent no. 2 though he was petitioner no. 1 in the Misc. Case after death of Om Prabha Devi. Learned senior counsel further submitted that the true fact of the matter is that the petitioners and respondent no. 2 along with deceased Om Prabha Devi had no intention to give a single dhur of land to the successors of late Satyapal Verma and when the Title Partition Suit No. 112 of 1986 was filed they did not implead even Satyapal Verma as party to the suit although he was alive at that time. Satyapal Verma died on 28th June, 2004 and while he was alive the petitioners and respondent no. 2 collusively and



surreptitiously had obtained a compromise decree of partition for partitioning the property only amongst the petitioners and respondent no. 2. When respondent no. 1 and her sons came to know about the fraudulent compromise decree, they filed Misc. Case No. 04 of 2006 for setting aside the said decree, which was opposed by the petitioners and respondent no. 2 challenging its maintainability. However, the said compromise decree was set aside by the concerned court of Subordinate II, Patna on 29.06.2010. Against that order the petitioners and respondent no. 2 preferred Civil Revision No. 769 of 2010 and the revision was dismissed by this Court vide judgment dated 30.11.2011 in the case of **Sateyendra Kumar @ Rajeev Ranjan Vs. Most. Shakuntala Kumari Verma & Ors.** reported in **2012(1) PLJR 437**. Against the said judgment, the petitioners and respondent no. 2 moved before the Hon'ble Supreme Court by filing SLP (Civil) No. 11140 of 2012 and the said SLP was also dismissed vide order dated 13.07.2022. The petitioners and respondent no. 2 are not allowing the disposal of Partition Suit No. 112 of 1986 one one pretext or another.

07. Learned counsel for the respondents relied on a decision of the Hon'ble Supreme Court in the case of **Krishna Kumar Sharma Vs/ Rajesh Kumar Sharma** reported in **(2009)**



11 SCC 537 to submit that there could be no question of limitation in the probate case filed by respondent no. 1 since in the referred case the probate petition was found maintainable even after 18 years. Learned senior counsel further submitted that the conduct of the petitioners have been noted by the learned trial court while passing the impugned order and from the order itself it is amply clear that the petitioners never wanted disposal of their case and were mainly interested in stalling the same. They did not approach the court with clean hands and tried to run the proceeding according to their whims and for this reason, their petition was rightly dismissed.

08. By way of reply Mr. Vikash Kumar Sharma, learned counsel for the petitioners submitted that the revocation case is entirely maintainable. Section 263 of the Indian Succession Act provides that the grant of probate or letters of administration may be revoked or annulled for just cause and the just cause shall be deemed to exist where the proceedings to obtain the grant were defective in substance, or the grant was obtained fraudulently by making a false suggestion and concealing from the court by something material to the case or the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such



allegation was made in ignorance or inadvertently. Learned counsel further submitted that since it is the contention of the petitioners that the probate was obtained fraudulently, there was no need to file any appeal under Section 299 of the Indian Succession Act. Learned counsel further submitted that there has been complete violation of Section 295 of the Indian Succession Act which prescribes procedure in contentious cases but the provisions of Section 295 were not followed and thus, on both the counts of Section 263(a)(b). Learned counsel further submitted that forged vakalatnama of the petitioners was filed by the grand daughters of Chandradeo Prasad and Om Prabha Devi being Class-I heir. Mr. Sharma, learned counsel for the petitioners relied on a decision of this Court in the case of ***Kusheshwar Purbey Vs. Shri 108 Ram Janaki Jee S.*** reported in ***2017(3) PLJR 791*** wherein the question of classification of appeal under Section 299 and 384(2) of the Indian Succession Act arose to support his claim that revocation under Section 263 has been made appealable under Section 384(2) of the Indian Succession Act and would be classified as Misc. Appeal.

09. I have given my thoughtful consideration to the different aspects of the matter. The main crux of the argument of respondent no. 1 is that any decision in the Misc. Case filed for



restoration of revocation case should be considered keeping the fact in mind whether revocation case itself was maintainable or not. It is the contention of respondent no. 1 that the court should hold that the petitioners are beating around the bushes. If the revocation case of the petitioners is not maintainable, no useful purpose would be served in restoring the same and thereafter, holding it to be not maintainable as the same would amount to beating a dead horse.

10. *Per contra*, the petitioners contended as there are allegations of fraud and defective procedure adopted by the court concerned while granting the probate, the revocation case is maintainable under Section 263 of the Indian Succession Act. Thereafter, another question is whether the learned trial court was right in dismissing the Misc. Case filed for restoration of the revocation case on the basis of the previous conduct of the petitioners.

11. At the outset I would like to make it clear that maintainability of the revocation case could not be an issue before this Court for the simple reason that respondent no. 1 has not challenged the initiation and further proceeding of the revocation case and if there is any issue other than maintainability if it so appears from the facts and circumstances



requiring detailed inquiry of the evidence, this Court would not like to venture into this territory. So whatever contention has been raised on behalf of the respondent no. 1 regarding maintainability, the same needs to be agitated before the court concerned.

12. It is admitted fact that from 06.06.2013 to 10.07.2013 the petitioners were in custody. The past conduct may be relevant but for the present case, the petitioners were required to show their bonafide as to why they did not appear on the date fixed when the matter was dismissed for default.

Further, Order 17 Rule 2 of the Code reads as under:-

“2. Procedure if parties fail to appear on day fixed.- *Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.*

[Explanation.— *Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its*



*discretion proceed with the case as if
such party were present.]*

Bare perusal of Order 17 Rule 2 of the Code makes it clear that the court could proceed with the case when the evidence or substantial of any party has already been recorded and such party fails to appear on any date on which the hearing of the suit is adjourned. Taking analogy from this provision, admittedly in the present Misc. Case, evidence of both the sides have been recorded and arguments were heard and written notes of arguments were submitted, the proper course for the learned trial court was to pass an order on merits or at least had given an opportunity to the applicant/petitioners. If the Misc. Case was dismissed on such technicalities and on consideration of past conduct, I am of the considered view that the learned trial court failed to exercise its jurisdiction properly and committed a jurisdictional error and hence, the impugned order is not sustainable and same is set aside and Misc. Case No. 04 of 2013 is allowed.

13. Accordingly, the instant petition stands allowed.

14. However, it is made clear that this Court has not made any comment on the merits of the case. The learned trial



court would proceed in the matter uninfluenced by any of the observations made by this Court.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	AFR
CAV DATE	15.03.2024
Uploading Date	11.04.2024
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