

**CIVIL REVISION No.232 OF 1990**

Against the order dated 28.02.1990 passed by Shri  
B.N.Sahay, Sub Judge I, Vaishali at Hajipur in  
Miscellaneous Case No. 28 of 1987.

SMT.MALTI DEVI & ORS-----Petitioners  
Versus  
RENU DEVI & ORS-----Respondents  
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For the petitioners : Mr. Naresh Chandra Verma, Advocate  
For the opposite Parties : Mr. Girish Chandra Verma, Advocate  
Mr. Ashok Kumar Verma, Advocate

**P R E S E N T**

**THE HON'BLE MR. JUSTICE CHANDRAMAULI KUMAR PRASAD**  
**THE HON'BLE MR. JUSTICE SHAILESH KUMAR SINHA**

Prasad &  
Sinha, JJ.

This revision application is directed against the  
order dated 28.02.1990 passed by the Sub-ordinate Judge,  
Ist, Vaishali at Hajipur, in Miscellaneous Case No. 28 of  
1987, whereby the application filed by the judgement debtor-  
opposite party nos. 1 & 2 under section 47 of the Code of  
Civil Procedure has been allowed and the execution case  
dismissed.

Short facts giving rise to the present application are

that Partition Suit No. 32 of 1976 was filed which led to passing of a preliminary decree. Attempt to set aside the aforesaid preliminary decree before the superior Court failed. The decree holder took steps for preparation of the final decree. For the said purpose by order dated 14.04.1981 one Sri Sheokumar Prasad, advocate was appointed as a Pleader Commissioner. However, while appointing the aforesaid advocate as a Pleader Commissioner no direction was given to the parties to appear before him. The Pleader Commissioner received writ on 18.04.1981 and submitted his report dated 27.07.1984. No objection to the report of the Pleader Commissioner was filed, and hence, by order dated 16.11.1984 the report was confirmed and the final decree was prepared, signed and sealed on 22.03.1985.

The decree holder put the decree for execution, which led to registration of Execution Case No. 15 of 1985. In the execution case an application under section 47 C.P.C. was filed to dismiss the execution case inter-alia on the ground that appointment of the Pleader Commissioner without direction to the parties to appear before the Commissioner is without jurisdiction and a decree prepared on the basis of his report is a nullity. The learned Judge by the impugned order had accepted the plea relying on a decision of this court in the case of **Mandira Mukherjee Vs. Sachindra Chandra Mukherjee & Ors., reported in A.I.R.**

**1962 Patna 211** and held that the final decree prepared on the basis of the report of the Pleader Commissioner is a nullity. Accordingly it allowed the application under section 47 of the Code of Civil Procedure and dismissed the execution case.

Decree holder aggrieved by the same has preferred this revision application.

When the matter was posted for consideration before the learned Single Judge on 27.06.1991, he doubted the correctness of the decision of this court in the case of Mandira Mukherjee (supra) and directed the matter to be heard by a division Bench. This is how the matter has been listed before us.

Mr. Naresh Chandra Verma, learned counsel appearing on behalf of the petitioners submits that the judgement of this court in the case of Srimati Mandira Mukherjee (supra) has been overruled by Division Bench in the case of **Mahrajo Kuar Vs. Sudamia Devi, reported in 1992 (2) B.L.J. 744.**

Despite service of notice on the opposite parties no body has chosen to appear on their behalf.

In view of the decision of the Division Bench in the case of Mahrajo Kuar (supra) the submission need not detain us. As observed earlier while passing the impugned order the learned Judge has relied upon the decision of the Single

Judge of this court in the case of Mandira Mukherjee and has come to the conclusion that the appointment of the Pleader Commissioner without direction of the Court to the parties to appear before the Commissioner is without jurisdiction. According to him same goes to the root of the matter and the decree prepared by Pleader Commissioner so appointed is a nullity. The Division Bench in the case of Mahrajo Kuar, however, has held that the appointment of the Pleader Commissioner without notice to the parties is valid, legal and binding. Relevant portion of the judgment of the division Bench in the case of Smt. Mahrajo Kuar read as follows :

“I hold for the reasons aforesaid that even if order XXVI, Rule 9 is read along with order XXVI, Rule 18, appointment of Advocate Commissioner without notice to the parties is valid, legal and binding and the law in this regard has not been correctly decided in the case of Smt. Mandera Mukherjee’s (supra).”

In that view of the matter, we are of the opinion that the learned Judge while passing the impugned order had exceeded in its jurisdiction in dismissing the execution case and holding that the final decree prepared is a nullity.

We have been told that first appeal is pending before this Court against the final decree. The decision rendered by us shall have no bearing on the same.

In the result this application is allowed, the order dated 28.02.1990 passed by the Sub-ordinate Judge Ist, Vaishali at Hajipur in Miscellaneous Case No. 28 of 1987 is set aside. In the facts and circumstances of the case, there shall be no order as to costs.

**( Chandramauli Kr. Prasad,J.)**

**( Shailesh Kumar Sinha,J.)**

Patna High Court  
The 30<sup>th</sup> of June, 2008  
N.A.F.R./Manish

