

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.562 of 2018

Abdul Badud @ Md. Badud, Son of Late Attiullah, resident of Village Chackyado, P.O. - Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.

... .. Petitioner/s

Versus

1. Abdul Quayum Son of Late Mohibul Haque, resident of Village- Paharpur, P.O.- Dihuli Bujurg, P.S.- Sakara, District- Muzaffarpur.
- 2.1. Chandani Devi Wife of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.2. Sanjay Kumar Son of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.3. Lalu Singh Son of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.4. Sunil Kumar Son of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.5. Rahul Kumar Son of Late Raju Singh, Grand Son of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.6. Abhisek Kumar Son of Late Raju Singh, Grand Son of Late Ramdeo Singh Resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
- 2.7. Gita Devi Wife of Shiv Chandra Prasad Singh, Daughter of Late Ramdeo Singh Resident of Village- Majholiya, P.O.- Chandan Patti, P.S.- Sakara, District- Muzaffarpur.
3. Mostt. Tiliya Devi, Wife of Late Bhajju Singh resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
4. Lotan Singh, Son of Late Bhajju Singh, resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
5. Subi Kumari, Daughter of Late Bhajju Singh. resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
6. Sushila Devi, Daughter of Late Bhajju Singh resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
7. Devendra Singh, Minor, Son of Late Bhajju Singh. through their mother guardian and next friend Most. Tiliya Devi, resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
8. Kumari Kumari, Minor Daughter of Late Bhajju Singh through their mother guardian and next friend Most. Tiliya Devi, resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
9. Sulekha Kumari, Minor Daughter of Late Bhajju Singh through their mother guardian and next friend Most. Tiliya Devi, resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
10. Lakhan Singh, Son of Guljari Mahto. resident of Village- Chicknauta, P.O.-



- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
11. Meena Devi, Daughter of Chalitar Mahto. resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 13. Rampari Devi, Wife of Late Bhola Mahto, resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 14. Arun Kumar Mahto, Son of Late Bhola Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 15. Ram Lalin Mahto, Son of Late Bhola Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 16. Ram Kishore Mahto, Son of Late Bhola Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 17. Bihari Mahto, Son of Late Bhola Mahto. resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 18. Meena Kumari, Daughter of late Bhola Mahto. resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 19. Mishri Lal Mahto, Son of Late Chulhai Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 20. Ram Pragash Mahto, Son of Late Chulhai Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 21. Babu Lal Mahto, Son of Late Chulhai Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 22. Sone Lal Mahto, Son of Late Chulhai Mahto resident of Village- Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 23. Jaibul Nessa, Wife of Late Md. Sakur resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 24. Md. Manjur, Son of Late Md. Sakur resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District Hajipur (Vaishali).
 25. Md. Sanjur, minor Son of Late Md. Sakur, through mother guardian and next friend Mostt. Jaibul Nessa, resident of Village- Chackyado P.O. Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 26. Sahida Khatoon, Daughter of Late Attiullah, resident of Village- Chackyado, P.O. Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 27. Md. Alam Hussain, Son of Md. Rahamtullah, resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 28. Jahuri Devi, Wife of Late Ram Chandra Mahto resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 29. Madan Kumar, Son of Late Ram Chandra Mahto, resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 30. Devendra Kumar, Iddiot through brother guardian and nest friend Madan Kumar resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
 31. Surendra Kumar, Son of Late Ram Chandra Mahto resident of Village-



- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
32. Upendra Kumar, Son of Late Ram Chandra Mahto resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
33. Jagdish Singh Son of Fuddi Singh@ Fuddi Mahto Resident of Village- 1. Bahadurpur, Chiknauta, P.O. Kawadih, P.S. Baligaon, District- Hajipur, Vaishali.
33. Ram Babu Mahto Son of Fuddi Singh@Fuddi Mahto Resident of Village- 2. Bahadurpur, Chiknauta, P.O. Kawadih, P.S. Baligaon, District- Hajipur, Vaishali.
33. Kalawati Devi Wife of Jai Narayan Singh, Daughter of Late Fuddi Singh@ 3. Fuddi Mahto, Resident of Village and P.O.- Muraul, P.S. Sakara, District- Muzaffarpur, Pin- 843121.
33. Lukhiya Devi, Wife of Puneshwar Mahto, Daughter of late Fuddi Singh @ 4. Fuddi Mahto, Resident of Village- Banch, P.O.- Gaspur Sarsona, P.S.- Bangara, District- Samastipur, Pin- 843130
33. Kaleshiya Devi, Wife of Arbind Singh, Daughter of late Fuddi Singh@ 5. Fuddi Mahto, Resident of Village and P.O.- Muraul,P.S. Sakara, District- Muzaffarpur, Pin- 843121.
33. Sunita Devi, Wife of late Lal Babu Singh, Daughter of Late Fuddi Singh@ 6. Fuddi Mahto, Resident of Village- Banch, P.O.- Gaspur Sarsona, P.S. Bangara, District- Samastipur, Pin- 843130
34. Bhikhu, Son of Jamil Akhtar resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.
35. Ritesh Kumar Paswan Son of Late Sahdeo Paswan resident of Village- 1. Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.
35. Roshan Kumar Paswan Son of Late Sahdeo Paswan resident of Village- 2. Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.
35. Chandani Devi Wife of Bishun Paswan, Daughter of Late Sahdeo Paswan 3. Resident of Village and P.O.- Bathua Simaha, P.S.- Musari Gharari, Dist.- Samastipur.
36. Sudama Devi, Daughter of Late Sundar Das resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.
37. Sharda Devi, Daughter of Late Sundar Das resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur Vaishali.
38. Ram Ashray Mahto, Son of Late Ram Sagar Mahto resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
39. Umesh Mahto, Son of Late Ram Sagar Mahto resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
40. Bhimali Devi, Daughter of Late Ram Sagar Mahto resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
41. Nirmala Devi, Daughter of Late Ram Sagar Mahto resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).



42. Bibi Sultana, Wife of Abdul Khair resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
43. Md. Shami Ahmad, Son of Abdul Khair resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
44. Md. Rafi Ahmad, Son of Abdul Khair resident of Village- Kawadih, P.O. Dargah Bela, P.S. Baligaon, District- Hajipur (Vaishali).
45. Md. Islam, Son of Late Nathuni Mian resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
46. Md. Hakim, Son of Late Md. Ibrahim resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
47. Md. Salim, Son of Late Md. Ibrahim resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
48. Sogara Khatoon, Duaghter of Late Md. Ibrahim, resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
49. Afijan Khatoon, Duaghter of Late Md. Ibrahim, resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
50. Nasiban Khatoon, Daughter of Late Md. Ibrahim, resident of Village- Bahadurpur Chicknauta, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
51. Muneshwar Singh, Son of Newalal Singh, resident of Village- Chak Sarifa, P.O.- Leorhan, P.S.- Baligaon, District- Hajipur (Vaishali).
52. Sahida Khatoon, Daughter of Late Attiullah, resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
53. Md. Sahud, Son of Late Attiullah, resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).
54. Md. Mabud, Son of Late Attiullah, resident of Village- Chackyado, P.O.- Dargah Bela, P.S.- Baligaon, District- Hajipur (Vaishali).

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Mahesh Narayan Parbat, Sr. Advocate
Mr. Ved Prakash Srivastava, Advocate
Mr. Praveen Prabhakar, Advocate
For the Respondent/s : Mr. Naresh Chandra Verma, Advocate
Mr. Natraj Verma, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 21-10-2024

The petitioner has been filed the instant petition under
Article 227 of the Constitution of India for quashing the order



dated 13.02.2018 passed by learned Sub Judge-8, Vaishali at Hajipur in Execution Case No. 4 of 2017 whereby and whereunder the learned executing court rejected the application filed for dismissal of the execution case.

2. The conspectus of the case, as it emerges from the record, is that the petitioner is one of the judgment-debtors and respondent no. 1 is the decree-holder in Execution Case No. 4 of 2017. It appears from the records that the respondent no. 1 filed Title Suit No. 162 of 1998 against the petitioner and respondents 2nd and 3rd sets or their ancestors with a prayer for declaration of his title and possession over 3 acres 43 decimals of land described in Schedule 1 of the plaint apart from other reliefs. Subsequently, by way of amendment, realization of *mesne profit* was also added as one of the reliefs. During pendency of the suit, some defendants died and their heirs were substituted. After service of notices, defendants appeared and three sets of written statements were filed on behalf of the defendants. Title Suit No. 162 of 1998 was decreed on 28.02.2017 with a direction to the defendants to hand over vacant possession of land, in question, to the plaintiff within a period of sixty days, failing which the plaintiff would be entitled to get possession of land in question, through the process of the court. *Mesne profit*



was also allowed in favour of the defendants. Aggrieved by the judgment and decree passed in Title Suit No. 162 of 1998, the petitioner and the respondents 3rd set filed Title Appeal No.33 of 2017, which is pending before the learned District Judge, Vaishali at Hajipur for its disposal. On the basis of judgment and decree dated 28.02.2018, the plaintiff filed Execution Case No. 4 of 2017 for execution of decree in the court of learned Sub Judge- 8, Vaishali at Hajipur against all the defendants named in the decree. The petitioner appeared on 14.09.2017 and informed the learned executing court about pendency of Title Appeal No. 33 of 2017 and also filed an application seeking stay of the execution proceeding till disposal of the appeal. The learned executing court was also informed about pendency of the application seeking stay before the learned appellate court. However, both the applications were dismissed by the learned executing court vide order dated 25.09.2017 and taking steps for appointment of Nazir and police force, for execution of decree in question, were ordered.

3. It further appears that during pendency of the execution proceeding, the petitioner became aware about the deaths of some of the defendants, namely Rasulan Nessa, Johara Khatoon, Chanda Devi, Ali Hussain and Ram Pukari Devi



which took place on 25.01.2010, 10.03.2015, 20.05.2015, 21.09.2015 and 14.01.2017, respectively during the pendency of the suit and no substitution of heirs/legal representatives was made for the deceased defendants by the plaintiff. The petitioner, after obtaining the death certificates of some of the defendants filed an application before the learned executing court on 15.12.2017 apprising the court about the deaths of some of the defendants during pendency of the suit and for holding that decree under execution was non-executable being nullity as the same was passed against dead persons. Thus, the petitioner prayed for dismissal of the execution case on the aforesaid ground. A rejoinder to the said application was filed on behalf of the decree-holder on 21.12.2017 taking a number of defences and praying for dismissal of the application. The matter was heard by the learned Sub Judge-8, Vaishali at Hajipur, which rejected the application of the petitioner vide order dated 13.02.2018. The said order is under challenge before this Court in the present petition.

4. Mr. Mahesh Narayan Parbat, learned senior counsel appearing on behalf of the petitioner, submitted that the impugned order suffers from arbitrariness and is colourable exercise of power and is, therefore, not sustainable. The learned



senior counsel further submitted that the application was filed under Sections 47 and 151 of the Code of Civil Procedure (hereinafter referred to as 'the Code') and it was dismissed without instituting a miscellaneous case. The impugned order has been passed without application of judicial mind and against the settled principle of law to the effect that the decree against a dead person is nullity and is not executable. The learned senior counsel further submitted that whenever an application under Section 47 of the Code is filed raising objection to the execution of decree, miscellaneous case is required to be instituted, but the same was not done by the learned executing court and it dismissed the petition at the stage of admission itself and, hence, the impugned order is not legal. The dismissal of the application is *de-hors* the rules as without instituting the miscellaneous case and without giving proper opportunity to the petitioner to adduce evidence in support of the case, the application was dismissed. Further disbelieving the death certificates produced by the petitioner on mere conjectures and surmises makes the impugned order non-sustainable. The learned executing court further failed to consider the facts and circumstances of the case and came to an erroneous conclusion. The learned executing court should have considered that the mentioning of names of



deceased defendants in the memo of appeal filed by the petitioner was a bonafide mistake of the counsel for the appellants and this fact was not going to improve the case of the decree-holder as non-substitution of the heirs/legal representatives of the deceased defendants by plaintiff during trial of the suit made the decree nullity. Therefore, it was beyond the jurisdiction of the learned executing court to execute the decree since it became a nullity. This fact is further clear from the stand of the decree-holder that he did not deny the death of defendants occurring during course of the trial. In a catena of decisions, it has been held by the Hon'ble Supreme Court as well as by this Court that validity of the decree can be challenged if the court which passes the decree lacks inherent jurisdiction or in cases where the defendants were dead at the time of passing of the decree. Thus, learned senior counsel submitted that the impugned order is not sustainable and the same be set aside.

5. On the other hand, Mr. Naresh Chandra Verma, learned counsel appearing on behalf of the respondent no.1, submitted that there is no infirmity in the impugned order and it does not require any interference by this Court. The learned counsel further submitted that the learned trial court has



considered each and every contention of the petitioner and, thereafter, passed a detailed order dismissing the application. The learned counsel further submitted that there is no requirement of law to register a miscellaneous case under Sections 47 and 151 of the Code when no provision has been mentioned while filing the application and when the short point in issue could be decided by the court on the basis of material available on record. The learned counsel further submitted that the decree passed in a case when one or more defendants are dead is not nullity in every case and in respect of every party to the suit. The principle has been rightly applied by the learned executing court in the present case after due consideration of the facts of the case. The learned counsel further submitted that the petitioner and the respondent no. 1 are residents of different district and at no point of time, during pendency of the Title Suit No. 162 of 1998, learned counsel for the defendants concerned informed the court about the alleged dates of death of the defendants, namely Rasulan Nessa, Johra Khatoon, Chand Devi, Ali Hussain and Ram Pukari Devi or even about the factum of death as the learned counsels for the defendants were under obligation to inform the court in terms of provisions under Order 22 Rule 10(A) of the Code. This fact goes on to show that



the defendants, stated to be dead by the petitioner, did not die on the alleged dates as claimed by the petitioner. Moreover, when the death of a defendant occurs and his counsel or heirs failed to inform the court, then the heirs cannot challenge the decree on this ground to be nullity.

6. The learned counsel further submitted that the petitioner has been taking a contradictory stand. The petitioner has mentioned about death of five defendants during the course of trial, but when the petitioner filed the title appeal against the judgment and decree of the learned trial court, all the dead defendants were impleaded as party respondents in the title appeal which was filed on 24.04.2017. Thus, a false statement has been made by the petitioner before this Court for which he deserves to be prosecuted and punished for the offence of perjury. The falsity of the statement of the petitioner is also clear from the fact that in Title Appeal No. 33 of 2017, notices were issued to the respondents on 27.05.2017 and service reports of notices were submitted on 16.06.2017 by the process server. From the service report, it is evident that appeal notices were served on Johara Khatoon and Chanda Devi along with other respondents, who refused to receive the notice in presence of the appellant and the witnesses, who also signed on the service



report. So far as notice upon Rasulan Nessa, who was made respondent no. 26, is concerned, her notice along with other members of her family was received by the petitioner himself. The learned counsel further submitted that the petitioner is the son of Rasulan Nessa and if she died prior to passing of the decree, the petitioner did not inform the learned trial court and did not even mention the fact in his title appeal. This goes on to say that Rasulan Nessa was alive on the date of judgment and service of appeal notice, but later on the petitioner fabricated a forged death certificate of his mother. The learned counsel further submitted that the petitioner Abdul Badud did never disclose about the death of his mother Rasulan Nessa, who was defendant no. 6 (A). All heirs of Rasulan Nessa are already on record in title suit as defendant nos. 6 (B) to 6 (E). The defendant no. 4 (B) Ram Pukari Devi never appeared in the suit despite service of notice by paper publication and, hence, decree was passed *ex-parte* against her. The decree against defendant no. 7 (k) was also passed *ex-parte*. Chand Devi, defendant no. 14 (F) had already received appeal notice and her sons and daughters are already on record as defendant nos. 14 (a) to 14 (d) in the suit and decree. Johara Khatoon died issue-less but she also received appeal notice on 16.06.2017. However, her



brothers and sisters were already on record as defendant nos. 18 (a) to 19 (c) and 19 (c) to 19 (f), who were made judgment-debtor nos. 52, 53, 54 in execution case. The suit was heard *ex-parte* against Johara on 17.09.2003. Thus, it is evident that the concerned defendants of the suit failed to file their written statement and contest the suit and, for this reason, their heirs cannot take the plea of abatement or decree being nullity as the estate of deceased was represented through out by the heirs, who were all along on the record as parties in the case.

7. The learned counsel for the respondent no.1 further submitted that the learned executing court dealt with other aspects of the matter as well. Except for Rasulan Nessa and her heirs, other original defendants in the suit either compromised with the decree-holder or did not contest the suit. Rasulan Nessa and her family members lost the suit but their claim was confined to R.S. Plot No. 2, 37 and 158 only and the petitioner could not challenge the decree as a whole. The learned counsel further submitted that even if, for the sake of argument, it is supposed that Rasulan Nessa was dead at the time of passing of the decree, the judgment and decree cannot be said to be nullity when her estate was duly represented through her heirs/legal representatives including the present petitioner, who were all



along on record. The learned counsel next submitted that the learned executing court suspected about the genuineness and correctness of the death certificates, which were obtained by the judgment-debtor/ petitioner after filing of the petition dated 17.10.2017. The learned executing court also considered the fact that the suit was proceeding against all the alleged judgment-debtors (defendants) *ex-parte* since 1999. For want of proper information, steps under Order 22 Rule 4 (4) of the Code could not be taken due to fault and negligence of the defendants, even if the version of the petitioner, for the sake of argument, is considered to be true. Moreover, the petitioner cannot challenge the decree under execution as nullity on account of alleged death of some of the defendants with whom the petitioner has got no concern whatsoever.

8. The learned counsel for the respondent no. 1 further pointed out that the petitioner, being one of the judgment-debtors in Execution case No. 04 of 2017, filed a simple petition on 15.12.2017 challenging the executability of the judgment and decree dated 28.02.2018 passed in Title Suit No. 162 of 1998 with a prayer to dismiss the execution case, but he has not mentioned any provision of law so as to enable the court to take cognizance and to proceed accordingly. Moreover, there is no



prayer in the said application to register a miscellaneous case and then to inquire into the facts alleged therein. Further, the petition was never filed in the form of a miscellaneous case and, hence, it was not proper for the executing court to register a miscellaneous case *suo motu* without any such prayer made by the petitioner in this behalf.

9. The learned counsel for the respondent no.1 further submitted that in these circumstances, even if the allegation of death of some of the defendants is taken to be true, the decree would not become nullity and decree may be erroneous but that does not mean it is non-executable. In this regard, the learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of *Balvant N. Viswamitra vs. Yadav Sadashiv Mule (D) through Lrs.* reported in *AIR 2004 SC 4377*.

10. The learned counsel for the respondent no. 1 further submitted that moreover, the title appeal of the petitioner is still pending and all issues raised by the petitioner could be considered by the learned first appellate court and there is no occasion for the learned trial court, at this stage, to stop the execution proceeding or to dismiss the execution case.

11. I have given my thoughtful consideration to the rival submission of the parties and have perused the record.



12. The challenge to the order dated 13.02.2018 passed by the learned executing court is on two grounds; firstly the petitioner claims a miscellaneous case ought to have been instituted and, thereafter, the petitioner should have been given opportunity to adduce evidence and then only the application should have been decided. Second ground of challenge is that as some of the defendants were dead at the time of passing of the decree, the decree has become nullity. I am afraid, both the grounds taken by the petitioner are fallacious and would not make the impugned order unsustainable for the reasons discussed hereinafter.

13. Normally when an application is filed under section 47 of the Code, Rule 459 of the Civil Court Rules provides that a miscellaneous case should be instituted. Now, perusal of the application dated 15.12.2017 filed on behalf of the petitioner, who is judgment-debtor no.26, does not show under which provision the application has been filed before the learned executing court in Execution Case No. 4 of 2017. Further, there is no prayer for institution of any miscellaneous case to consider the objection raised by the petitioner. The averment in the said application is that some of the defendants were dead at the time of passing of the decree as they died



during course of the trial and hence the execution case should be dismissed. In these circumstances, the institution of miscellaneous case was not warranted. Further, if there is no issue raising disputed facts requiring adducing evidence and elaborate hearing, I do not think there is any requirement of institution of any miscellaneous case on the basis of an application which has been filed without making any such prayer or without mentioning any provision. Hence, the contention of the learned senior counsel for the petitioner on the aforesaid ground is not sustainable.

14. From the facts brought before the learned executing court, which the learned executing court has elaborately discussed in the impugned order, it is evident that the petitioner could not claim the decree to be nullity only because some of the defendants died during pendency of the suit. If the heirs of such defendants are already on record and they did not contest the suit or were proceeded *ex-parte*, by their conduct, such legal heirs are not entitled to any relief on the ground of abatement or decree becoming a nullity against such person.

15. So far as the contention of learned senior counsel for the petitioner about the decree as a whole being nullity is



concerned, the same is also not sustainable. The decree can become nullity only in cases (i) when the court lacks inherent jurisdiction to pass the decree (ii) the decree has been passed against a dead person and (iii) the decree has been passed in ignorance of provision of law or the law was promulgated making a decree inexecutable after its passing.

16. In the present case, even if contention of the petitioner about decree being passed against dead persons is taken to be correct, the decree would not become nullity against all the defendants if right to sue survives against other defendants. Since the suit would not abate as a whole and, for this reason, decree as a whole would not become nullity.

17. Moreover, in the present case, it has been contended that the heirs/legal representatives of the deceased defendants are already on record and, in these circumstances, when the estate of the deceased defendants is properly represented, there is no scope of decree becoming nullity at all. Further, the conduct of the petitioner is also pertinent as the same would affect the cause of the petitioner and prejudice it seriously. The petitioner is the son of defendant Rasulan Nessa and the petitioner was himself a party in the trial court as well as one of the appellants in the appellate court. He did not disclose



about death of his mother before the learned trial court and even made her deceased mother party in the appellate court. The learned executing court even doubted the genuineness of the death certificates produced by the petitioner for her mother and other defendants. If the mother of the petitioner was already dead, making her one of the parties in the title appeal smacks of malafide on the part of the petitioner and it could be said that the petitioner did not approach the learned executing court with clean hands and, for this reason, the petition of the petitioner was liable to be rejected without granting him further indulgence.

18. Further, the Hon'ble Supreme Court in the case of ***Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Ors.*** reported in ***AIR 1970 SC 1475*** held that a Court executing a decree cannot go behind the decree and cannot entertain any objection that the decree was incorrect in law or on facts. The following extract from this decision seems apt :

“A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is till binding between the parties.”



When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction”.

19. It is the established law that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder and this observation has been made by the Hon’ble Apex Court in a number of cases including the case of ***Topanmal Chhotamal Vs. Kundomal Gangaram & Ors.***, reported in ***AIR 1960 SC 388***. It is only in the limited cases,



where the decree is by a court lacking inherent jurisdiction or is a nullity, that the same is rendered non est and is thus inexecutable. An erroneous decree cannot be equaled with one which is a nullity. There are no intervening developments as well as to render the decree inexecutable. In this regard, reliance could be place on the decision of the Hon'ble Apex Court in the case of *Dhurandhar Prasad Singh vs. Jai Prakash University and Ors.* reported in *AIR 2001 SC 2552*.

20. Since none of the conditions mentioned for making a decree nullity or in-executable are present in the case, the challenge to the execution proceeding was grounded on wrong footing and even the non-institution of miscellaneous case is not an issue in the facts and circumstances as discussed hereinbefore. Only because no miscellaneous case has been instituted on a vague petition filed on behalf of the petitioner and an erroneous claim of non-executability of the decree has been made, the impugned order would not become assailable.

21. Moreover, the learned trial court has considered each and every aspects of the matter and passed a reasoned order and the petition would not lie against such order under Article 227 of the Constitution of India. Furthermore, the petitioner has already filed title appeal against the judgment and



decree of the learned trial court and has every opportunity to raise all issues before the learned appellate court.

22. Therefore, in the light of the discussion made herein-before, I find the impugned order dated 13.02.2018 passed by learned Sub Judge-8, Vaishali at Hajipur in Execution Case No. 4 of 2017 to be a reasoned order passed after due consideration of each and every aspect of the matter and hence, the impugned order is affirmed.

23. As a result, the present petition stands dismissed.

24. However, it is open for the parties to take recourse of law in appropriate proceeding, is so advised.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	30.09.2024
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