

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**W.P.(227) No. 111 of 2017**

1. Ashok Kumar, S/o. Late Vilayati Ram, aged about 55 years,
  2. Arvind Kumar, S/o. Late Vilayati Ram, aged about 50 years
  3. Smt. Rita, D/o. Late Vilayati Ram, aged about 46 years
  4. Satish Kumar, S/o. Late Vilayati Ram, aged about 40 years
- All are residents of Shanti Nagar, Lailunga, Tahsil – Lailunga,  
District – Raigarh (C.G.)

----Petitioners

**Versus**

1. Mu. Urmila Devi, W/o. Ramashray Dubey, aged about 55 years,
  2. Mu. Sujeeta, W/o. Dhanurjay Patnayak, aged about 54 years
  3. Pradeep Kumar, S/o. Ramashray Dubey, aged about 36 years,
  4. Ku. Pratibha, D/o. Ramashray Dubey, aged about 36 years,
  5. Ku. Mahima, D/o. Ramashray Dubey, aged about 28 years,
  6. Prakash, S/o. Ramashray Dubey, aged about 26 years,
  7. Smt. Mamta Bai, D/o. Late Vilayati Ram, aged about 57 years,
  8. Smt. Sunita, D/o. Late Vilayati Ram, aged about 40 years,
- All are residents of Rewapara, Raigarh, Tahsil and District –  
Raigarh (C.G.)
9. State of Chhattisgarh, Through : Collector, Raigarh, District –  
Raigarh (C.G.)

---- Respondents

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| For Petitioners      | : Mr. J.K. Shastri, Advocate      |
| For State/Respondent | : Mr. Neeraj Jain, Govt. Advocate |

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**Hon'ble Shri Justice Goutam Bhaduri**

**Order On Board**

**07/02/2017**

1. Challenge in this petition is to the order dated 25.01.2017, passed in Civil Appeal No.05/2017, by the learned Additional District Judge, Raigarh, whereby an application filed under Order 41 Rule 5 of Civil Procedure Code for stay of the decree has been dismissed.

2. Learned counsel for the petitioners would submit that by the judgment and decree dated 05.12.2016, the decree for possession was passed and against such judgment and decree, a execution case was filed by the decree holder. Further an appeal was also filed by the present petitioners, who were the defendants/judgment debtors under Section 96 of the Civil Procedure Code on 05.01.2017 and along with the memo of appeal, an application was preferred under Section 41 Rule 5 of C.P.C. for stay of the possession part of the decree, however, the same has been dismissed. It is further submitted that in the appeal, notices have been issued and the appeal is formally admitted for hearing and if the said execution is being carried out, then entire filing of the appeal would become infructuous, consequently, the trial Court failed to exercise its jurisdiction vested in it by law.
3. Perused the order dated 25.01.2017. Learned Court below has primarily rejected the application under Order 41 Rule 5 read with Section 151 of C.P.C. by observing that only execution notices has been issued to the judgment debtor, consequently, no urgency exists to stay the execution of the decree and application has been dismissed on merits. The order itself shows that the notices were issued on memo of appeal, wherein respondent No.1 to 3 and 6 were represented and the respondent No. 4 & 5 were not served and respondent No.-7 remained ex-parte. The tenure of the order would show that appeal has been admitted for hearing and the notices have been issued. Perusal of the document would show a decree for possession is also part of the decree which is under

challenge. Naturally in such case, if the decree for possession is executed by dispossessing the petitioner/judgment debtor it may lead to render the first appeal infructuous and also would cause irreparable injury to the judgment debtor. An appeal is essentially continuation of original proceeding and right of appeal is statutory. Therefore, when conferred by statute it becomes a vested right and it has power to review the evidence subject to statutory limitations and right of appeal carries with it a right of re-hearing on law as well as on facts. Consequently, this Court is of the opinion that first appeal having been admitted for hearing, which involves re-appreciation of the facts and law and if the decree for possession is executed then it may lead to render the first appeal infructuous in all practical sense.

4. In a result, the petition is allowed without notice to the respondents and it is directed that the possession part of the decree which is under challenge in the first appeal shall remain stayed, till the first appeal is decided on merits.
5. Certified copy as per rules.

**Sd/-**  
**(Goutam Bhaduri)**  
Judge