

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1214 of 2019**

1. Md. Shamim Ahmad Son of Md. Hanif Resident of Mohalla Maullachakl @ Maullanachak, Badrul Hassan Lane, P.S. Mojahidpur, District-Bhagalpur.
2. Bibi Ishrat Begum, Wife of Md. Shamim Ahmad, Resident of Mohalla Maullachakl @ Maullanachak, Badrul Hassan Lane, P.S. Mojahidpur, District-Bhagalpur.

... .. Petitioner/s

Versus

Nasima Khatoon Wife of Late Qaisar Khan Resident of Badrul Hossain Lane, Mullachak @ Maullana Chak, P.S. Mojahidpur, District-Bhagalpur.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Dr. Manoj Kumar
For the Respondent/s : Mr.Anshay Bahadur Mathur

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV ORDER

4 03-03-2022 The present civil miscellaneous application has been filed for quashing of the order dated 12.07.2019, passed by the learned Sub Judge-XII, Bhagalpur in Misc. Case No.10 of 2018, whereby the petition dated 04.05.2019 filed by the petitioners to stay the further proceedings of that miscellaneous case has been rejected.

The petitioners/plaintiffs claiming themselves to be landlords of the respondent, filed Eviction Suit No. 02 of 2004. The suit was decreed in favour of the petitioners/plaintiffs and a decree of eviction was passed. The petitioners/plaintiffs filed Execution Case No. 01 of 2015. The decree was executed and



delivery of possession was handed over to the petitioners/plaintiffs. After taking the delivery of possession, as submitted, the existing building was demolished and a new construction was erected in place thereof.

Against the judgment and decree of the trial court, the defendant/respondent preferred Title Appeal No. 40 of 2016. The appeal was allowed and the judgment and decree of the trial court was set aside.

The petitioners/plaintiffs preferred second appeal before the High Court challenging the judgment and decree of the appellate court, which is admittedly pending up-till now.

When the respondent/defendant succeeded in first appeal, she filed a Misc Case No. 10 of 2018 (as discussed above) for restitution of her possession of the suit premises under Section 144 of the Code of Civil Procedure. The plaintiffs/petitioners appeared in Misc. Case No. 10 of 2018 and filed a petition for stay of the proceeding of that restitution case on the ground that against the appellate judgment and decree, the petitioners/plaintiffs have preferred the second appeal being S.A.No. 449 of 2017 which is pending. That petition was rejected vide order dated 12.07.2019 by the learned Sub Judge-XII, Bhagalpur, which is under challenge.



The learned counsel for the petitioners has submitted that they have challenged the judgment and decree of the first appellate court which is *sub judice* in a second appeal in this Court. In these circumstances, it was essential for the ends of justice to stay the proceeding of Misc. Case No. 10 of 2018. The learned court below has committed illegality in rejecting the stay application of the plaintiffs/petitioners.

It is an admitted fact that S.A.No.449 of 2017 is still pending in this Court. There is statutory provision under Order XLI, Rule 5(1) of the Code of Civil Procedure which empowers the appellate court to stay the proceedings of the execution of the judgment and decree under appeal. By virtue of Order XLII, Rule 1, the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. As such, the petitioners have alternative statutory remedy for stay of the appellate decree.

Accordingly, the present civil miscellaneous application is not maintainable. It is hereby dismissed.

(Nawneet Kumar Pandey, J)

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