

FD-03/19

04-1-2023 : The Ld Adv. for D-Heldur (Plaintiff) & Judgment Debtors No. 16, 17, 18 filed a motion on their's behalf. Today the record is fixed for order on the motion of Judgment Debtors dated 13-10-2022. The Ld. Advocate for Judgment Debtors filed a motion on dated 13-10-2022 v/o 41, R-5 of the Code of Civil Procedure, 1908

and

the result is

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Submitting therein that the Decree-Holder has filed this Suit on fir Final Decree against the Judgment/Decree passed as Preliminary Decree. Against the Preliminary Judgment/Decree the Judgment Debtor has preferred a Second Appeal No. 268 of 2019 before the Hon'ble High Court, Patna which is pending. The Second Appeal was admitted by the Hon'ble High Court, Patna finding the error of law. The Decree Holder is stranger to the Suit land. Dhondhali Singh has already executed gift deeds in favour of his daughter & Son-in-law and thereafter these Judgment Debts are in peaceful possession over the Suit land. The Sub Judge, Buxar has rightly passed Judgment/Decree in favour of Judgment Debtor in T.S. 89/89. The Decree Holder Yashoda Devi & her husband Satyanarayan Singh have no concern with the Suit land and with Dhondhali Singh & his families. He further prayed to stay further proceeding of this case till final disposal of Second

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04-1-2023—Appeal pending before Hon'ble High Court.

The Cd Adv for Decree holder filed a rejoinder on dated 14-11-2022 submitting therein that the pethm of defendant/judgment Debtor is not maintainable. A partition suit no. 89/89 Wm filed and a first Appeal was filed against the Decree as Appeal no 36 of 2011 in which the Cd. FTC-2, Buxar delivered judgment in favour of Decree holder on dated 25-3-2019 and on that basis the Decree holder has filed this case to carried out his $\frac{1}{3}$ rd share from the suit land. There is no provision to stay and as per O-41, R-5 only Appellate Court can exercise the power. The judgment debtor should take stay order from the Hon'ble High Court, patna in second Appeal case. He further cited as case as 2003(3) PLJR P-408 in which Hon'ble High Court held that the final Decree can not be stayed. He further submitted ~~that~~ that during pendency of the second Appeal the judgment Debts has executed a Sale Deed on 22-12-2022. The Decree holder has filed a pethm for a temporary injunction & in order to delay

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here Judgment Debtors have filed this petition. He further prayed to dismiss the present petition.

Heard both sides & perused the case record it appears to me that the Decree Holder has filed this case for carrying out their $\frac{1}{3}$ rd share in suit properties. It is admitted by both parties that a second Appeal is pending before the Hon'ble High Court, Patna but no stay order has been passed by the Hon'ble High Court in the second Appeal. This case is filed only for carrying out $\frac{1}{3}$ rd share of plaintiff from the suit land. D-41, R-5 provides as: Stay by Appellate Court: - An appeal shall not operate as a stay of proceeding under a decree or Order appealed from except so far as the Appellate Court may order, no shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Appellate Court may for sufficient Cause order stay of execution of such Decree. Hence, it appears & clear that D-41, R-5 is not applicable & inapplicable. The petition of Judgment Debtors dated 13-10-2022 is hereby dismissed. Put up in dated 02.02.23 for hearing on the petition of Decree Holder dated 20/8/2022

By JUDGE
Sub-Judge
Munim