

Order on I.A. No.II

The appellants/plaintiffs have filed this application under order 41 rule 5 of CPC to stay the operation and execution of the judgment and decree passed in OS.No.2/2011 by the Civil Judge and JMFC Banhatti, till disposal of the appeal.

2. The appellant No.1 in his affidavit filed along with this application has stated that, they have preferred this appeal against the judgment and decree passed in OS.No.2/2011 and they are likely to succeed in this appeal and hence the operation of judgment and decree has to be stayed otherwise they will face much hardship and loss and very purpose of preferring this appeal will be defeated.

3. The respondent No.1 in his objections to this application has stated that, the plaintiffs have filed the suit before the trial court for declaration and possession against them but same is dismissed by the trial court on 14.06.2023. Now they have preferred this appeal but this application is not maintainable as the said judgment and decree is not at all executable. Only if the suit is decreed then only execution of

the judgment and decree came into picture. Therefore, this application is not maintainable and hence it is prayed to dismiss the same.

4. Heard both sides on IA.No.I.

5. Then the following points arise for consideration of this court are as under:-

1. Whether the appellants/plaintiffs have made out grounds to allow IA.No.II?

2. What order?

6. The findings of this court on the above points are as under:

Point No.1 - **In the Negative.**

Point No.2 - As per final order,
for the following:

: REASON :

7. Admittedly, these plaintiffs/appellants have filed the suit for declaration and possession of the suit property against these respondents before the trial court in OS.No.2/2011 but same was dismissed by the trial court. It is rightly pointed out by the learned counsel of the respondent No.1 that, only if the suit is decreed then this type of application is maintainable. The plaintiffs/appellants have suffered the decree by the trial court and it is not the executable decree and hence, the application itself is not

maintainable. Hence, my finding to **point No.1 is in the Negative.**

8. Point No.2: In view of the reason and finding given to point No.1, the following is made-

ORDER

IA.No.II filed U/O-41, Rule-5 of CPC is hereby dismissed.

No order as to costs.

Appearance of R.2 and 4 to 6, Re-issue notice on appeal memo to R.3, 7 and 8, if complied.

Sd/-

**Sr. C.J. & JMFC,
Banahatti**