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not make any difference as regards the court fee payable by him. The legislature lays down certain rules governing the court fees payable on suits for possession of immovable properties and I see no justification for interpreting "possession" as meaning "possession as beneficial owner".

I hold that the court fee is payable *ad valorem* under section 7, clause (v) upon the value of the properties of the *math*. In calculating the value of such properties the temple itself should be left out of consideration as having no market value.

Before Mr. Justice Kendall.

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HAR NARAIN SAHI (JUDGMENT-DEBTOR) *v.* SADHU GOVIND RAI (DECREE-HOLDER).*

Civil Procedure Code, order XLI, rule 6 (2)—Interpretation —Appeal pending from a decree—Order for sale of immovable property—Whether executing court is bound to stay sale on security being given.

Order XLI, rule 6 (2) of the Civil Procedure Code was not intended to impose on the court which ordered the sale an obligation to stay the sale pending an appeal from the decree, merely because the property which is to be sold is immovable property and security is given.

The attention of the legislature seems, in sub-rules (1) and (2) of rule 6, to have been directed to the manner in which security should be demanded; and as the rule immediately follows rule 5, which prescribes the manner in which execution proceedings may be stayed, the whole of rule 6 must be held to be complementary to rule 5, providing in fact an explanation of the word "security" which has been used in clause (*c*) of sub-rule (3) of rule 5.

Dr. *M. Wali-ullah*, for the applicant.

Mr. *Shambhu Prasad* (for Mr. *Shiva Prasad Sinha*), for the opposite party.

KENDALL, J.:—This is an application under order XLI, rule 5 of the Code of Civil Procedure for stay of execution proceedings. It is made on the ground that the judgment-debtor entered into a compromise

*Application in Second Appeal No. 182 of 1932.

with the decree-holder to the effect that the latter should execute his decree against the villages of Singha and Mahesra, which were said to be free from encumbrance; and if any encumbrance were discovered on these villages the decree-holder should proceed against the villages of Pakaryar and Sorha. The decree-holder has, however, proceeded against these two latter villages on the allegation that village Singha had an encumbrance on it. On the question of whether there is an encumbrance on this village the two lower courts have decided that there is, but a second appeal is pending.

The applicant states in paragraph 12 that he will suffer an irreparable injury and may have to pay substantial compensation if the villages of Sorha and Pakaryar are sold. This is explained by the allegation that he has entered into a deed of partition with his wife and son by which they become the owners of these two villages. Apart from this, there is nothing to show why he should suffer any more substantial loss by the sale of these two particular villages than of the others which he is willing to offer for sale. If he really has transferred the villages of Sorha and Pakaryar to his wife and son, he may have to pay compensation to them under some private arrangement, but will himself be compensated by escaping from the liability that would attach to his own villages. Moreover, if the villages have been transferred it is difficult to see on what principle the judgment-debtor can come into court and object to their sale. The proper remedy would be for the transferees to make an objection under order XXI, rule 58 of the Code of Civil Procedure. In short, after hearing counsel on both sides I am not satisfied that there is sufficient reason for the stay of the sale under rule 5 of order XLI.

The suggestion was made that the sale could be stayed under clause (2) of rule 6 of order XLI. As the interpretation of this rule has on some occasions given some

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difficulty I have considered the matter somewhat carefully. Clause (2) of rule 6 reads as follows: "Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale *shall*, on the application of the judgment-debtor to the court which made the order, *be stayed* on such terms as to giving security or otherwise as the court thinks fit, until the appeal is disposed of." And rule 8 of the same order provides: "The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree", as is the case here.

If this rule is to be interpreted to mean that in every case where an order has been made for the sale of immovable property in execution of a decree from which an appeal is pending, the executing court is obliged to stay the sale on the application of the judgment-debtor, then the present application might succeed on the ground that the High Court will have jurisdiction to pass an order that ought to have been but has not been passed by the executing court.

Rules 5 to 8 of order XLI are the rules covering stay of proceedings and of execution, and the marginal notes to rule 5 show that that is the rule that is applied to stay of proceedings and of execution, while the marginal notes to rule 6 show that that is the rule that is applied to security. Clause (1) of rule 6 shows that where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken (from the decree-holder executing the decree) for restitution. Clause (2) shows that where an order has been made for the sale of immovable property in execution of a decree from which an appeal is pending, the sale shall be stayed on the application of the judgment-debtor to the court which ordered the sale "on such terms as

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to giving security or otherwise as the court thinks fit". The attention of the legislature seems in both these clauses to have been directed to the manner in which security should be demanded, and as the rule immediately follows rule 5, which prescribes the manner in which execution proceedings may be stayed, the whole of rule 6 must, I think, be held to be complementary to rule 5, providing in fact an explanation of the word "security" which has been used in clause (*c*) of sub-rule (3) of rule 5. I am not therefore of opinion that clause (2) of rule 6 was intended to impose on the court which ordered the sale an obligation to stay the sale merely because the property which is to be sold is immovable property.

The result is that the present application fails and is dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

HIRA SINGH AND ANOTHER (PLAINTIFFS) *v.* CHANDAN SINGH AND OTHERS (DEFENDANTS).*

1932 *May*, 6.

Jurisdiction—Civil and revenue courts—Suit by tenant against zamindar for declaration of ownership of a well situate in his tenancy plot—Cognizable by revenue court—Agra Tenancy Act (Local Act III of 1926), *section* 121.

A suit by a tenant against the zamindar for a declaration of ownership of a pucca well situate in the plaintiff's tenancy plot is cognizable by the revenue court. The suit amounts to a suit for a declaration of the right of the plaintiff as tenant, within the meaning of section 121 of the Agra Tenancy Act. Such a suit will cover the question of the ownership of the well which is situated in the plaintiff's tenancy plot. Also, all questions in regard to improvements, such as wells, are cognizable by the revenue court.

Mr. *Krishna Murari Lal*, for the plaintiffs.

Mr. *M. L. Chaturvedi*, for the defendants.

MUKERJI and BENNET, JJ.:—This is a reference by a learned Munsif under section 267 of the Agra Tenancy Act, Act III of 1926, inquiring for a direction of this Court as to whether the Munsif has jurisdiction to entertain the suit in question. Learned counsel for

*Miscellaneous Case No. 739 of 1931.