

MISCELLANEOUS CIVIL.

Before Mr. Justice Scot-Smith and Mr. Justice Leslie Jones.

DHERA MAL (DEFENDANT)—*Petitioner*,

versus

Haidar Shah, etc. (PLAINTIFFS)—*Respondents*.

Civil Miscellaneous No. 29 of 1921.

[Civil Appeal No. 3280 of 1916.]

Civil Procedure Code, Act V of 1908, Order XLI, rule 5—Stay of execution during pendency of an appeal when immoveable property concerned.

Held that under Order XLI, rule 5 of the Code of Civil Procedure no order of stay of execution during pendency of an appeal can be made unless the Court is satisfied that substantial loss may result to the applicant and this rule applies to immoveable equally with moveable property.

Gokal Chand v. Sarwal Das (1), penultimate paragraph distinguished.

Application for stay of execution proceedings pending decision by the High Court, Lahore, of the appeal case noted above.

NANAK CHAND for Petitioner.

Nemo for Respondents.

The facts of the case are sufficiently [stated in the order of the Court delivered by—

LESLIE JONES, J.—Dhera Mal, the defendant-petitioner, was in possession of certain land which, he alleged, he had obtained on a lease for twenty years from a widow. On her death the collaterals of her late husband sued for possession and obtained a decree on findings that the property in suit was ancestral, that the plaintiffs had not waived their rights, and that as the deed of lease propounded by the defendant required compulsory registration and had not been registered, the defendant was precluded from proving title.

The decree of the Munsif was maintained on appeal by the District Judge. The defendant afterwards

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preferred a second appeal which was admitted to a hearing, and has now made the present application for stay of execution.

Counsel for the petitioner relies on the penultimate paragraph of *Gokal Chand v. Sanwal Das* (1) and contends that when immoveable property is concerned, execution should invariably be stayed. That passage, however, proceeded on an admission of counsel made in that case and it cannot have been intended to lay down any general rule. The law is contained in Order XLI, rule 5 (1), which provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree. Sub-section (3) goes on to provide that no order for stay of execution shall be made unless the Court making it is satisfied that substantial loss may result to the party applying for a stay of execution unless the order is made. This rule applies to immoveable equally with moveable property and sufficient cause is not shown merely by putting in, as in the present case, an affidavit containing a bare statement that the appellant will suffer substantial loss. He will no doubt lose possession of the property which has been decreed in favour of the plaintiffs, but it cannot be predicated that his appeal will succeed, and it is necessary also to consider the decree-holders. The petition is dismissed.

Application dismissed.