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in existence on the 20th of December, 1897, which was capable of execution on that date. It was only when the decree-holder plaintiff paid the purchase money within the time allowed by the decree that he acquired the right to execute the decree by applying to be put in possession of the property in suit. The decree was drawn up in the usual form under section 214 of the Code of Civil Procedure, and one of the provisions of it was that on failure of the plaintiff to pay the purchase money within the time fixed the suit was to stand dismissed with costs, so that the decree was subject to a condition, the performance or non-performance of which made it one which could be enforced at the instance of the plaintiff or the defendant as the case might be. Such being the case, we are of opinion that the article properly applicable to the first application for the execution of such a decree is article 178, and that the three years provided in that article should be calculated from the date on which the right to apply accrued. Subsequent applications for the execution of the decree will of course be governed by article 179. We think the learned Judge was right, and we dismiss the appeal with costs.

Appeal dismissed.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burditt.

SAKINA (APPLICANT) v. GAURI SAHAI (OPPOSITE PARTY).*

Civil Procedure Code, sections 80, 108—Application to set aside a decree passed ex parte—Irregular service of summons.

Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service.

In this case Gauri Sahai having obtained a decree *ex parte* against Musammat Sakina, the latter applied, under section 108 of the Code of Civil Procedure, to have the *ex parte* decree set aside and the case re-heard. The principal grounds of the judgment-debtor's application were that she had not been served with notice of the suit, and had in fact only come to know of the existence of the decree about two weeks or more after it was

* First Appeal from Order No. 94 of 1901, from an order of Maulvi Muhammad Shafi, Officiating Subordinate Judge of Moradabad, dated the 13th May 1901.

passed, and that although her husband's brother Ashfaq Husain had been a party to the suit and had appeared and defended, Ashfaq Husain was in reality hostile to her and had neither informed her about the suit nor protected her interests therein.

The Court of first instance dismissed the application. The material part of its finding was as follows :—

“The record shows that the 9th April, 1900, was the date fixed for final hearing. There were several defendants, among whom was one Ashfaq Husain who was own brother to Musammat Sakina's husband, and he contested the claim fully. Musammat Sakina's summons was affixed to the door with the allegation that she had gone to Seana on the 12th March, 1900, that is, about one month before the date fixed for hearing which was the 9th April, 1900. Ashfaq Husain fully contested the claim, and the suit was decided on the 25th August, 1900. On the 19th September the present application for setting aside the decree was presented on behalf of Musammat Sakina. I consider it extremely improbable that during the whole period of more than five months that the suit was litigated she had no notice of it. A few of her relations have been called to show that Musammat Sakina had remained in Seana for six or seven months; but being her relations they are partial. These witnesses vaguely stated that Ashfaq Husain was on hostile terms with Musammat Sakina; but no particular ground of hostility has been shown. I believe that it is really Ashfaq Husain who wants to get the case reopened, or at least to cause a delay in execution.”

From this order the applicant appealed to the High Court.

Maulvi *Ghulam Mujiaba*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from an order of the Subordinate Judge of Moradabad refusing an application made by the defendant, the present appellant, to have an *ex parte* decree obtained against her set aside under the provisions of section 108 of the Code of Civil Procedure, on the ground that she was not duly served with the summons. It appears from the evidence of the process-server that he attended at the house of the defendant, and learnt on inquiry that she was not present in the house, but had gone to Seana, in the district of Bulandshahr. Without further attempt to serve the summons on the defendant personally, he affixed the summons to the outer door of the house in which she had resided. This was clearly not proper service within the provisions of the Code of Civil Procedure. Where the serving officer finds a defendant to be away temporarily from home and knows where he is, it is not good

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service if he thereupon does no more than fix the summons to the outer door. He must make further efforts to effect personal service. The Subordinate Judge ought in our opinion, under the circumstances, to have set aside the *ex parte* decree, and allowed the defendant an opportunity of defending the suit. We accordingly must set aside his order, and direct that the decree passed *ex parte* be set aside, so far as the appellant is concerned, and the case re-heard upon the merits as against her. The appellant is entitled to her costs.

Appeal decreed.

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REVISIONAL CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.
AMIR BEGAM AND OTHERS (DEFENDANTS) v. PRAHLAD DAS (PLAINTIFF).
Civil Procedure Code, section 25—Transfer—Retransfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge.

Where a District Judge has once exercised the powers conferred by section 25 of the Code of Civil Procedure, and transferred a case to his own files from the files of the Subordinate Judge, he cannot afterwards re-transfer such case to the Subordinate Judge. *Sukharam v. Gangaram* (1) followed. *Sita Ram v. Nanni Dulaiya* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. R. K. Sorabji, for the applicants.

Pandit Moti Lal Nehru, for the opposite party.

STANLEY, C.J. and BURKITT, J.—This is an application under section 622 of the Code of Civil Procedure praying that an order of the District Judge of Allahabad transferring a suit from his file to the Court of the Subordinate Judge may be set aside, on the ground that the learned Judge had no power to retransfer the suit from his Court to the Court of the Subordinate Judge.

The suit was brought in the Court of the Subordinate Judge, and upon an application made by both parties to the District Judge, it was transferred by him to his own file. Several applications appear to have been made in the suit, one of which, namely, an

* Civil Revision No. 2 of 1902.

(1) (1899) I. L. R., 13 Bom., 654.

(2) (1889) I. L. R., 21 All., 230.