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what they had to expect. They went prepared to fight, and they did fight. They have been punished, and rightly punished too. It is not a case where a man has been in actual exclusive possession of the land, in which case the presumptions of law are all in his favour; there is no such possession in this case. The petition is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

CHHEDI (JUDGMENT-DEBTOR) v. LALU (DECREE-HOLDER).*

Act No. XV of 1877 (Indian Limitation Act), sch. ii, arts. 178, 179—Execution of decree—Limitation—Decree for pre-emption—Time from which limitation begins to run against the decree-holder.

Article 179 of the second schedule to the Indian Limitation Act, 1877, applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution until the decree-holder pays into Court the pre-emptive price. The first application, therefore, for execution of such a decree will be governed, not by article 179, but by article 178, and limitation commences to run against the decree-holder from the time when the pre-emptive price is paid. *Muhammad Saleman Khan v. Muhammad Yar Khan* (1), referred to.

ONE Lahu obtained a decree for pre-emption against Chhedi. The decree was passed on the 20th of December, 1887, and was conditioned on the decree-holder's paying the pre-emptive price on or before the 20th of February, 1898. The decree-holder deposited the money on the 17th of February, 1898, but made no application for execution until the 16th of February, 1901. On that date the decree-holder applied to the Court which passed the decree alleging that he had in fact got possession of the property to which the decree related, but asking that for the sake of greater security formal possession might also be awarded to him. To this application it was objected by the judgment-debtor that it was barred by limitation. The Court of first instance (Munsif of Ghazipur) held the application to be barred and dismissed it. On appeal by the decree-holder the lower appellate

* First Appeal from Order No. 104 of 1901, from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 25th September, 1901.

Court (Officiating District Judge of Ghazipur) overruled the Munsif on the question of limitation and remanded the case under section 562 of the Code of Civil Procedure.

From this order of remand the judgment-debtor appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for the execution of a decree for pre-emption passed on the 20th of December, 1897. The decree provides that the purchase money should be paid within two months from its date, and that on such payment the plaintiff should obtain possession of the property. The purchase money was paid on the 17th of February, 1898, and the present application for execution was presented on the 16th of February, 1901. It was thus made after the lapse of three years from the date of the decree, but within three years from the date on which the money was paid. The Court of first instance on the objection of the judgment-debtor held the application to be barred by limitation, applying to it article 179 of schedule ii of the Indian Limitation Act. On the decree-holder's appeal the lower appellate Court set aside the order of the Court of first instance and remanded the case to that Court under section 562, Code of Civil Procedure. From this order of remand the present appeal has been preferred by the judgment-debtor, who renews his contention that the application for execution is barred by limitation.

It is clear that if the first paragraph of article 179 applies, the application is beyond time. But in our opinion, having regard to the nature of the decree which was passed in the case, that article cannot be held to be applicable. It was held in *Muhammal Sulaiman Khan v. Muhammad Yar Khan* (1) that the first paragraph of the third column of art. 179 must necessarily apply only when there is a decree or order which can at its date be executed. A decree for pre-emption is not capable of execution on the date on which it is passed, unless on that date the plaintiff pre-emptor pays the purchase money which the decree directs to be paid. In this case there was no decree

(1) (1894) I. L. R., 17 All., 39.

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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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March 11.

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.