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apply to this case. The courts below were right in holding the sum claimed to have been borrowed more than three years before the date of the suit, and, therefore, barred by time. It has, however, been contended here that the payments made from time to time are sufficient to save limitation. It must be established that any payment made as payment of the principal appears in the handwriting of the debtor. The writings of the account are certainly not the writing of Kamta Prasad. It is impossible to accept the contention that after the suit was filed and Kamta Prasad put into the witness box, the deposition made and signed by him constitutes evidence of part-payment which would be available to the plaintiff Bank in this case for the purpose of saving limitation, nor again is it made to appear that any of the payments record of which is to be found in the copy of the account filed were payments made on account of interest as such. There is in our opinion no ground on which the plaintiff Bank can succeed in this appeal, which we accordingly dismiss with costs to the respondent.

Appeal dismissed.

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June, 21.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

CHEDI LAL (DECREE-HOLDER) *v.* SAADAT-UN-NISSA BIBI (JUDGEMENT-DEBTOR).*

Civil Procedure Code, 1908, *order XXXIV, rule* 14—*Act No. IV of* 1882 *(Transfer of Property Act), section* 68—*Execution of decree - Decree against heirs of deceased debtor—Execution sought against property once subject to a mortgage which had become time-barred.*

Held that a decree in a suit under section 68 of the Transfer of Property Act, 1882, against the heirs of a deceased mortgagee, as such heirs, for payment of money originally due under a mortgage, which, however, had become unenforceable by lapse of time, could be executed against any property of the deceased in the hands of the heirs, including the property once the subject of the mortgage, and that the bar of order XXXIV, rule 14, of the Code of Civil Procedure did not apply.

Madho Prasad v. *Debi Dial* (1), *Arunachalam Chetti* v. *Ayyavayyan* (2), *Khub Chand* v. *Kalian Das* (3), *Ponnappa Pillai* v. *Pappuvayyangar* (4),

* Second Appeal No. 203 of 1916, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 27th of November, 1915, confirming a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 25th of August, 1915.

(1) Weekly Notes, 1891, p. 163.
(2) (1897) I. L. R., 21 Mad., 476.
(3) (1876) I. L. R., 1 All., 240.
(4) (1881) I. L. R., 4 Mad., 1.

Ganesh Singh v. *Debi Singh* (1), *Madho Prasad Singh* v. *Baij Nath* (2), *Kishan Lal* v. *Umrao Singh* (3) and *Indurpal Singh* v. *Mewa Lal* (4) referred to.

THE facts are fully stated in the judgement. Shortly stated they were as follows:—Chedi Lal appellant was the assignee of mortgagee rights of one Inayat Ahmad. On the 18th of January, 1901, one Zahur Ahmad had executed a simple mortgage-deed in favour of Inayat Ahmad aforesaid whereby shares in two villages, Bahmanpur and Khasmau, were mortgaged. Subsequently the share in mauza Bahmanpur was sold by the mortgagor to satisfy a prior encumbrance. Chedi Lal instituted a suit in 1913 against the heirs of Zahur Ahmad, who had in the meantime died, and sought a simple money decree under section 68 of the Transfer of Property Act, on the ground that he had been deprived of part of the security by reason of the fraud of the mortgagor. In the alternative he prayed for the usual decree for sale of the remaining mortgaged share in mauza Khasmau. The court granted a simple money decree *ex parte* and the decree provided that the plaintiff would be entitled to realize the decretal amount out of the assets of Zahur Ahmad in the possession of the defendants. In execution of this decree the decree-holder sought to attach and sell the mortgaged share in mauza Khasmau. The defendants objected to the sale under order XXXIV, rule 14, of the Code of Civil Procedure. The lower courts allowed the objection. The decree-holder appealed to the High Court.

Pandit *Kailas Nath Katju*, for the appellant:—

The decree appealed from is wrong on three grounds:—(1) order XXXIV, rule 14, does not apply. The decree in question had not been obtained in satisfaction of a claim "arising under the mortgage." As a matter of fact the plaintiff had repudiated the whole mortgage transaction on the ground of fraud and claimed relief apart from the mortgage transaction on a quite independent ground. His cause of action was absolutely distinct from the one under the mortgage. He was not seeking to bring merely the equity of redemption to sale, but the whole property. The very grounds on which he had obtained the simple money decree showed that there was no mortgage left outstanding. The

(1) (1910) I. L. R., 32 All., 377.
(2) Weekly Notes, 1905, p. 152.
(3) (1908) I. L. R., 30 All., 146.
(4) (1914) I. L. R., 36 All., 264.

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plaintiff, by his own action, had abandoned and extinguished it for all purposes. The mischief which the rule embodied in order XXXIV, rule 14, was intended to remedy does not exist in the present case. The contrary view would lead to grave hardship on the mortgagee and multiply needless litigation. The mortgagor would actually profit by his own fraud. He would deprive the mortgagee of one part of the mortgaged property by his fraud, and then be able to save the other under cover of the law. Moreover, the rule was enacted to prevent the sale of the mere equity of redemption, and where it is quite clear that, by reason of express relinquishment on the part of the mortgagee or otherwise, what is sought to be sold is not the bare equity of redemption but the entire property, the rule ceases to apply. (2) The mortgage is no longer a subsisting mortgage. A suit on the mortgage would now be and was as well on the date on which objection was taken by the defendants, barred by time. The principle is the same, whether the mortgage is extinguished, by act of parties, e.g., by novation or by operation of law, e.g., by the statue of Limitations; *Gour, The Law of Transfer in British India, Vol. II*, p. 1577 (4th ed.); *Ganesh Singh* v. *Debi Singh* (1), *Madho Prasad Singh* v. *Baij Nath* (2). The decree expressly directs the sale of the property of Zahur Ahmad in the possession of the defendants. Mauza Khasmau is one of such properties, and the decree should be executed as it stands. The execution court cannot go behind the decree; *Maharaja of Bhartpur* v. *Rani Kanno Dei* (3), *Kashi Pershad Singh* v. *Jamuna Pershad Sahu* (4).

Mr. *Yusuf Hasan*, for the respondent:—

Order XXXIV, rule 14, clearly applies. Section 68 of the Transfer of Property Act indicates cases where a mortgagee can obtain a simple money-decree. It does not authorize the sale of the mortgaged property. For that purpose recourse must be had to section 67 and the usual mortgage suit for sale must be brought. The decree was plainly one in "satisfaction of a claim arising under the mortgage." The claim arose directly out of a mortgage transaction; and it is immaterial that the ground of

(1) (1910) I. L. R., 32 All., 377.
(2) Weekly Notes, 1905, p. 152.
(3) (1900) I. L. R., 23 All., 181.
(4) (1904) I. L. R., 31 Calc., 922.

action was stated to be a fraud of the mortgagor. Suppose the mortgage contains a personal covenant to pay, and the mortgagee sues upon that covenant and obtains a simple-money decree. Though that action would clearly be governed by section 68, yet it is well established that the mortgagee cannot bring the mortgaged property to sale under such a decree. There should in principle be no distinction whether the decree under section 68 is obtained on clause (*a*) or (*b*) or (*c*) of that section. Order XXXIV, rule 14, was enacted partly to preserve to the mortgagors the time for redemption allowed by the statute. If the rule were not, there the mortgagee could easily defeat the provisions of the law by obtaining a simple money-decree and selling the property without allowing the mortgagor any opportunity for redemption. (2) There is nothing in rule 14 to show that the rule can apply, provided the mortgage is a subsisting one. The language of the rule is very wide and should be liberally construed. Otherwise the mortgagee may well get round law by waiting for a sufficiently long time after he has obtained a simple money-decree. Moreover, the mortgage was a subsisting one at the date of the suit. That is the material date. If the mortgagee allowed his mortgage to become barred by time, he has to thank himself. He cited *Kishan Lal* v. *Umrao Singh* (1), *Madho Prasad Singh* v. *Baij Nath* (2), *Narsingh Das* v. *Musammat Munna* (3), *Indarpal Singh* v. *Mewa Lal* (4).

Pandit *Kailas Nath Katju*, replied.

WALSH and SUNDAR LAL, JJ.:—This appeal arises under the following circumstances. On the 18th of January, 1901, one Zahur Ahmad mortgaged for the sum of Rs 500 and interest thereon to Inayat Ahmad a 2 anna 8 pie share in Bahmanpur and an 8 anna share in Khasmau. Mauza Bahmanpur appears to have been previously mortgaged to another person on the 12th of August, 1900, and the mortgagor, on the 21st of September, 1901, sold the said village to satisfy the said prior mortgage. After the said sale, on the 5th of October, 1912, Inayat Ahmad the mortgagee sold his interest in the mortgage in suit to Chedi Lal. On the 9th of August, 1913, Chedi Lal sued the heirs of Zahur

(1) (1908) I. L. R., 30 All., 146.
(2) Weekly Notes, 1905, p. 152.
(3) (1909) 6 A. L. J., 731.
(4) (1914) I. L. R., 36 All., 264.

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Ahmad, who had died in the meanwhile, for the recovery of a sum of Rs. 2,100 on the allegation that by reason of the sale of Bahmanpur on the 21st of September, 1907, to satisfy the previous mortgage of the 12th of August, 1900, the plaintiff had lost a part of the property mortgaged. He alleged that, when Zahur Ahmad had made the mortgage, he had represented that the property was free of all mortgages, etc. (and so it is stated in the deed of mortgage). It had since transpired that there was a previous mortgage on one of the properties to satisfy which the said property had been sold. He therefore sued for the recovery of Rs. 2,100 from the estate of Zahur Ahmad, dating his cause of action as accruing in September, 1907, when Bahmanpur passed away from the mortgagor. He also prayed for an alternative relief to the effect that if the first prayer could not be granted for any reason, the plaintiff might be given a decree for sale of the 8 anna share in mauza Khasmau mortgaged under the deed of mortgage.

The defendant did not enter appearance, and on the 6th of January, 1914, the court was pleased to grant a decree *ex parte* in the terms of the first prayer. It granted a decree for the recovery of the sum of Rs. 2,100, from the estate of Zahur Ahmad. In execution of the said decree the decree-holder seeks to attach and bring to sale the interest of Zahur Ahmad in mauza Khasmau aforesaid. The judgement-debtors, *inter alia*, contend that under rule 14 of order XXXIV of the Code of Civil Procedure the said village is not saleable in execution of this decree. This objection has been allowed by both the courts below, and the decree-holder has preferred this appeal against the order. Mr. *Kailas Nath Katju* on behalf of the appellant has urged three points for the consideration of this Court, viz.

1st*ly*—That the decree under execution being a decree against the estate of Zahur Ahmad, the decree-holder was entitled to realize it by the sale of any property which forms part of his estate.

2*ndly*—That the decree under execution is not "a decree for payment of money in satisfaction of a claim arising under the mortgage" under rule 14 of order XXXIV of the Code, and

3rdly—That in any case the rule is applicable only to the case of a subsisting mortgage. In this case the mortgage has now ceased to be enforceable at law, by reason of the bar of limitation as also by reason of the alternative prayer on the basis of the mortgage not having been granted by the court which passed the decree under execution.

To deal with the first point raised in the argument. The decree in question is one of the nature referred to in section 52 of the Code. Zahur Ahmad had died. His heirs were impleaded in the suit as his legal representatives and, as is usual in such cases, the decree was passed against them in their representative capacity realizable out of the assets of the deceased in their possession. There was no order in the decree creating a charge upon any specific property. It merely pointed out that there was no personal decree against the heirs, but against the estate represented by them. Any item of the assets of the deceased debtor in their hands could be attached in execution, provided that attachment was not forbidden by any rule of law. Thus if the item of assets sought to be attached was, say, the house of an agriculturist or a pension or other property the attachment of which is forbidden by section 60 of the Code of Civil Procedure, such item of property would not be liable to attachment and sale in execution of this decree. Similarly, if it was an occupancy tenancy, the sale of which was prohibited by the Agra Tenancy Act, it would not be liable to attachment under this decree. So also if its sale is prohibited by rule 14 of order XXXIV of the Code, the property could not be sold in execution. The decree is not like a decree for sale in which under the orders embodied in the decree specific property is ordered to be sold. It is a decree in which the attachment or sale can take place only by virtue of orders made for attachment and sale in execution. Whether in respect of a particular property an order for attachment and sale should or should not be made, must depend upon the rules of law relating to execution contained in the Code, or in any other legislative enactment for the time being in force. Rule 14 of order XXXIV is one such enactment, if on a true interpretation of that rule the attachment and sale is prohibited by it. There is therefore no force in this contention.

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The second contention is one which presents considerable difficulty. It has been held that in a suit under section 68 of Act IV of 1882, which this was, the only decree which a court can pass is a decree for money; *Madho Prasad* v. *Debi Dial* (1), *Arunachalam* v. *Ayyavayyan* (2). If a decree so made is "a decree for payment of money on a claim arising under the mortgage" within the meaning of this rule, the result is that where by reason of the wrongful act or default of the mortgagor the mortgagee is deprived of a substantial part of the mortgaged property or where the mortgaged property is partially destroyed or rendered insufficient, and the mortgagor fails within a reasonable time to give another and sufficient security and the mortgagee thereupon sues under this section, he will, under the interpretation placed upon the section by the courts below, be unable to sell so much of the mortgaged property as is still in existence. Thus a mortgagor in possession may fail to pay up the Government revenue and allow a part of the mortgaged property to be sold, or he may, contrary to the terms of the mortgage, fail to obtain a renewal of a lease-hold mortgaged by him. The mortgagee can only obtain a money decree in a suit under this section, in execution of which the remaining mortgaged property will not be liable to attachment and sale. It is, however, not necessary for us to decide this question, as the view we are inclined to take of the third contention set up on behalf of the appellant, is sufficient to dispose of the appeal. The rule now before us for interpretation found legislative sanction in somewhat wider and more comprehensive form in the provisions of section 99 of Act IV of 1882. The practice of mortgagees suing to obtain a money decree on their mortgages was a common one all over India, prior to the passing of the Transfer of Property Act, and in many cases the mortgaged property used to be put up to sale by them with notice of the mortgage and purchased at an under-valuation. The Calcutta and the Bombay High Courts held that a sale in execution of such a decree passed also the rights of the mortgagee; 14 B. L. R., 408, and I. L. R., 4 Bom., 57; while the Allahabad and the Madras High Courts took a contrary view

(1) Weekly Notes, 1891, p. 168.

(2) (1898) I. L. R., 21 Mad., 476.

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Khub Chand v. *Kalian Das* (1) and *Ponnappa Pillai* v. *Pappuvayyangar* (2). Section 99 of Act IV of 1882 was apparently enacted to stop this practice. Rule 14 of order XXXIV which now takes the place of section 99 aforesaid limits the scope of the rule as originally enacted. We have only to consider the rule as now formulated in rule 14 of order XXXIV of the Code. Bearing in mind the object in view in enacting the rule, we think it applies only to the case of a subsisting mortgage, and not to the case of a dead and defunct mortgage, which by reason of the efflux of time, or any other like circumstances has ceased to be enforceable at law. The term "mortgagee" in this rule, we think, was intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would be purchaser of the mortgaged property, who would thus be deterred from purchasing the property at proper valuation. We see no reason why a mortgage which has become inoperative, or time-barred should still be deemed to be mortgage which should bar the sale of the property. In this case the mortgage was made on the 18th of January, 1901. The term for payment fixed by it was two years, and after the 18th of January, 1915, no suit for the recovery of the mortgage money on foot of this mortgage was maintainable in any court in British India. The objection which the courts below had to determine was preferred on the 14th of July, 1915, after the mortgage had become time-barred. In the case of *Ganesh Singh* v. *Debi Singh* (3), the parties to a suit for possession on foot of a usufructuary mortgage, entered into a compromise, by which, in lieu of a decree for possession, a simple money decree was passed in favour of the mortgagee. A Bench of this Court (KNOX and KARAMAT HUSAIN, JJ.), held that rule 14 aforesaid did not bar the sale of the said property in execution of the decree. The usufructuary mortgage in this case was put an end to by consent of parties, which was given effect to in the decree, and it was held that the mortgagor could not go behind it and set up the mortgage as a bar to the sale. If the parties can by consent put an end to the mortgage, there is no reason why the mortgage should not be deemed to have been

(1) (1876) I. L. R., 1 All., 240 (2) (1881) I. L. R., 4 Mad., 1.

(3) (1910) I. L. R., 32 All., 377.

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extinguished by the operation of the Indian Limitation Act. This is not a case where the mortgagee is in possession of the mortgaged property which the mortgagor has still to redeem. It is the mortgagor and his heirs who are or were in possession. The right of the mortgagor or his heirs to redeem no doubt remains unaffected by the act of the mortgagee, but in this case, where mortgage is a simple mortgage, under which they are in possession of the mortgaged property and the mortgage debt has become time-barred, there is no occasion or necessity left for the exercise of a right of redemption. The respondent, however, has relied upon two cases in supporting the decree of the court below. The first is the case of *Madho Prasad Singh* v. *Baij Nath* (1). In this case the mortgagees had sued for a simple money decree, relinquishing their right against the mortgaged property, and obtained a decree for money. In execution of the said decree, the mortgaged property was put up to sale. It was held that the provisions of section 99 of Act IV of 1882 barred the sale of the property. It was urged by the mortgagee in that case that the abandonment of the claim on the mortgage put an end to the mortgage, on foot of which no suit could be maintained. Section 42 of Act XIV of 1882 (corresponding to rule 2 of order II of the present Code) in ordinary cases precludes a plaintiff from suing again for a relief upon the same cause of action which might have been claimed by him in the former suit. Section 99 of Act IV of 1882, and rule 14 of order XXXIV, however, directs that a mortgagee may institute such a suit, notwithstanding anything contained in the said section or rule. The mortgagee was therefore still entitled to maintain the suit on his mortgage under the said provisions of law. At page 153 of the report their Lordships (BANERJI and RICHARDS, JJ.) observed as follows:—"It has been conceded here, and we think it would not have been possible to argue otherwise, that when there is *subsisting mortgage* the mortgaged property cannot be sold at the instance of a mortgagee under a money decree obtained by him." The italics are our own. The observation is in entire accord with the view we are inclined to take, and fully supports it. Their Lordships, however, held in that case, that the mere declaration in the

(1) Weekly Notes, 1905, p. 152.

plaint that the plaintiff has abandoned his rights under the mortgage was not sufficient to extinguish the mortgage: the declaration was without consideration and section 99 of Act IV of 1882, had removed the only other bar to a suit for sale on that mortgage which section 43 of the Code of Civil Procedure had provided. We take it that, so far as limitation was concerned, the mortgage in that case was still one on which a suit for sale or redemption could be maintained. In a later case, *Kishan Lal* v. *Umrao Singh* (1), the question really for determination was whether a sale in contravention of the provisions of section 99 of Act IV of 1882, which was confirmed in due cause, was void in law. A Bench of this Court presided over by AIKMAN and KARAMAT HUSAIN, JJ., held that it was not void in law. In the course of their judgement their Lordships refer to the case of *Madho Prasad Singh* v. *Baij Nath* (2) with approval. The principle upon which the decision of this case is based, is, as we have already shown, in accord with the view we are inclined to take.

We come now to the last case decided by this Court upon the point—*Indarpal Singh* v. *Mewa Lal* (3). There the mortgagees had brought a suit for a simple money-decree, which they obtained in the case. In that decree it was expressly stated that the mortgaged property was not liable to sale in execution of it. The decree not having been paid up, the mortgagees then brought a suit for sale on foot of the mortgage. It was pleaded by the mortgagors that the plaintiffs were not entitled to maintain the suit, as the relinquishment of all claim for sale on the mortgage in the former suit precluded them from suing for sale now, and such relinquishment operated as a release of the mortgage. At page 266 the Hon'ble the Chief Justice Sir HENRY RICHARDS, and Mr. Justice BANERJI, thus disposed of the contention :—" This contention has, in our opinion, been rightly repelled by the court below. The answer to it is furnished by the provisions of order XXXIV, rule 14, of the Code. That rule provides that if a decree is obtained under a mortgage, the property comprised in that mortgage will not be sold in execution

(1) (1908) I. L. R., 30 All., 146. (2) Weekly Notes, 1905, p. 152.

(3) (1914) I. L. R., 36 All., 264.

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of such a decree, unless the mortgagee obtains a decree for sale of the property, but order II, rule 2, shall be no bar to the maintenance of a suit for sale. It cannot be contended that the first suit brought by the plaintiffs for a money decree could not be maintained. It is true that order II, rule 1, provides that all suits should be so framed as to afford ground for decision upon the subjects in dispute and to prevent further litigation concerning them. The penalty for not following the directions contained in that rule is provided by rule 2. Ordinarily, if rule 1 was violated rule 2 would preclude the plaintiff from bringing a second suit, but in the case of the mortgage we have the distinct provision in order XXXIV, rule 14, which permits a suit being brought for sale upon the mortgage in spite of the provisions of order II, rule 2. Therefore it is manifest that the rule last mentioned is no bar to the present suit. It is urged that the bar is afforded by the fact that in the plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. If this statement be regarded as an agreement releasing their rights as mortgagees, that agreement, being without consideration, cannot be enforced. The mere averment in the plaint that the plaintiffs gave up their right under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee rights."

This case is important as explaining the decision of the same Judges in the case of *Madho Prasad Singh* v. *Baij Nath* (1). The bar of limitation is not removed by rule 14 aforesaid, and, as the suit in the case last quoted was filed within time, the decree of the court of first instance was upheld by this Court. As we have already said, in this case the claim on the mortgagee for the recovery of the mortgage money has become time-barred. There is no claim for redemption outstanding and the mortgage is no longer a subsisting mortgage. In our opinion, therefore, rule 14 aforesaid does not apply, and the decree-holder is entitled to bring to sale in execution of this decree the share in mauza Khasmau aforesaid. We decree the appeal, and, setting aside the orders of the court below, direct that the execution case be restored by the court of first instance to the file of pending

(1) Weekly Notes, 1905, p. 152.

execution cases and disposed of according to law. The decree-holder is entitled to his costs both here and in the courts below.

Appeal decreed.

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Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

DULLA AND ANOTHER (PLAINTIFFS) *v.* SHIB LAL (DEFENDANT).*

Civil Procedure Code, 1908, *sections* 47 *and* 52 - *Execution of decree—Parties impleaded as representatives of a deceased debtor—Sale in execution—Objection by representatives to sale—Procedure.*

Persons who are impleaded in a suit as representatives and asset holders of a deceased party are in the same position as regards section 47 of the Code of Civil Procedure, 1908, as persons who are parties in their own right An objection, therefore, raised by such persons to the sale of property in execution of the decree, must be taken under the above-mentioned section and not by way of a separate suit. *Seth Chand Mal* v. *Durga Dei* (1), *Basti Ram* v. *Fattu* (2) and *Punchanun Bundopadhya* v. *Rabia Bibi* (3) referred to.

THE facts of this case were as follows :—

In 1904 a simple money decree was obtained against Dulla and Dhani Ram and their mother on a promissory note executed by their mother and their elder brother, Ram Lal, since deceased, Dulla and Dhani Ram being impleaded as representatives of their deceased brother. Certain property was brought to sale in execution of that decree as the property of Ram Lal. Dulla and Dhani Ram were then minors; but when Dulla came of age he brought a suit against the purchaser to recover the property so sold upon the ground that it was not part of the assets of the judgement-debtor, but was the property of himself and his brother. The first court decreed the claim; but in appeal that decree was reversed and the suit dismissed. The plaintiffs appealed to the High Court.

The Hon'ble Munshi *Narayan Prasad Ashthana* and Munshi *Baleshwari Prasad*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

WALSH, J.—In this case one Ram Lal and his mother executed a promissory note. In 1904 a simple money decree was obtained by the creditor against the mother and against the estate of

* Second Appeal No. 882 of 1915, from a decree of B. C. Forbes, Subordinate Judge of Muttra, dated the 16th of March, 1915, reversing a decree of Ali Muhammad, Munsif of Mahaban, dated the 4th of July, 1913.

(1) (1889) I L. R., 12 All., 313. (2) (1886) I. L. R., 8 All., 146.

(3) (1890) I. L. R., 17 Calc., 711.