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these decisions will show that they are not on all fours with the facts of the present case and do not help us. If we assume (and we think that it may fairly be so assumed) that the present application is one in continuation of the former, even then article 181 of the Limitation Act must apply, and it was necessary for the appellant to come into court within three years of the removal of the bar which prevented his carrying on the execution of his decree. That bar was removed by the decision of the first court on the 26th of April, 1915. We are asked to give the appellant a further extension of time and to calculate the three years from the 19th of April, 1917, the date on which the High Court dismissed the appeal. We cannot see how this can possibly be done. The learned counsel for the appellant admits that on the 27th of April, 1917, his client could legally have applied for execution as he has now applied and that there was nothing to prevent him carrying on the execution from that date onwards. It is, therefore, clear that time began to run against him after the decision of the 26th of April, 1915. We would point out that he is not entitled to much sympathy, for though the High Court had dismissed the appeal on the 19th of April, 1917, he still waited till the 11th of June, 1918, before he came to court. He has been negligent of his rights and the Law does not look with favour on persons or litigants of that description. The appeal, therefore, fails and is dismissed. We direct that each party pay its own costs in this matter in view of the circumstances of this case and the dishonest conduct of the opposite party.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SURAJ NARAIN SINGH (JUDGMENT-DEBTOR) v. JAGBALI SHUKUL

AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code (1908), order XXXIV, rule 14—Mortgage—Suit on mortgage, but only simple money decree given—Execution of decree.

Order XXXIV, rule 14, of the Code of Civil Procedure does not apply when the mortgagee, having already brought a suit upon his mortgage, has

* Second Appeal No. 680 of 1919, from a decree of I. B. Mundla, Additional Judge of Gorakhpur, dated the 28th of February, 1919, confirming a decree of Muhammad Shafi, Subordinate Judge of Gorakhpur, dated the 9th of March, 1918.

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obtained only a simple money decree on the finding that his mortgage was not legally enforceable. On such a decree execution can be had against any property of the judgment-debtor. *Chedi Lal v. Saada'-un-nisa Bibi* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Iswar Saran* and Munshi *Harnandan Prasad*, for the appellant.

Babu *Piari Lal Banerji* and Pandit *Narbadeshwar Prasad Upadhya*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—The circumstances which have given rise to this appeal are as follows :—On the 12th of May, 1908, a mortgage was executed by Chatar Singh in favour of Kamla Kant and a suit was brought to recover the amount due on this mortgage deed by the mortgagee. This suit was contested by the minor son of the mortgagor and a subsequent transferee, Nageshar Prasad. It appears that the court held that this mortgage was not for family necessity and was not binding on the family at all, and ultimately only a simple money decree was passed against the mortgagor. The mortgagee has put this decree in execution and attached property, *i.e.*, the rights and interests of the mortgagor in the joint property which had originally been mortgaged. An objection was raised that, inasmuch as this very property had been mortgaged under the mortgage deed, the mortgagee was not entitled to sell this property in execution of the simple money decree unless and until a separate suit was brought under the provisions of order XXXIV, rule 14. The court below has not accepted this contention, hence this appeal.

In our opinion the provisions of order XXXIV, rule 14, can not apply to the facts of this case, because the mortgagee, seeing the force of the defendant's contention that the mortgage was not enforceable, had to abandon his claim and rest content with only a simple money decree. The effect of that decision was that the mortgage was held to be unenforceable and the mortgagee only obtained a simple money decree against the mortgagor. In our opinion there is no longer any subsisting mortgage, and it is not open to the mortgagee to bring a separate suit for

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the enforcement of such a mortgage, as provided for in order XXXIV, rule 14. He is clearly entitled to attach the interest of the mortgagor and put it up for sale. This view was taken in the case of *Chedi Lal v. Saadat-un-nissa Bibi* (1), in which it was held that the term "mortgagee" in rule 14 of order XXXIV of the Code of Civil Procedure 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. No such subsisting mortgage exists in the present case. We are satisfied that the view taken by the lower court is correct and we accordingly dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

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SURYA DAT (DECREE-HOLDER) v. JAMNA DAT (JUDGMENT-DEBTOR).*
Civil Procedure Code (1908), section 144—Procedure—Partition—Possession obtained under colour of decree but not in execution—Decree reversed—Application by defendant for restitution of possession.

The plaintiff in a suit for partition of a house obtained a decree and under colour of that decree, although not by a proceeding in execution thereof, took possession of part of the house. The decree was reversed on appeal, the finding being that the plaintiff had no interest at all in the house.

Held that the defendant was entitled to recover possession of that portion of the house which the plaintiff had taken possession of by application under section 144 of the Code of Civil Procedure. *Sheodihal Sabu v. Bhawani* (2) followed.

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

Babu Durga Charan Banerji, Babu Sarat Chandra Chaudhri and Munshi Sarkar Bahadur Jauhari, for the appellant.

Munshi Panna Lal, for the respondent.

TUDBALL and SULAIMAN, JJ. :—Briefly put, the facts of this case are as follows:—Jamma Dat, respondent, judgment-debtor, brought a suit for partition of certain property which included the house now in dispute. His allegation was that he and Bala Dat were jointly in possession of the property; that it was joint family property, and that he, Jamma Dat, was entitled to a half

* First Appeal No. 164 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 8th of March, 1919.

(1) (1916) I. L. R., 39 All., All., 86. (2) (1907) I. L. R., 29 All., 848.