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The learned Advocate has also urged that the sentences are excessive. But the cheating was of a character which requires severe treatment. The passing off of the Munda girls as Rajput brides must mean trouble in several families and was as despicable as it was difficult at the time to detect. We must, therefore, discharge the rules and dismiss these applications in revision.

As soon as the above was pronounced from the Bench at the end of the arguments, it was brought to our notice that out of the two cases dealt with Criminal Revision no. 650 of 1935 alone was on the board for to-day, and that the learned Advocate for the petitioners in that case also appears for the petitioners in Criminal Revision no. 651 of 1935, which was not on the board only because the papers were not yet complete. We have it, however, from the learned Advocate that he may be taken to have argued both the revisional applications and accordingly the orders above must be taken to have disposed of both the applications.

Rule discharged.

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November, 29.
December, 3.
January, 16.

APPELLATE CIVIL.

Before Macpherson and Dhavle, JJ.

HARIHAR PRASAD SINGH

v.

BHUBNESHWARI PRASAD SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 2—payment of part of decretal money out of court by some of the judgment-debtors—application by others pleading satisfaction under section 47, if maintainable.

* Appeal from Appellate Order no. 257 of 1935, from an order of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 19th August, 1935, reversing an order of Mr. Muhammad Shamsuddin, Munsif of Monghyr, dated the 21st January, 1935.

Where two out of four sets of judgment-debtors set up the plea that the decree under execution had been satisfied out of court and the objection was overruled and properties of one set of judgment-debtors was sold. An application under Order XXI, rule 90, was filed by the judgment-debtors whose property was sold on the ground that part of the decree had been satisfied by the other judgment-debtors and the application was rejected on the ground that the matter was beyond the scope of an enquiry under Order XXI, rule 90, of the Code. The judgment-debtors then applied under section 47 of the Code and contended that inasmuch as the payment had been made by another set of judgment-debtors Order XXI, rule 2, of the Code and Article 174 of the Limitation Act had no application and that the case was governed by Article 181 of the Limitation Act. The Munsif rejected the application, but the Subordinate Judge on appeal allowed the objection.

Held, *(i)* that there is nothing in Order XXI, rule 2, which precludes application by judgment-debtors other than those who have actually made the payments.

(ii) The words of clause 3, rule 2, are too plain to admit of any other construction than that the Court executing the decree is barred *in limine* from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the executing court.

(iii) It is inconceivable that the legislature could have intended, where there are several judgment-debtors in a case, to place the judgment-debtor who does not pay in a stronger position to assail the execution proceedings than another who does pay.

(Obiter) : A judgment-debtor who does not pay may avail himself of section 18 of the Limitation Act in getting a payment by another recorded by showing that the decree-holder had by means of fraud kept him from the knowledge of his right to do so.

Appeal by the decree-holders.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

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Manuk (with him *A. B. Mukherji* and *D. C. Varma*), for the appellants.

Mahabir Prasad and *Rameshwar Misser*, for the respondents.

DHAVLE, J.—This appeal arises out of an application under section 47 of the Civil Procedure Code to set aside an execution sale. The decree under execution was obtained by the appellants in May, 1932, against four sets of defendants out of whom we are concerned with two only, namely, respondents, 1st party and respondents, 2nd party. It was a joint and several decree for Rs. 3,430 and odd against the four sets of defendants who each had a 4-annas interest in the properties to which the decree related. In August, 1932, the decree-holders applied for execution against defendants, 1st party and defendants, 2nd party, who resisted on the ground among others that the decree had already been satisfied. Their objections were overruled and 6 items of property, 3 belonging to defendants, 1st party and 3 to defendants, 2nd party, were attached and advertised for sale. The sale was actually held on the 24th May, 1933, and the decree-holders bought in the 3 items of property belonging to defendants, 1st party for a price totalling the entire amount for which the execution was levied, with the result that the other 3 items of property were not proceeded against. On the 22nd June, 1933, defendants, 1st party, made an application under Order XXI, Rule 90, to have the sale set aside. In the course of this proceeding they stated on the 8th December, 1933, that they had come to know of a sale deed executed by defendants, 2nd party in favour of the decree-holders by which the decree-holders' dues were satisfied. No details were apparently given, but on the 17th March, 1934, they applied again saying that they had come to know on the 7th December, 1933, that half the decree had been satisfied by the sale deed of defendants, 2nd party in favour of the decree-holders and that, therefore, the

sale should be set aside on the ground of the decree-holders' fraud. The date of the sale deed was not given, and the Munsif held that the allegations were irrelevant to the proceeding before him, but that it was open to the objectors to file an application under section 47 or Order XXI, Rule 2, giving the date of satisfaction. On the 19th of March, the application under Order XXI, Rule 90, was dismissed after trial. There was an appeal which was summarily dismissed by the District Judge in April, 1934, and then there was an application in civil revision to this Court, which was disposed of by Wort, J. upholding the orders of the lower Courts. The learned Judge dismissed the application on the ground that the satisfaction alleged by the objectors was not a matter under Order XXI, Rule 90, and that they, the objectors, had sat down under the order of the 17th March, leaving it open to them to apply under section 47; and he added—

> "The petitioners had certain rights or they must be presumed to have certain rights apart from the question of limitation which I do not propose to deal (with), and I assume that those rights exist at the present moment. This Court does not revise the orders of the subordinate courts in matters in which the parties have remedies within their own hands as they had in this case."

About two weeks after this, on the 24th September, 1934, defendants, 1st party, applied to the lower Court under section 47 for setting the sale aside on the ground that the decree had already been satisfied to the extent of a half under a sale deed executed on the 28th March, 1933, by defendants, 2nd party in favour of the decree-holders. The sale deed in fact says nothing about any satisfaction of the decree, and the learned Munsif dismissed the application, holding as a matter of fact that half the decretal dues had not been satisfied and as a matter of law that the application, though headed as an application under section 47, really fell under Order XXI, Rule 2, and was barred by limitation. On appeal the learned Subordinate Judge of the 2nd Court, Monghyr, differed from the Munsif on both points and allowed

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the application. The decree-holders have accordingly appealed; respondents, 1st party are judgment-debtors, 1st party, being the objectors, and respondents, 2nd party are defendants, 2nd party who executed the kebala in favour of the decree-holders in the name of their nominee, one Babu Hit Narayan Singh.

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It has been contended on behalf of the appellants that the lower appellate Court has erred both on the facts and as regards the law. The learned Subordinate Judge finds that half the decretal amount was satisfied by the kebala on the ground of a statement made by Brahmadeo Narayan Singh, one of the decree-holders, on the 28th February, 1934, in a proceeding under section 145, Criminal Procedure Code that his entire demand against respondents, 2nd party was satisfied. That deposition was not made in the course of the execution proceedings, nor was it made in proceedings to which defendants, 1st party were parties. The deposition was admitted in evidence without any objection, but if it is read as an admission that half the decretal dues were satisfied by the kebala, it is opposed to the evidence of Brahmadeo Narayan Singh himself, the 3rd witness for the defendants, 1st party in these proceedings, who says that what he had deposed on that occasion was that nothing was due to him on account of certain mortgages. Ram Prakash, son of the leading member of defendants, 2nd party, was the first witness for the objectors and claimed to have paid up half the decretal amount by executing the kebala, but he had to admit that his share (the share of this party)

> " was 4 annas in the decretal dues ",

and that it is not entered in the kebala that half the decretal dues were satisfied. His cross-examination concludes with the statement that the decree-holders had told him that they would realise the entire decree from Bhubaneshwar (the leading member of defendants, 1st party). None of this evidence which was

considered by the learned Munsif along with Brahmadeo Narayan's deposition of the 28th February, 1934, was referred to by the learned Subordinate Judge. In support of his reading of a somewhat ambiguous deposition as an admission that the consideration for the sale included half the decretal amount, the learned Subordinate Judge referred to the fact that the decree-holders had actually put up to sale only those items of property that belonged to defendants, 1st party. It was pointed out to him that as these items of property fetched the amount under execution, it was unnecessary for the decree-holders to proceed against the properties belonging to defendants, 2nd party; but the learned Subordinate Judge said that he was not much impressed with this contention, and that the decree-holders could easily have put up to sale some of these properties, had they been so minded, but that they had deliberately abstained from doing so and that they had not come to court with clean hands because they had failed to certify to the court the adjustment entered into with defendants, 2nd party. A finding of fact by the lower appellate court that half the decretal amount " was satisfied " as alleged by the objectors would be binding upon us in second appeal, provided it was arrived at on a fair consideration of the evidence in the case, even if the Subordinate Judge erred in his reasoning and argued in a circle as he has clearly done. But the finding in the present case practically ignores all the evidence in the case, particularly those circumstances specifically mentioned by the trial Court which led that court, on a construction of the deposition, to the opposite conclusion. It is, however, unnecessary to say anything further about the finding of fact of the lower appellate court, because it is quite clear that the order of the lower court cannot be supported on the law.

The learned Subordinate Judge held that the application of respondents, 1st party was not governed

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by the 90 days limitation laid down in article 174 of the Limitation Act because it came not under Order XXI, Rule 2, but under section 47 of the Civil Procedure Code. The case of respondents, 1st party was that the respondents, 2nd party had paid half the decretal amount to the decree-holders, and clause 3 of Order XXI, Rule 2, which deals with " Payment out of Court to decree-holder " provides that

> " a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree ".

The learned Subordinate Judge accepted the contention of respondents, 1st party, that this provision does not apply to a payment made by one judgment-debtor but set up by another judgment-debtor in order to have a sale of his property set aside. The clause does not speak of any judgment-debtors or decree-holders at all; but the learned Subordinate Judge held that clause 2 of the Rule which enables " the " judgment-debtor to apply to the Court and have a payment made out of Court recorded as certified applies only to the particular judgment-debtor who makes such payment. This conclusion was rested on the use of the definite article before the word " judgment-debtor " in the clause. The reasoning is manifestly unsound, and the definite article is, as a matter of grammar easily intelligible as distinguishing not one judgment-debtor from another but one party to the suit from the other—the judgment-debtor from " the " decree-holder already dealt with in clause 1 of the rule. The appellants have been able to find a decision, *Mehbunissa Begum* v. *Mehmedunnisa Begum*(1), in which some judgment-debtors set up payments made by other judgment-debtors which were not certified, and it was held that the words of clause 3 " are too plain to admit of any other construction than that the Court executing the decree is barred *in limine* from considering any allegation that a payment not certified has been made. The party

(1) (1924) I. L. R. 49 Bom. 548, F. B.

alleging such a payment may have a remedy, but not before the Court executing the decree". This was a Full Bench decision overruling the view taken in *Hansa Godhaji* v. *Bhawa Jogaji*(1), in accordance with the views of Heaton, J. in *Trimbak Ramkrishna* v. *Hari Laxman*(2) that a Court executing the decree could deal with the question whether uncertified payments had, as a matter of fact, been made or not. It is true that in *Mehbunissa's* case(3) no contention was raised that clauses 2 and 3 of Order XXI, Rule 2, refer only to payments made by the particular judgment-debtor who applies to have the sale set aside. But what possible reason can there be for the legislature to enact that the judgment-debtor who pays himself must apply within 90 days to have the payment recorded or (failing to do so) remain without any remedy in the Court executing the decree, while leaving it open to other judgment-debtors, who have an even smaller claim on the decree-holder and the executing Court alike, to assail the execution within the 3 years allowed under Article 181 of the Limitation Act for applications for which no period of limitation is provided elsewhere in the schedule or by section 48 of the Civil Procedure Code? As Rankin, C.J. observed in the Full Bench decision in *Lakshmanchandra Naskar* v. *Ramdas Mandal*(4), the legislature could not in enacting Order XXI, Rule 2, have been ignorant that decrees will be executed despite unrecorded adjustments and that such cases would commonly, if not necessarily, raise a question of fraud; and the Rule was introduced—as Dawson Miller, C.J. said in *Sukhdei Kumri* v. *Mahamaya Prasad*(5), with the very object of avoiding in execution proceedings disputes between the parties, and frequently long enquiries, as to what sums had or had not been paid out of Court in satisfaction of the

(1) (1915) I. L. R. 40 Bom. 333.
(2) (1910) I. L. R. 34 Bom. 575.
(3) (1924) I. L. R. 49 Bom. 548, F. B.
(4) (1929) I. L. R. 57 Cal. 403, F. B.
(5) (1918) 48 Ind. Cas. 765.

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decree. It was pointed out in *Imamuddin Khan* v. *Bindubasinin Prasad*(1) following *Biroo Gorain* v. *Musammat Jaimurat Koer*(2), that the judgment-debtor who pays out of Court is not at liberty to plead in the executing Court that the decree-holder has been guilty of fraud in failing to have the payment recorded, because clause (2) of the Rule enables him to protect himself by having the payment recorded. An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to override the 90 days limitation of Article 174 for making an application under Order XXI, Rule 2, and to secure an investigation of the same matter by invoking section 47—see *Mukund Lal De* v. *Bansidhar Marwari*(3). The decree-holder may be guilty of fraud, but if the judgment-debtor does not avail himself of the procedure laid down in clause 2 of the Rule, he must be content to let the sale of his properties in execution stand, and as Rankin, C.J. said in the case already referred to, seek his remedy in damages or otherwise without challenging the sale. The view taken in some old decisions that uncertified payments ought to be inquired into under section 47 because the Court will not tolerate fraud is not now, so far as I am aware, accepted in any High Court; and Mr. Mahabir Prasad's contention that the Court need not look helplessly on the decree-holder's fraud but may deal with it in the exercise of its inherent jurisdiction is opposed to the scheme of the Civil Procedure Code as found in section 47 and Order XXI, Rule 2. This being the position when there is only one judgment-debtor, it is inconceivable that the legislature could have intended, where there are several judgment-debtors in a case, to place the judgment-debtor who does not pay in a stronger position to assail the execution proceedings than

(1) (1919) 5 Pat. L. J. 70.
(2) (1911) 16 Cal. W. N. 923.
(3) (1923) I. L. R. 50 Cal. 468.

another who does pay. It is true that the judgment-debtor who does not pay may conceivably, unlike one who does pay, be able to avail himself of section 18 of the Limitation Act in getting a payment by another recorded by showing that the decree-holder had by means of fraud kept him from the knowledge of his right to do so; but this is merely because the judgment-debtor who does pay cannot plead ignorance. No such case, however, was made out in the application of respondents, 1st party, which speaks of fraud in paragraph 12 alone, the fraud consisting merely in not giving credit for the moiety of the decretal amount realised from respondents, 2nd party and realising the entire decretal amount by the execution sale. Bindeshwari Prasad Singh, the only member out of defendants, 1st party, who went into the witness-box, speaks of coming to know of the kebala of respondents, 2nd party on the 7th December, 1933, but the kebala makes no mention of the decree under execution; and while his statement in cross-examination that his uncle, the leading member of respondents, 2nd party, told him that he had satisfied half the decretal dues is not supported by any evidence nor accepted by the lower Courts, he proceeds to say that the uncle told him so

"one day or one month or one year after the kebala",

which he immediately changes to

"I came to know from the deposition of Brahmadeo Narayan".

That deposition was dated the 28th February, 1934, and could not have been the basis of his application of the 8th December, 1933. Quite apart from the fact, therefore, that as shown by the learned Munsif on a consideration of the entire evidence, the deposition does not establish the payment of a moiety of the decretal amount by respondents, 2nd party, it is clear that the respondents, 1st party failed to show that their application was made (as under clause 2 of Order XXI, Rule 2) within 90 days of their coming

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to know of what they called the decree-holders' fraud in proceeding with the execution for the entire decretal dues. The contention that a party may be barred under Order XXI, Rule 2, and yet may move for the same relief under section 47 has been repeatedly held to be unsound; nor does the fact that the respondents, 1st party erroneously, as it was found, pleaded the kebala in the proceedings under Order XXI, Rule 90—on which much stress was laid by Mr. Mahabir Prasad—entitle them to any relief in this proceeding in view of the circumstance that, as I have already shown, they made no real effort to establish that they moved the Court within 90 days of their knowledge of the alleged payment by respondents. 2nd party. Mr. Mahabir Prasad has endeavoured to read Wort, J.'s observations (which I have already quoted) as amounting to a decision that respondents, 1st party were entitled to proceed under section 47 in respect of the alleged payment. But the learned Judge expressly declined to deal with the question of limitation, and it is under clause 2 of Order XXI, Rule 2, read with Article 174, that the question of limitation arises in the case. The learned Subordinate Judge was, in my opinion, entirely mistaken in holding that these provisions of the law had no application to the case, on the ground that the payment set up is not a payment made by respondents, 1st party themselves.

I would, therefore, allow the appeal, reverse the order of the lower appellate Court, and dismiss the application made by respondents, 1st party on the 24th September, 1934, with costs in all Courts.

MACPHERSON, J.—I agree.

Appeal allowed.