1937.

PRATAP NARAIN JHA v. RAMASRAY PERSHAD CHAUDHURY.

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.

claimed by the landlord. The learned Additional District Judge was misled in supposing that the onus lay upon the defendants to prove that the amounts witten in the papers produced did not represent the proper amount of crop. He was also misled in supposing that there was lack of proof in the technical sense, to prevent him from accepting the apparently trustworthy evidence put forward by the defendants in support of their case that the outturn was very much less than that claimed. But in the state of the record which we have noted, it would be useless to remand this case for rehearing in appeal, since no decree can be claimed except so far as liability has been admitted by the defendants.

The decree of the lower appellate court must accordingly be set aside and the decree of the Munsif will be restored. The appellants are entitled to their costs in this Court and in the court of the Additional District Judge.

J. K.

Appeal allowed.

APPELLATE CIVIL.

1937.

December, 21, 22.

Before Dhavle and Varma, JJ.

SHAIKH DARSAN ALI

v.

SURAJ MAL.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 47 *and Order XXI, rule* 2—*instalment decree—court whether entitled to enquire into payments made more than* 90 *days before objection—Limitation Act*, 1908 (*Act IX of* 1908), *article* 174.

*Appeal from Appellate Order no. 205 of 1937, from an order of A. Mukharji, Esq., I.C.S., District Judge of Purnea, dated the 9th February, 1937, affirming an order of Maulavi S. M. Hasan, Munsif, Second Court, Kishanganj, dated the 21st July, 1936.

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An instalment decree provided that the decree-holder was entitled to execute the decree in case certain payments were not made by the judgment-debtor and in execution it was contended that payments had been made according to the terms of the decree, and so the decree-holder had no right to execute.

Held that the case was governed by Order XXI, rule 2(3), of the Code and the alleged payments having been made more than 90 days before the objection was filed in court it could not be recognised under Article 174 of the Limitation Act.

Radha Kant Lal v. *Musammat Parbati Kuar*(1) and *Harihar Prasad Singh* v. *Bhubneshwari Prasad Singh*(2), followed.

Wali Shah v. *Bihari Lal*(3) and *Ligraj Patjosi* v. *Mahadeb Rani*(4), explained.

Appeal by the judgment-debtor.

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

M. Azizullah, for the appellant.

Syed Hasan, for the respondent.

DHAVLE, J.—This is an appeal by the judgment-debtor who resisted the decree-holders' application for execution on the ground that he had paid the decree-holder Rs. 325 out of court.

The lower courts held that the bulk of the payments were alleged to have been made at a time which made it impossible to recognize them in execution proceedings under sub-rule (*3*), rule 2 of Order XXI, of the Code of Civil Procedure and that none of the payments had been proved in fact.

The learned Advocate for the appellant has endeavoured to argue that the matter in dispute between the parties falls not within Order XXI,

(1) (1921) 6 Pat. L. J. 337.
(2) (1936) I. L. R. 15 Pat. 422.
(3) (1926) A. I. R. (Lah.) 641.
(4) (1912) 30 Cal. L. J. 118.

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rule 2, but within section 47 of the Code of Civil Procedure so that there could be no question of the limitation of ninety days applied by the lower courts under article 174. This contention is rested on the ground that the decree was an instalment decree, that the judgment-debtor was to pay certain sums by certain dates and that the decree-holder was to be entitled to execute only in the event of default in respect of any instalment. It is argued that before the decree-holder could be permitted to execute it was necessary for him to show that there had been a default in respect of some instalment and that, therefore, this was not a case where it was necessary for the judgment-debtor to show that he had paid. The words of sub-rule (*3*) of Order XXI, rule 2, are, however, far too clear to permit us to accept this contention, whether the onus of proving payments lay on the judgment-debtor or of proving default lay on the decree-holder (a point to which reference will be made again). What the sub-rule provides is that

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

On this wording the attempt to take the case out of Order XXI, rule 2, and bring it within section 47 cannot be supported: see *Radha Kant Lal* v. *Musammat Parbati Kuar*(1) and *Harihar Prasad Singh* v. *Bhubneshwari Prasad Singh*(2). The learned Advocate has endeavoured to find support for his contention in *Wali Shah* v. *Bihari Lal*(3) in which Dalip Singh, J., purporting to follow *Ligraj Patjosi* v. *Mahadeb Rani*(4), seems to have held that it was permissible for a judgment-debtor to prove that certain conditions on which a decree depended had been complied with irrespective of Order XXI, rule 2, sub-rule (*3*). The report of *Wali*

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(2) (1936) I. L. R. 15 Pat. 422.
(3) (1926) A. I. R. (Lah.) 641.
(4) (1912) 30 Cal. L. J. 118.

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Shah's case(1) is, however, obscure and differs from the report of the same case in *Wali Shah* v. *Bihari Lal*(2). The obscurity is enhanced by the fact that the learned Judge considered *Ligraj Patjosi's* case(3) " to be directly in point ". In this last case, however, it appears that the decree provided that the defendant was to carry out certain terms and to notify compliance to the court, that he did so, and that when the decree-holder objected and the court of first appeal directed an investigation under Order XXI, rule 2, Mookerjee, J., with whom Beachcroft, J., agreed, held that the judgment-debtor's " application is clearly not one under sub-rule (2) of rule 2 of Order XXI and no action ought to have been taken thereon." This was the decision in *Ligraj's* case(3), and it does not seem to have any bearing on the facts in *Wali Shah's* case(1) so far as one can ascertain them from the report. It may be that the learned Lahore Judge had in mind the following observations in *Ligraj's* case(3) :—

" The proper course for the plaintiff is to apply for execution of the decree if his case is that the terms of the decree have not been faithfully carried out by the defendant. If such application is made, it will be open to the defendant to show that he has as a matter of fact carried out the terms of the decree. The Court will then be in a position to consider whether the terms of the decree have been carried out."

There is no reference in these observations to Order XXI, rule 2, or to limitation under article 174. The point about limitation under this article, it is true, was raised on behalf of the decree-holder in *Ligraj's* case(3), but it was overruled on the ground that " the proceedings have been throughout misconceived ". It seems to me, therefore, that in that

(1) (1926) A. I. R. (Lah.) 641.
(2) (1926) 93 Ind. Cas. 369.
(3) (1912) 30 Cal. L. J. 118.

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case there was no pronouncement that when the decree-holder would apply for execution, the defendant's objection would not be barred under article 174 if Order XXI, rule 2, were applicable in the circumstances. The contention of the learned Advocate that the onus was on the decree-holder to make out his right to proceed in execution by establishing that the defendant was in default is plainly opposed to the ruling in *Radha Kant Lal's* case(1) (already referred to) that when no payment or adjustment of a decree has been certified under Order XXI, rule 2, and where the verified application for execution does not state under Order XXI, rule 11(*e*), that any payments have been made, but under Order XXI, rule 11(*g*), the decree-holder applies for execution of the entire amount awarded by the decree, the executing court has to assume that there has been no adjustment of the decree either in whole or in part, and cannot, after the lapse of the period fixed by article 174 of the Limitation Act, permit the judgment-debtor to plead any adjustment, or, it may be added, payment, under Order XXI, rule 2(*2*). The decree in the case before us required the judgment-debtor to pay Rs. 1,100 in certain instalments and in the event of his default empowered the decree-holder to proceed in execution. The alleged payments were therefore payments of "money payable under" the decree within the meaning of Order XXI, rule 2. *Wali Shah's*(2) was not a case of payments at all. It may sometimes be difficult to distinguish between conditions precedent to the decree-holder taking out execution and adjustments of a decree or payments towards satisfaction of a decree. The decision in *Wali Shah's* case(2) apparently turned on such a distinction. There is no room for such a distinction in the present case, nor can the judgment-debtor be permitted to evade Order XXI, rule 2(*3*), by giving to these payments towards satisfaction of the decree the

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(2) (1926) A. I. R. (Lah.) 641.

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name of conditions precedent to the decree-holder taking out execution. No payment towards the satisfaction of a decree for money can be recognized by the executing court unless it is certified or recorded under the rule, and no decree-holder is entitled to realise any money by execution if he has been already paid out of court, entirely irrespective of whether or not the decree provides for instalments with execution in default. Where the decree makes such provision and the decree-holder applies for execution, it must be taken that his case is that default has been made and the judgment-debtor will have to meet it by proving payment, a positive fact within his knowledge. As this will have to be done in the executing court, the bar of Order XXI, rule 2(*3*), will come into play, and it is impossible to evade it by invoking section 47, as I showed in some detail in *Harihar Prasad Singh's* case(1) (already referred to)—*see* also *Imamuddin Khan* v. *Bindubasini Prasad*(2). So far, therefore, as the bulk of the payments—the first four payments in alleged satisfaction of the first two instalments—are concerned, it must be held that it is not open to the executing court to recognize them in any way. As regards the two later payments, there are concurrent findings of fact against the appellant. The learned Advocate for the appellant has endeavoured to show that these findings are contrary to law, because the lower court declined to compare the signature on the receipt put forward by the appellant with an admitted signature of his. It is difficult to see any error of law in the lower courts' expressing their inability as laymen to arrive at a conclusion merely on a comparison of handwriting. It was for the appellant to produce evidence to the satisfaction of the courts of fact, and this he clearly failed to do. I may add that we have looked at those signatures in this Court and that in our opinion it would have been surprising if any court with any

(1) (1936) I. L. R. 15 Pat. 422.
(2) (1919) 5 Pat. L. J. 70.

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sense of responsibility could on a comparison of those signatures have come to the conclusion that they were the work of one and the same man.

I would dismiss the appeal with costs.

DHAVLE, J.

VARMA, J.—I agree

J. K.

Appeal dismissed.

APPELLATE CIVIL.

1938.

December, 16
January, 25.

Before Courtney Terrell, C. J. and Khaja Mohamad Noor, J.

BAMDEB DAS

v.

RAJA BRAJASUNDER DEB.*

Hindu Law—marriage—gandharva form—minor, whether competent to contract—custom of delivering immature children to be made concubines, whether can be upheld in a court of law!

A minor girl is incompetent to contract a marriage in *gandharva* form which means a union by mutual exchange of garlands, as she is incapable of giving the necessary consent which is essential in such a union.

A custom of delivering immature children to be made concubines is a diabolical one and invalid and cannot be upheld in a court of law.

Appeal by the defendants.

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

P. Mahanti (with him *B. N. Das*, *B. K. Ray*, *B. Mohapatra* and *S. N. Ray*), for the appellants.

G. Jagati and *N. N. Mitra*, for the respondents.

* Appeal from Original Decree no. 2 of 1933, from a decision of Babu Akhoury Nityanand Singh, Subordinate Judge of Cuttack, dated the 28th December, 1932.