

Paul Vs. Cheeran Narayanan

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Court : Kerala

Decided On : Mar-08-1968

Reported in : AIR1969Ker232

Judge : T.S. Krishnamoorthy Iyer, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 32(1)

Appeal No. : S.A. No. 1298 of 1964

Appellant : Paul

Respondent : Cheeran Narayanan

Advocate for Def. : V. Parameswara Menon, Adv.

Advocate for Pet/Ap. : S. Narayanan Potti and; N.K. Varkey, Adv.

Disposition : Appeal allowed

Judgement :

T.S. Krishnamoorthy Iyer, J.

1. The plaintiff-decree-holder is the appellant, and the matter arises in execution of the decree. The judgment-debtor is admittedly a kudiki-dappukaran in the plaint property belonging to the decree-holder. The decree is for permanent injunction restraining the defendant from trespassing into the decree schedule property

beyond 5 koles of his kudikidappu. According to the decree-holder, the defendant in violation of the decree trespassed beyond the aforesaid 5 koles and he, therefore, filed S. A. 538 of 1963 under Order 21, Rule 32, Civil P. C. to attach the judgment-debtor's property and thereby compel him to remove the fence which he had constructed in violation of the decree. The execution Court allowed the application and directed the defendant to remove the fence. The learned Judge in appeal took a different view on the ground that since the decree is one for prohibitory injunction there is no scope for applicability of Order 21, Rule 32, Civil P. C.

2. The decree passed in the suit is to the following effect: (Original in Malaya-lam script omitted).

The prayer in the execution application is to attach the judgment-debtor's property on the ground that the judgment-debtor in violation of the decree had cut and removed the branches from the trees standing on the decree schedule property beyond the 5 koles and constructed new fence in the place of the old fence in existence on the north, west and south of the property. The appellate Judge took the view relying on the decision in *Joseph v. Makkarlu*, AIR 1960 Ker 127 that Order 21, Rule 32 (5) is not applicable to a decree allowing preventive injunction. This point was not disputed by the learned counsel for the appellant. But he contended that the application that he filed in the lower Court is under Order 21, Rule 32 (1) of the Civil P. C. which will apply to decrees granting preventive injunction as well as mandatory injunction. In *Chinnabba v. Chengaloroya*, AIR 1950 Mad 237 Panchapakesa Ayyar, J. said that Order 21, Rule 32 (1) is applicable to a case of prohibitory injunction also. The learned Judge pointed out:

'The decree-holder in the case of a prohibitory injunction has not only got a right of suit in such a case, in order to get a mandatory injunction for the removal of the obstructions etc., but has also the easier remedy under Order 21, Rule 32 (1). He can ask for the detention of the judgment-debtor in the civil prison, or the attachment of his property or both, and a Court can order either or both of these things to be done in case the judgment-debtor will not remove the obstruction on the path preventing the decree-holder from using the path, within a time prescribed

by it. Such an order of Court will be normally quite effective and will enable the decree-holder to enjoy the fruits of his decree.'

In *Manjappa Shetty v. Manjakke Shedthi*, AIR 1961 Mys 268, Somnath Iyer, J. observed:

'It is, in my opinion, indisputable that a person disobeys an injunction not only if he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. There is as much disobedience in the one case as in the other.

It is not easy to understand how the judgment-debtor in this case can contend that since the injunction granted against him was merely in the nature of a prohibition, and not mandatory, the executing Court cannot find him guilty of having disobeyed it, although it was satisfied that he had done the very thing which he was forbidden from doing. The decree-holder was, therefore, clearly entitled to ask the executing Court to direct the judgment-debtor to obey the injunction and in default to commit him to civil prison.

That that is the true construction of Sub-rule (1) of Rule 32 of Order 21 of the Code is also clear from a decision of the Chief Court of Oudh in *Prag Dutta v. Kedar Nath*, AIR 1945 Oudh 81 on which the decree-holder's learned advocate Mr. B. Krishna Rao relied.'

To the same effect are the observations in *Murari Lal v. Nawal Kishore*, AIR 1961 Punj 547 at 548. I, therefore, hold that Order 21, Rule 32 (1) applies to the instant case and the learned Judge was not justified in rejecting the application. Normally, therefore, I should remand the execution application to the execution Court to proceed with the same in accordance with law. But it was pointed out by the learned counsel for the defendant that there is no evidence to show that the judgment-debtor has cut and removed branches of the trees as alleged in the execution application. This is not disputed by the learned counsel for the decree-holder. Regarding the second relief in the execution application the learned counsel for the judgment-debtor pointed out that the statement in the execution application that the judgment-debtor renewed the fence only refers to the fence

which separates the 5 koles of the property. If that is so, there is no necessity to remand the execution application. In these circumstances, I set aside the finding of the learned Judge and hold that Order 21, Rule 32 (1) is applicable to cases of decrees allowing preventive injunction. If it is found that the judgment-debtor has violated the terms of the decree it is open to the decree-holder to file a fresh application for taking action under Order 21, Rule 32, Civil P. C. The appeal is allowed to the extent indicated and subject to the above observations. I make no order as to costs.

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