

**Ajayakumar Vs. Damayanthi**

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**Court :** Kerala

**Decided On :** Dec-12-2003

**Reported in :** 2004(2)KLT48

**Judge :** Pius C. Kuriakose, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 32 and 32(5); Code of Civil Procedure (CPC) (Amendment) Act, 1999; Code of Civil Procedure (CPC) (Amendment) Act, 2002 - Sections 47

**Appeal No. :** C.R.P. No. 728 of 2002

**Appellant :** Ajayakumar

**Respondent :** Damayanthi

**Advocate for Def. :** K.P. Balasubramanyan, Adv.

**Advocate for Pet/Ap. :** K.P. Dandapani and; Milly Dadapani, Advs.

**Disposition :** Revision succeeded

**Judgement :**

ORDER

**Pius C. Kuriakose, J.**

1. The decree holders are the revision petitioners. The decree of prohibitory injunction which was granted by the lower appellate court and confirmed by this Court in appeal is to the following effect: 'That the defendants be hereby restrained by a permanent prohibitory injunction from trespassing into plaint schedule properties and from taking usufructs from the plaint schedule property. That the defendants be hereby also restrained from interfering with the plaintiffs in their possession and enjoyment of the plaint schedule properties'. Alleging that the above decree has been violated by the judgment debtors, the decree holders filed execution petition before the executing court as E.P.267/93 seeking arrest and detention of the judgment debtors in civil prison. -In the said E.P., E.A. No. 38/94 was filed by the decree holders for the deputation of ameen for the construction of a fencing around the decree schedule property after a measurement of the property with the assistance of taluk surveyor. The application was allowed by the executing court. The respondents/judgment debtors came to this court impugning that order filing CRP 402/94. This Court relying on the decision in Joseph alias Kochu v. Makkaru Pillai, AIR 1960 Ker. 127, and following Evuru Venkala Subbayya v. Srishti Veerayya, AIR 1969 A.P. 92, and Y. Lakshmaiah v. Esso Eastern Inc., AIR 1974 A.P. 32, and after referring to Kochupennu Ambujakshi v. Velutha Kunju, 1992 (2) KLJ 606, held that the provisions of Order 21 Rule 32(5) can have application only in the context of execution of decrees for mandatory injunction or any other decree which mandates that a positive act shall be done by the judgment debtors and when the judgment debtors fail to do that act. Accordingly, this Court set aside the order passed by the executing court and remanded the case back to the executing court for continuing with the E.P. under Order 21 Rule 32(1) alone.

2. It appears that the order of this Court in C.R.P. 402/94 aroused ideas in the minds of the judgment debtors who allegedly cut and removed certain trees which were standing on the decree schedule property leaving the stumps alone. When this was brought to the notice of the executing court, the judgment debtors took the stand that the trees cut and removed did not stand on the decree schedule property; but they stood on a neighbouring property which had been kept common. Under this circumstance, the decree holder filed E.A. No. 81/02 for the issuance of a commission to determine on the basis of the position of the stumps as to

whether the trees stood on the decree schedule property or outside the same. This application was filed by the decree holders after both sides had adduced their evidence on the basis of the remand order passed by this Court and with the objective of belying the evidence adduced by the judgment debtors regarding the position of the trees which had been cut and removed. It was therefore prayed in the commission application that evidence be reopened and commission be issued. The executing court found that the decree holders had many opportunities earlier to take out commission. That court dismissed the application also on the view that the design of the decree holders is to bypass the order passed by this Court in C.R.P. 402/94 and that the decree holders will not be permitted to fill up the lacuna since questions regarding identity of the decree schedule property were to be resolved on the original side and not on the execution side. It is that order which is impugned before me in this revision.

3. Heard Sri. Millu Dandapani, Advocate for the revision petitioners and Sri. K.P.Balasubramanyan, Advocate for the respondents. Sri. Millu Dandapani, supplied me with copies of all relevant papers.

4. Sri. Millu Dandapani submitted that in a litigation which commenced 22 years ago wherein the revision petitioners were given decree for injunction by the lower appellate court which was confirmed by this Court in Second Appeal, they have not been able to enjoy the fruits of the decree so far. Situation, according to the learned counsel was extremely painful for the revision petitioners. Litigants like them, according to the counsel, are not often worried about the technicalities of civil procedure, but approach the courts for obtainment of substantial justice. Counsel submitted that the revision petitioners' state of mind after more than two decades of litigation is one of desperation. Regarding the question of identity of the decree schedule property, counsel submitted that there was no dispute between the parties regarding the identity on the trial, first appellate and second appellate stage and that the question is raked up unnecessarily only on the execution side. Issuance of commission in the manner sought for in the application, counsel submitted, will be very much within the scope of Section 47 of the Code of Civil Procedure. Regarding the order passed by this Court in C.R.P. 402/94, counsel submitted that the same related only to the prayer for construction

of a fence around the decree schedule property.

5. Meeting the above arguments, Sri. K.P. Balasubramanyan submitted on behalf of the respondents that the order of this Court in C.R.P. 402/94 has attained finality and that every endeavour to bypass that order is to be checked. Counsel asserted that his clients have not cut or removed any trees standing on the decree schedule property in violation of the decree. Counsel fairly conceded that cutting and removal of trees actually standing on the decree schedule property will amount to violation of decree of prohibitory injunction passed in this case and that the court has power to initiate steps under Order 21 Rule 32 for enforcement of the decree by arrest and detention or attachment of property or by both.

6. I have gone through the order passed by this Court in C.R.P. 402/94 carefully. It is true that under the order which was impugned in that CRP, the amin had been directed to identify the decree schedule property apart from to facilitate construction of a fence around the said property. However, this Court's order will show that the point that was argued before this Court and actually considered by this Court was whether the steps contemplated under Order 21, Rule 32(5) are applicable to proceedings for execution of a decree for prohibitory injunction. This Court found on a scrutiny of the decree in this case that the decree was one pure and simple for prohibitory injunction and that under the decree, the judgment debtors had not been commanded to do any positive act. On that reason, this Court followed decisions in Joseph alias Kochu v. Makkaru Pillai, AIR 1960 Ker. 127, Evuru Venkata Subbayya v. Srishti Veerayya and Ors., AIR 1969 AP 92, and Y. Lakshmaiah v. Esso Eastern Inc., AIR 1974 AP 32 and found that invocation of steps envisaged by Order 21, Rule 32(5) for the execution of the decree in this case which was not for mandatory injunction was wrong and set aside the directions for the construction of a fence around the decree schedule property. The order will show that this Court has neither examined the correctness of the direction to identify the decree schedule property nor expressed even any opinion regarding the correctness of that direction while allowing C.R.P.402/94. Importantly, this court did not dismiss the E.P., but only remanded it back to the execution court for continuing the proceedings under Order 21 Rule 32(1). Obviously, this Court passed such a direction to ensure that the executing Court

will ensure the enforcement of the decree passed in this case by taking effective steps under Order 21 Rule 32(1). It was pursuant to the above remand order that the executing court enquired into the matter afresh. Enforcement of the decree under Order 21, Rule 32(1) is possible either by arrest and detention of the judgment debtors or by attachment of the properties belonging to the judgment debtors. In order to enable the executing Court to pass orders of arrest or attachment in an E.P. under Order 21, Rule 32(1) that court has to be convinced that the decree has been violated or disobeyed by the judgment debtors. The complaint of the decree holders/ revision petitioners in this case was that the judgment debtors have disobeyed the decree. The judgment debtors refuted this complaint. I am of the view that the best method for resolving the above controversy in this case is the issuance of a commission since the controversy between the parties is whether the trees which were admittedly cut and removed stood upon the decree schedule property or upon the neighbouring property which had been kept common. I cannot agree with the apparent view of the executing court that the revision petitioner ought to have taken out a commission on the trial side itself. As stated already, on the trial side upto the disposal of the Second Appeal by this Court, there was no dispute between the parties regarding the identity of the plaint schedule/decreed schedule properties. It has to be taken in the face of the decree which has been confirmed by this Court that the said decree has been passed with respect to a property, identity of which was beyond dispute. The property is well described in the, decree schedule. The question of identity has been raked up only on the execution side. In fact this question was raised initially by certain strangers who sought their impleadment as additional judgment debtors. Prayer was not allowed by the execution court or by this Court. It was thereafter only that the judgment debtors started pursuing this identity dispute more seriously and on their own. Sri. K.P. Balasubramanian is not able to suggest any other effective method by which the present controversy as to whether the trees cut and removed stood in decree schedule property or outside the same could be resolved.

7. The execution court has a duty to make every endeavour to ensure that the decree holder does secure the fruits of the decree. Courts render assistance of police and other officials in the matter of execution even in the absence of specific

provisions in the Code authorising the same in discharge of such duty. The jurisdiction conferred on the civil courts as becomes clear from Section 9 of the Code is almost unlimited in the matter of resolution of disputes of civil nature between persons. The litigants who approach the Civil Court are obliged to incur considerable expenditure by way of Court Fees, Pleader's fees, Pleader's Clerk's charges and other miscellaneous expenditure and often have to wait for years before they obtain an executable decree. Though in a light vein it is often said that Order 21 is the paradise of the judgment debtors and that the ordeal of the plaintiff commences after he obtains a decree. I find that notwithstanding C.P.C. Amendment Acts 46/99 and 22/02, Section 47 remains intact and only two rules of Order 21 have been amended. Rule 32 is significantly one of them. The change introduced in Rule 32 of Order 21 is that a new explanation has been incorporated under which it is not clarified that the expression 'act required to be done' appearing in Sub-rule (5) of Rule 32 shall cover prohibitory injunctions also. Thus it is possible now under Order 21 Rule 32 to have even decrees for prohibitory injunction enforced to a practicable extent in the same way as decrees for mandatory injunctions. In other words, the decision in Joseph alias Kochu (supra), AIR 1960 Ker. 127, and the two decisions of the Andhra Pradesh High Court referred to in the order of this Court in C.R.P.402/94 no longer hold the field in so far as they relate to execution of prohibitory injunction decrees under Sub-rule (5) of Rule 32 of Order 21. The introduction of the explanation to Sub-rule (5) of Rule 32 reveals the anxiety of the Parliament to ensure that the executing court is able to enforce obedience not only of decrees for mandatory injunctions, but also decrees for prohibitory injunctions.

8. The problem now before me is simple. There is dispute between the judgment debtors and the decree holders as to whether the trees which admittedly have been cut and removed stood in the decree schedule properties or outside the same. The above dispute which is one of identity of the decree schedule properties has been raised for the first time before the executing court. The proper and effective method for resolving that dispute is by appointing a commission for the purpose of identifying the decree schedule property. The decree holders alone are not to blame for the delay which has been caused in the matter. At any rate, the delay from the side of the decree holders in the matter of seeking deputation of

a commissioner is only to be condoned since a commission is very likely to enable the executing court to discharge its duty of ensuring the enforcement/execution of the decree.

The result is that the revision succeeds. The impugned order is set aside. E.A.No. 81/02 stands allowed. C.R.P. allowed as above. No costs.

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