

**Bindu Khan Vs. Samee Khan**

**Bindu Khan Vs. Samee Khan**

**SooperKanoon Citation :** [sooperkanoon.com/759583](http://sooperkanoon.com/759583)

**Court :** Rajasthan

**Decided On :** Feb-17-1998

**Reported in :** AIR1998Raj115; 1999(1)WLC518

**Judge :** M.A.A. Khan, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 21, Rule 32 - Order 39, Rule 2A and 2A(1)

**Appeal No. :** Civil Revn. Petn. No. 298 of 1996

**Appellant :** Bindu Khan

**Respondent :** Samee Khan

**Advocate for Def. :** S.K. Gupta, Adv.

**Advocate for Pet/Ap. :** V.K. Gupta, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

1. This revision petition Under Section 115, C.P.C. is directed against the order dt. 7-2-1996 whereby the learned Civil Judge (Senior Division), Gangapurcity upheld the order of the Munsiff and Judicial Magistrate, Gangapurcity dt. 28-9-1991 sentencing the petitioner to civil imprisonment for one month under Order 39, Rule

2-A, C.P.C. The impugned orders were rendered by the Courts below under the following circumstances.

The parties are residents of Gangapur city town in district Sawaimadhopur. Their residential houses appear to be situated just close to each other. In the south of the double storied house of the respondent there sits the residential house of the applicant. Some portion of applicant's house lies in the west of respondent's house. The house of the applicant and portion of his house in the west of respondent's are stated to be separated by about 4 ft's wide Gali in the west of respondent's house. The parties appear to be in dispute over the land or a part of the land covered by the said Gali.

2. Sometimes in the year 1984 the respondent filed a suit for injunction for restraining the applicant from interfering with his use of the Gali on the western side and from not putting any obstruction therein. Along with the plaint an application under Order 39, Rules 1 and 2, C.P.C. was also filed by the respondent whereupon ad interim injunction requiring the applicant to maintain status quo was granted on 16-10-1984, The injunction order, so granted on 16-10-1984, was made absolute on 31-10-1987 with the consent of the parties.

3. On 30-11-1987 the respondent moved an application under Order 39, Rule 2-A, C.P.C., complaining that the applicant had blocked the Gali on Western side by raising a brick wall in front of the portion of his house on its Northern, side, which lay to the West of respondent's house. The Court was required to punish the applicant with three months civil imprisonment for having disobeyed the order of the Court dt. 31-10-1987. After hearing parties and allowing them opportunity to produce evidence in support of their respective cases. The learned Munsiff came to the conclusion that the applicant had disobeyed the order of the Court dt. 31 - 10-1987 by constructing Kachcha bricks wall. 46 inches long and 21 inches high, on the disputed land. The learned Munsiff, accordingly held the applicant liable for disobeying order of the Court dt. 31-10-1987 and sentenced him to one month's simple imprisonment. The appeal preferred by the applicant against the order of the Munsiff was also dismissed on 7-2-1996. Hence, this petition under Section 115, C.P.C.

4. Mr. V.K. Gupta, learned counsel for the petitioner, vehemently urged that the nature of the alleged breach of the order of Court of Munsiff was not such as would have justified the imposition of sentence of civil imprisonment for one month upon him. It was submitted that the applicant was an old man and that since after institution of the suit in the year 1984 and grant of ad interim injunction on 31-10-1987 the suit had shown to substantial progress and, therefore, the applicant might have raised the disputed Kachcha wall. It was submitted that the act of the applicant was in the direction of protecting his property from the flow of water and not with the intention of disobeying the order of the learned Munsiff made on 31-10-1987. At any rate, urged the learned counsel, in the nature of the alleged breach of the order of the Court the property of the applicant should have been attached in the first instance and the punishment of civil imprisonment should not have been awarded to him. It was submitted that the object of Order 39, Rule 2-A was to enforce the interim order of injunction and that should have been done by attachment of the property of the petitioner in case such attachment yielded no result then of course, the order of sentence of civil imprisonment might have been passed.

5. Mr. S.K. Gupta, learned counsel for the respondent, on the other hand, submitted that in exercise of his powers under Section 115, C.P.C. this Court cannot disturb the concurrent findings of fact regarding the breach of the order of the Courts below by the petitioner. It was further submitted by the learned counsel that it is in the discretion of the Court, whose order is disobeyed, either to punish the contemner by attachment of his property or by sentencing him to civil imprisonment. The learned counsel thus submitted that in the facts and circumstances of the case the learned Munsiff had exercised the discretionary jurisdiction vested in him under Order 39, Rule 2-A, C.P.C. in judicial manner and, therefore, this Court should not interfere with such order. In support of his arguments Mr. S.K. Gupta relied upon the decision of the Patna High Court in the case of Kapildeo Upadhya v. Raghunath Pandey, AIR 1978 Pat 212 and Allahabad High Court in the case of Niranjana Shukla v. Shanker Shukla, AIR 1972 All 556.

6. In exercise of its powers under Section 115, C.P.C. this Court is not to interfere with the concurrent findings of the facts recorded by the Court below, if such finding is based on the material on record. In the instant case there was ample

evidence on the record of the Courts below to come to the conclusion that by order dt. 31-10-1987. the applicant had been required to maintain status quo with regard to the subject-matter of the dispute. It is also evident from the report of the local Commissioner that the applicant had constructed a Kachcha wall 46 inches long and 21 inches high on the land of the disputed Gali. Such facts support the conclusion arrived at by the Courts below. Therefore, this Court would not interfere with the findings of the facts as recorded by the Courts below.

7. However, the pertinent question for consideration in the present matter is whether the learned Munsrff should have, in the first instance, proceeded to attach the property of the applicant for disobedience of his order dt. 31 -10-1987, or he could have directly proceeded to punish the contemner by sentencing him to civil imprisonment. Here it would be worthwhile to produce Rule 2-A of Order 39, C.P.C. in extenso :

'2-A. Consequence of disobedience or breach of injunction-- (1) In the case of disobedience of any injunction granted or other order made under Rule 1 or 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or proceedings is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.'

8. It may be noted that consequent upon disobedience of the order of the Court, passed under Rules 1 and 2, the Court may order the property of the person guilty of such disobedience of breach to be attached. Further power of the Court is that it may also order such person to be detained in the civil prison for a term not exceeding three months. It may be noted that between the phrase 'may order the

property of the person guilty of such disobedience or breach to be attached' and 'may also order such person to be detained in the civil imprisonment for a term not exceeding three months' the conjunction 'and' has been used. Use of conjunction 'and' suggests that the Court may pass two types of orders in case of disobedience or breach of its injunction orders. The Court may pass (i) an order attaching the property of the person guilty of disobedience or breach of order and (ii) may also pass an order detaining the contemner in the civil prison. The use of conjunction 'and' in the language of the two phrases indicates the type of orders which a Court may pass under Rule 2-A(1) of Order 39, C.P.C. Prima facie conjunction 'and' does not suggest that it should be read in sense of the conjunction 'or' so as to enable the Court to pass either of the two types of the order in the alternative according to his discretion. The sequence used in the language of Rule 2-A of Order 39 in the context of the orders that may be passed by the Court in consequence of disobedience or breach of the injunction suggests that in the first instance the Court should pass an order attaching the property of the contemner. In this behalf it may be noted that Sub-rule (2) of Rule 2-A says that the attachment made under Sub-rule (1) shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto. The mandate contained in Sub-rule (2) of Rule 2-A suggests that the main purpose of Sub-rule (2-A) is to enforce the obedience of the injunction order by the party against which such order has been passed. The requirement of attachment of his property and in the event of continuance of disobedience or breach of the order the sale of the property and the appropriation of the sale proceeds to awarding compensation to the aggrieved party suggest that in the first instance the Court should ordinarily attach the property of the contemner in order to enforce him to obey and carry out the injunction order passed by it;

9. Here it may be pointed out that a final order for injunction may be executed as per provision contained in Rule 32, Order 21, C.P.C. which runs as under:

'32. Decree for specific performance for restitution of conjugal rights, or for an injunction-- (1) Where the party against whom a decree for the specific

performance, of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property or in the case of a decree for the specific performance of a contract, or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under Sub-rule (1) or Sub-rule (2) has remained in force for (six months) if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been\* obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done, so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.'

10. The study of the provision contained in Rule 32 of Order 21 shows that Sub-rule (1) of Rule 32 directs that an order of the injunction may be executed by

detention of the person disobeying such order in the civil prison or by attachment of his property or by both. It may be noted that in the language of Sub-rule (1) of Rule 32 the sequence in the modes of execution of the order of injunction is, in the first instance, by detention in the civil prison and thereafter by attachment of the property. The conjunction used in between different modes prescribed thereunder is 'or'. The words 'or' and 'or by both' suggest that the two types of order may be passed simultaneously. The mandate contained in Sub-rule (5) of Rule 32 suggests that the Court may in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practical by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree. The object of Sub-rule (5) Rule 32 of Order 21 seems to compel the judgment-debtor to comply the order of the Court and in case, he fails to comply with such order then the order may be got executed either by the decree-holders or by some other person appointed by the Court at the cost of the judgment-debtor.

11. Now reading of provisions contained in Order 21, Rule 32 with those in Order 39, Rule 2-A it may reasonably be held that Order 21, Rule 32 deals with, inter alia, execution of a final decree or order of injunction which has not been obeyed by the judgment-debtor. Order 39, Rule 2-A on the other hand, deals with enforcement of Court's interim orders of injunction and provides for remedies for disobedience or breach of the orders made by the Court. This distinction between two remedies, therefore, suggests that the conjunction 'and' used in the language of Sub-rule (1) of Rule 2-A of Order 39, C.P.C. should not be read as 'or' as has been used in the language of Sub-rule (1) of Rule 32 of Order 21.

12. It may further be noted that the use of the words 'and may also' in the latter part of Sub-rule 2-A(1) clearly suggests that the remedy of civil imprisonment of the contemner is not an alternate remedy but an 'additional remedy'. Alternate remedies give option to choose one or the other remedy from amongst the remedies provided and such remedies are not co-existent unless specifically provided as has been done in Order 21, Rule 32 by use of the words 'or both'. In

the language of Order 39, Rule 2 A(1) the use of the words 'and may also' indicates the intention of the Legislature that the order of detention of the contemner in civil imprisonment may be passed in 'addition to' the order of attachment of his property and not 'in lieu' thereof. The same conclusion is, to my mind, arrived at if the matter is viewed at from another angle.

13. Disobdience of the injunction order of a Court amounts in a sense to contempt of Court though, strictly speaking, it does not fall within ambit of Section 2(b) of the Contempt of Courts Act 1961 as it has been specifically dealt with in Order XXXIX, CPC. But the nature of contempt committed is civil and not criminal, though the proceedings to be undertaken to punish such contempt are of quasi-criminal character. The main distinction between civil contempt and criminal contempt is that whereas the function of taking action against a contemner in a civil contempt is to enforce compliance and not so much as to punish him, the function of and object behind the proceedings for criminal contempt, on the other hand, is to uphold the majesty of law and the dignity of the Court. In a matter relating to civil contempt there is an order for the benefit of a party against some other party and the enforcement of the order of the Court is for the benefit of one party against the other. In criminal contempt on the other hand, there is some kind of interference with the judicial proceedings or there is scandalizing of the Court to undermine its authority. Therefore, in civil contempt when there is compliance of the order of the Court rarely a punishment is imposed, except levying costs. But in criminal contempt normally a punishment would be imposed unless the contemner honestly repents and offers apology which is acceptable to the Court as being genuine. In view of this fundamental distinction between the civil contempt and criminal contempt the sequence of the orders which may be passed under Rule 2A(i) becomes more apparent significant and real.

14. Viewed from the above angle also I am of the opinion that the punishment of civil imprisonment in the case of violation or disobedience of the order of an injunction of a Court is to be awarded 'in addition to' and not 'in lieu of or in the alternative of the punishment of attachment of his property. Rule 2A(1) gives an 'additional' power to the Court, as is indicated by the use of the words 'and may also' and not an 'alternate' power, as would have been indicated if the word 'or'

had been used to punish the contemner by his sending to civil prison besides attaching his property. In my opinion, the Legislature cannot be attributed an intention of using the words 'and may also' in the later part of Sub-rule (1) of Rule 2-A of Order XXXIX, CPC unnecessarily, superfluously and without any purpose. Those words, to my mind necessarily suggest that the order of sending the contemner to civil prison may be passed only in addition to the order of attachment of his property. In other words, before passing the additional order, the order which is to be added to must be there in existence.

15. In the case of Kapildco Upadhya v. Raghunath Pandey (AIR 1978 Patna 212) the Patna High Court, following the views expressed in two of its earlier decisions in the cases of State of Bihar v. Rani Sonabati Kumari, AIR 1954 Pat 513 and Nawal Kishore v. Rajendra Pd. Singh, AIR 1976 Pat 56, appears to have confirmed the order of detention of the petitioner in prison, though no order of attachment of his property had been made against him in the first instance. The learned Judges of the Division Bench quoted with approval the following observations of the learned single Judge deciding the case of Nawal Kishore v. Rajendra Pd. (supra)-:

'.... Reading the relevant provision of Sub-rule (3) in my opinion, it is difficult to accept this contention raised on behalf of the petitioners that in case of disobedience, it is always mandatory for the Court to order for detention of the guilty person in civil prison. As a matter of course the first punishment or the direction that has been indicated in Sub-rule (3) for the disobedience in question is the attachment of the property of the guilty person.....'

16. It may be noted that the view expressed by the single Judge in Nawal Kishore case (supra), which, view was quoted with approval by the Division Bench, is in conformity with the view taken by me above.

17. In the Supreme Court case of State of Bihar v. Rani Sonabati Kumari, AIR 1961 SC 221, whereby the judgment of the Patna High Court had been upheld, the Apex Court had made following pertinent observations in para 23 of the judgment:

'.... .Though undoubtedly proceedings under Order 39, Rule 2(3), Civil Procedure Code have a punitive aspect as is evident from the contemner being liable to be ordered to be detained in civil prison, they are in substance designed to effect the enforcement of or to execute the order.....

18. The Apex Court thus seems to have endorsed the view that purpose of Order 39, Rule 2(3). which may now be read as Order 39, Rule 2A is in substance to effect the enforcement of the order of injunction which may be done by attaching the property of the contemner and not to punish the contemner by sending him to civil prison in the very first instance.

19. In the case of *Niranjan Shukla v. Shanker Shukla*( AIR 1972 All 556) (supra), the Allahabad High Court held that 'the language of Rule 2-A no doubt is misleading, but it cannot be said that in every type of breach of an injunction it is imperative on the Court to attach the property also. Attachment is effected to ensure award of compensation whereas detention in civil prison checks the infringement and punishes the person committing a breach. The nature of punishment will depend on the nature of breach. The violation of an injunction is a civil wrong and it is discretionary with the Court not to award any punishment when the breach is a minor breach or where the breach has not been the result of deliberate action. In a case where the breach is a continuing one and further disobedience is sought to be stopped, attachment of the property may be an appropriate remedy. But where the breach is a single completed breach punishment by detention in civil prison alone will not be an inappropriate order.'

20. In support of their views, their Lordships of the Allahabad High Court had placed reliance on the decision of Madras High Court in the case of *Thazath Suppi v. Alabi Kunhi Koya* (AIR 1917 Madras 448), Calcutta High Court in *Mowazzam Ali Khan v. Shebash Chandra*, AIR 1927 Cal 598 and Gujarat High Court in *Thakorlal Parshottamdas v. Chandulal Chunnilal*. AIR 1967 Gujarat 124, wherein the view expressed seems to be that it was discretionary with the Court in a case of disobedience of its order of injunction, to order either arrest of the contemner or attachment of the property and that court is not in first instance, to attach property and then only to order imprisonment. In the case of *Thazath Suppi* (supra) relied

upon by his Lordship of the Allahabad High Court, a reference was made to the practice in England in such matters. The practice prevailing in England is stated to be the following :

'In England the usual order in cases of disobedience of an injunction by natural person is attachment of the person or committal while sequestration is the usual order passed in case of disobedience by Corporation.'

21. It may be noted that the practice in England also was to maintain sequence in the orders of attachment of the property and committal of the person to the civil prison in the matters of disobedience of the injunction order of the Court.

22. With due respect to their Lordships of (he Patna, Madras, Calcutta and Gujarat High Courts I am unable to subscribe to the views expressed by them. I am of the opinion that since the character of the contempt, committed on disobedience or breach of order of injunction issued under Order 39, CPC, is that of a civil contempt and the object and purpose behind Rule 2-A of the order is to enforce order of the Court rather than to vindicate the majesty of law or scandalization of the Courts, in the first instance an order of attachment of the property is required to be made. In that case also it is necessary that the disobedience of the order of the Court should be deliberate wilful and not with the intention to protect his rights by the contemner to the property in respect of which injunction order had been passed.

23. Now coming to the merits of the case, it may be noted that the injunction order had been made in the instant case as back as on 16-10-1984 and the same was confirmed on 31-10-1987. During that long period the petitioner had not disobeyed the injunction order issued by the Court. On 31-10-1987 the parties had agreed to maintain status quo. The applicant, thereafter appears, to have raised the 46 inches long and 21 inches high wall on the land of the Gali with the intention to protect his property rather than to disobey or to commit breach of the order of the Court. His conduct of not this obeying the initial order of the Court for three years is relevant in this respect. It is also relevant to point out that when the petitioner approached this Court in the present petition the court felt satisfied with his submission that the construction which had been raised by him had been

removed. The petitioner had also offered unconditional apology for having made the construction. Such facts have been clearly stated in this Courts order dt. 16-2-1996. Since the very object of Order 39, Rule 2-A (1). C.P.C. is to enforce the injunction order and the petitioner is found to have already removed the construction and tendered unconditional apology. there remains no necessity or occasion of ordering the attachment of his property so as to enforce him to comply with the injunction order. The impugned orders cannot therefore, be sustained apart from their being not justified in law and on the facts and circumstances of the case as in the first instance no order of attachment of the property of the petitioner had been made.

24. In view of the above, the impugned orders of the Courts below are set aside and the present petition is allowed The punishment of civil imprisonment passed against the petitioner is hereby quashed. Costs shall remain easy.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**