
(1960) 11 KAR CK 0002
In the Karnataka High Court
Case No : Second Appeal No. (M) 102 of 1956

Gundila Manjappa Shetty

APPELLANT

Vs

Manjakke Shedthi and Others

RESPONDENT

Date of Decision : 18-11-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32 (1), Order 21 Rule 32 (5)

Citation : AIR 1961 Kar 268 : (1961) ILR (Kar) 67

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Advocate : N.T. Raghunathan, for M. Gopala Krishna Shetty, for the Appellant;
B. Krishna Rao, for T. Krishna Rao, for the Respondent

Judgement

1. This is a judgment-debtor's appeal from an order made against him in execution proceedings.
2. In a suit brought by the decree-holder, who is the respondent in this appeal, a permanent injunction was made against the judgment-debtor restraining him from interfering with the right of the decree-holder to take water from the water course, which was the subject-matter of the suit. The decree-holder and the judgment-debtor owned neighbouring lands, the judgment-debtor being a higher riparian proprietor. The complaint made by the decree-holder was that the judgment-debtor had impeded the flow of the water in the water course and brought about a diminution in the supply of water to the decree-holder's land.
3. In the executing Court, the decree-holder charged the judgment-debtor with having deepened his land after the decree, and thereby made the water flowing in the water course percolate into his land, again causing similar diminution, in the supply of water to the decree-holder's land. An order was sought by the decree-holder, under Sub-rule (1) of Rule 32 of Order 21 of the Code of Civil procedure, directing the detention of the judgment-debtor in the civil prison for his disobedience to the injunction made against him in the suit.

4. The executing Court appointed a Commissioner to investigate into the truth of the allegation made by the decree-holder. The Commissioner's report having substantiated that allegation, that court made an order directing the judgment-debtor to either lower the water course abutting his land or to suitably raise the level of his own land so as to prevent the percolation from the water course. It Ordered the detention of the judgment-debtor in the civil prison if he failed to obey that direction.

5. The judgment-debtor appealed from that order, but the lower appellate Court dismissed this appeal.

6. In this second appeal, Mr. Raghunathan first urged that it was not competent for the executing Court to direct the judgment-debtor either to lower the level of the water course or to raise the level of his land. According to the argument, since the injunction made in the suit brought by the decree-holder merely prohibited the judgment-debtor from interfering with the right of the decree-holder to use the water flowing in the water course for his own land, if the judgment-debtor had by an act committed by him after the decree, lowered the level of his own land, and thereby made it possible for the water of the channel to percolate into it, the only remedy available to the decree-holder was to institute another suit in respect of the cause of action which had subsequently arisen, and not to apply for the enforcement of the injunction in the execution proceedings or to ask for the detention of the judgment-debtor in the civil prison.

7. In support of this contention, reliance was placed on a decision of the High Court of Allahabad in *Angad v. Madho Ram* AIR 1939 All 418.

8. That was a case in which the decree-holders, had brought a suit for the removal of certain constructions from a piece of land and also for the removal of a certain drain opening on to it. The decree which was ultimately passed did not direct the removal of the constructions on the land but made an injunction against the defendants that they should not make any other use of the land beyond keeping those structures upon it. The decree-holders' complaint in the execution proceedings was that the judgment-debtors put up a new structure, in violation, of the injunction made in the suit. The decree-holders applied for a direction that the judgment-debtors should remove that structure, and the contention urged on behalf of the judgment-debtors was that the executing court had no competence to direct the demolition of that new structure.

Their Lordships of the High Court of Allahabad expressed the view that the demolition of the new structure put up by the judgment-debtors was not one which the executing Court could order, under the provisions of Sub-rule (5) of Rule 32 of Order 21 of the Code of Civil Procedure. The ratio of their decision was that since under that sub-rule, it was competent for the executing Court only to direct the act which the decree required the judgment-debtors to do and the demolition, of the new structure put up by the judgment-debtors was not an act of that description, it was not competent for the executing Court to order its

removal.

9. It is clear that Mr. Raghunathan cannot derive any assistance for his contention from this decision. This is not a case in which any order was made by the executing Court, under the provisions of Sub-rule (5) of Rule 32 of Order 21 of the Code. Although Mr. Raghunathan contended that in effect by directing the judgment-debtor to lower the level of the channel or to raise the level of his land, the executing Court directed an act to be done by the judgment-debtor under Sub-rule (5) of Rule 32 of Order 21, I am not prepared to say that the executing Court did anything more than merely giving an opportunity to the judgment-debtor to obey the decree which had been made against him under the provisions of Sub-rule (1) of Rule 32 of Order 21 of the Code.

That the impugned orders under appeal were made under Sub-rule (1) and not under Sub-rule (5) is perfectly manifest from the fact that the executing Court directed the detention of the judgment-debtor in civil prison if he did not obey the order of injunction, in the manner directed by it, which it could not have done under Sub-rule (5).

10. The decision in *Ramabrahma Sastri v. Lakshminarasimham* AIR 1957 AP 44 on which Mr. Raghunathan next relied has also no-resemblance to the case before me. That was a case in which, in a suit brought for the removal of an obstruction to the right of way, claimed by the plaintiff, the contention of the defendant, was that the remedy of the plaintiff was only to execute a decree which he had previously obtained against the defendant. Their Lordships repelling that contention observed that the obstruction to the right of way complained of in the suit, not having been in existence at the time when the decree was made in the previous suit, it was not possible for the defendant to resist the suit on the plea advanced by him.

11. But the injunction in the present case which was made in the suit brought by the decree-holder restrained the judgment-debtor from impeding the free flow of water in the water course on to the decree-holder's land. If by deepening his own land, the judgment-debtor diverted the free flow of water in the water course, by making it percolate into his land, what he did, to my mind, amounted to a clear disobedience to the injunction made against him. It is, in my opinion, indisputable that a person disobeys an injunction not only if he falls 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.

12. 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 Dutt v. Kedar Nath* AIR 1945 Oudh 81, on which the decree-holder's learned advocate Mr. B. Krishna Rao relied. It was pointed out in that case that it is not necessary that some definite act should be required to be performed by the decree before there can be disobedience to the decree within the meaning of Rule 32 (1) and that if a person is prohibited from doing something and does it, it is just as much disobedience as if he is ordered to do something and falls to do it.

13. In my opinion, the contention that the order made by the executing Court in this case was one which it could not have properly made under the provisions of Sub-rule (1) of Rule 32, of Order 21 of the Code must therefore fail.

14. It was next argued that there was no clear finding by the executing Court that the deepening of his land by the judgment-debtor, was made after the decree in the suit, Mr. Raghunathan's contention was that even in the suit one of the allegations made by the decree-holder was that the judgment-debtor had lowered the level of his own land, and that no direction was made by the decree in the suit for the restoration of the land to its original level. That not having been done, it was urged, that the decree-holder could not again apply for an order from the executing Court directing the performance of an act which the decree itself did not direct, although the decree-holder had asked for it in the suit.

15. The infirmity in this contention is that the executing Court, as I understand its order, accepted as correct the report made by the Commissioner appointed by it that the judgment-debtor had in fact lowered the level of his own land and the finding of the appellate Court, although the executing Court itself did not say so very clearly was that the land had been deepened after the termination of the suit. That being a finding on a question of fact, it would not, in my opinion, be open to the judgment-debtor to contend in this case--and indeed, no such attempt was made before me--that the level of the land had been lowered to the depth to which it had been found to have been lowered even during the pendency of the previous suit.

16. In that view of the matter, the contention that either under the provisions of Rule 2 of Order 2 of the CPC or on principles analogous to these incorporated in that rule, the decree-holder was debarred from applying for the direction which the executing Court gave to the judgment-debtor cannot succeed.

17. It was next urged that even if the judgment-debtor had made it possible for the water flowing in the water course to percolate into his own land, by deepening his own land, the decree-holder, even if there had been any diminution in the supply of water to his own land, could not complain against it. What was urged by Mr. Raghunathan was that cases in which the diminution of water flowing in a water course is brought about by directly drawing or tapping

water from it, have to be distinguished, and stand on a different footing from those cases in which the diminution is the indirect result of percolation, although such percolation is attributable to an act like the one which the judgment-debtor did in this case.

18. This contention was founded on the decision in *English v. Metropolitan Water Board* 1907 1 KB 588, and on the observations of Lord Alverstone, C. J. in it.

19. The defendants in that case were the owners of a well and of a pumping station situate at a short distance from a natural stream. No access for water to the well from the adjacent soil was possible except at a depth greater than 76 feet, by reason of the fact that the well had been lined with steel cylinders to that depth. The plaintiff was a riparian owner lower down the stream. As a result of the defendant's pumping of water from the well, the general level of the water in the soil in the neighbourhood of the well was lowered to the extent of about twelve inches, making the soil dry, and the water flowing down the stream leak out into the well, bringing about a substantial diminution in the volume of the water in the stream by the time it reached the plaintiff's land.

It was held in that case that since the defendants did not appropriate any portion of the water of the stream by pumping it up themselves, but merely caused it to sink further into the ground by withdrawing the support of the lower subterranean water the damage to the stream gave no cause of action.

20. Mr. Raghunathan urged that the principle on which the above conclusion was reached is also the principle by the application of which the question whether the decree-holder in this case can complain of any actionable wrong has to be decided. If in that case, the withdrawal of the support of the lower subterranean water which brought about the diminution of the volume of water in the stream did not give a cause of action to the plaintiff, it was suggested that the deepening of the land by the judgment-debtor, although it resulted in percolation and consequent diminution in the supply of water to the decree-holder, could not amount to an actionable wrong.

21. It seems to me that there is nothing in the decision in 1907 1 KB 588 which supports this argument. It is a firmly established principle that if a stream of water flows in a known or defined channel, the right to have it run in its natural course is an incident of property, and that an action lies for the infringement of that right. It is equally clear that a lower riparian proprietor can institute an action against the higher riparian proprietor for injuries, diversion or abstraction, it being immaterial that the diversion or abstraction was brought about by percolation through the strata, if the percolation was the consequence of some operation of the higher riparian proprietor by which, he directly drained or tapped water flowing in the water course and brought about a diminution in the supply to the lower riparian proprietor. Indeed, in 1907 1 KB 588, Lord Alverstone referred to the following passage from the judgment of Lord Hatherley in *Grand Junction Canal Co. v. Shugar*. (1871) 6 Ch A 453.

"As far as regards the support of the water all one can say is this: I do not think *Chasemore v. Richards* (1859) 7 HLC 349, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate under-ground; but that has no bearing at all on what you may do with regard to water which is in a defined channel and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity."

Lord Alverstone, C. J. thought that Lord Hatherley, whose observations have been extracted above, treated the case as one in which there was direct tapping of an over ground stream, flowing in a definite channel, and not merely percolating water indirectly affecting the surface stream, and he went on to add:

"I desire to say that if I had been satisfied that the defendants, by their operations, had directly drained or tapped water from the brook which would otherwise have flowed past the plaintiff's property, I should have applied the principle of the judgment in *Shugar's case* (1871) 6 Ch A 483, and have given effect to the opinion which I expressed in delivering judgment in *Salt Union v. Brunner, Mond and Co.* (1906) 2 KB 822 that the abstraction of water or soil by the direct act of an adjoining proprietor may afford ground for action; but, having regard to the judgment of the Exchequer Chamber in *People-well v. Hodgkinson* (1869) 4 Ex 248, and for the reasons which I have given, I am of opinion that abstraction or diminution of quantity by the withdrawal of support does not come within the same principle."

Lord Alverstone, C. J. next proceeded to observe that in the case which he was deciding, he found as a fact that no water from the brook got into or was pumped by the defendants' well, and that the only effect of the defendants' pumping was to lower the level of the sub-soil water underneath and at the sides of the brook, causing a diminution in the quantity of the water passing the plaintiff's land, and that such diminution was the consequence of the withdrawal of the support and of that alone. Lord Alverstone, C. J., it is clear, had no doubt in his mind that if an abstraction of water from a water course and the diminution in the quantity of water flowing in it was the consequence of a direct act of an adjoining proprietor, such act would plainly afford ground for action.

22. Mr. Raghunathan's argument that Lord Alverstone, C. J., expressed his dissent from the enunciation of the law by Lord Hatherley in the *Shugar's case* (1871) 6 Ch A 483 does not appear to me to be well founded. On the contrary, Lord Alverstone, C. J. made it clear that if he had been satisfied that the defendants, by their operations, had directly drained or tapped water from the brook, which would otherwise have flowed past the plaintiff's property, he would have applied the principle of the judgment in *Shugar's case* (1871) 6 Ch A 483.

Not having been so satisfied, he found against the plaintiff,

23. But, in the present case, it is clear that the percolation against which the decree-holder complained was brought about by an Operation of the judgment-debtor through which he directly drained and tapped water from the water course, which otherwise would have reached the decree-holder's land or flowed past it.

24. That being so, this case can have no-resemblance to the case of 1907 1 KB 588 where the diminution in the water flowing in the stream was the consequence of the withdrawal of support and of that alone.

25. It is well established law that the ordinary rule is that although a landowner has a right to the water that percolates or flows from a channel, into his land, it would not be lawful for him to draw or abstract or tap water flowing in a definite over ground channel by a direct act, whether it be by deepening his own land or by making an artificial cutting or otherwise. If he does that, it is to my mind clear that the neighbouring landowner who has a right to the water flowing in such over ground water course has a right of action against him.

26. My view on this question accords with that taken by Chandrasekhara Iyer, J., as he then was, in *K. Keshava Bhatta v. S. Krishna Bhatta* AIR 1046 Mad 334, on which Mr. B. Krishna Rao, the learned advocate for the respondent relied. The argument in this case that the judgment-debtor was entitled by his own operation to abstract the water from the water course through percolation is thus unsubstantial and cannot succeed.

27. It was lastly contended that this was a case in which the executing Court should have declined to make an order in execution proceedings. Mr. Raghunathan contended that the question as to whether there was really a diminution in the water flowing into the decree-holder's land and whether such diminution was the consequence of any act of the judgment-debtor was so complicated and so difficult that it should have been made the subject-matter of an investigation in a properly constituted suit. He referred to a decision of the High Court of Madras in *Pusapati Ramabhadra Raju Vs. Ayitha Ramanna and Others*, , in which Balakrishna Ayyar, J., expressed the view that although an executing Court can certainly take note of the altered circumstances, it had the discretion to disallow execution in cases in which it considers that the aggrieved party should institute a separate suit for obtaining the relief claimed by him.

28. It may be, as pointed out by Balakrishna Ayyar, J., although I abstain, from expressing any opinion about it, that an executing Court can in appropriate cases direct the aggrieved party to institute another suit; but, even if it could do so, the question as to whether execution should be disallowed on that ground in a particular case is a matter depending on the discretion of the executing Court and on the facts of the case which it has to consider.

29. Now, in this case, the Commissioner's report that the diminution in the

supply of water to the decree-holder's land was the consequence of the deepening of the judgment-debtor's land was accepted by both the Courts. Whatever enquiry was necessary in this case in that regard had been made through a Commissioner which the executing Court appointed for that purpose. It was apparently clear to the executing Court that the investigation which it had to make was neither so complicated nor so difficult as to justify a direction that the decree-holder should institute a separate suit, and, if that was what the executing Court thought, it would certainly be not open to the judgment-debtor to contend in this appeal that I should disturb the orders made by the Courts below and direct the decree-holder to institute another suit.

30. This appeal therefore fails, and, in my opinion, should be dismissed.

31. The appellant must pay the costs of the respondent in this appeal.

32. Appeal dismissed.