

(2012) 05 KAR CK 0014

In the Karnataka High Court

Case No : Writ Petition No. 16998 of 2010 (GM-CPC)

Sri H.S. Shivaswamy

APPELLANT

Vs

H.S. Raghavendra, H.R. Ravi and H.R. Keshavamurthy

RESPONDENT

Date of Decision : 24-05-2012

Acts Referred:

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

Citation : AIR 2012 Kar 157 : (2012) ILR (Kar) 3966

Hon'ble Judges : S. Abdul Nazeer, J

Bench : Single Bench

Advocate : S.V. Prakash, for the Appellant;

Final Decision : Dismissed

Judgement

Hon"ble Mr Justice S. Abdul Nazeer

1. The petitioner had filed a suit in O.S. No. 106/1998 on the file of the Civil Judge (Jr.Dn.) & JMFC. Sringeri, for permanent injunction restraining the respondents herein or any person claiming under them from removing earth from the channel or causing damage to the road leading to his house from Begane-Sringeri main road. The suit was decreed on 21.1.2003. The petitioner filed Execution Case No. 12/2005 for the execution of the said decree. In the said case, the petitioner has not only sought for arrest and detention of the judgment debtor in the civil prison but also police protection for fencing "A" schedule property. The respondents have opposed the execution petition by tiling their objections.

2. H.S.Shivaswamy, the petitioner/decreed holder got examined himself as P. W1. He was also cross-examined on behalf of the respondent/judgment debtors. After consideration of the materials on record, the court below has dismissed the execution petition by order dated 12.10.2009. The petitioner has called in question the validity of the said order in this writ petition.

3. Learned Counsel for the petitioner would contend that the Civil Court had not

only restrained the defendants from removing the earth from the channel but also from causing damage to the road connecting the house of the petitioner and Begane-Sringeri road. They have deliberately disobeyed the decree. Therefore, the executing Court ought to have directed arrest and detention of the respondents in the civil prison and also permitted the petitioner to fence the "A" schedule property marked in the sketch enclosed along with the execution petition.

4. It is clear that the court below has passed a decree of prohibitory injunction. According to the petitioner, it has been deliberately disobeyed by the respondents. He has sought for detention of the respondents in the civil prison. He has also sought permission to fence "A" schedule property marked in the sketch enclosed along with the execution petition. Therefore, let us first consider as to whether the petitioner has made out a case for detention of the respondents in the civil prison for disobedience of the order of injunction.

5. Order 21 Rule 32 of the PC provides for execution of decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction. Rule 32(1) of Order 21 is relevant for the purpose of this case, which is 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.

6. In the instant case, we are concerned with the execution of the decree for injunction. The above provision contains the expression "wilfully", which means deliberate or intentional. In SHIVAMURTHY MAHALINGAPPA KUCHANAUR VS. DANNAMMADEVI CYCLE MART, RABAKAVI - AIR 1987 Kar. 26. this Court has held that Order 21. Rule 32(1) requires that the person seeking execution of the decree for injunction by detention of the person bound by the decree in civil prison must place materials before the executing Court as would enable it to conclude that (1) the person bound by the decree was fully aware of the terms of the decree and its binding nature upon him and (2) that person has had an opportunity of obeying such decree but has wilfully i.e. consciously and deliberately disobeyed such decree so that it can make an order for his detention as sought for. Thus, the onus of placing the aforesaid materials before the executing Court is on the decree holder. The executing Court cannot make an order for detention of the judgment debtor under O.21 R.32(1) without recording a finding on the basis of the materials to be produced by the person seeking execution of the decree that the judgment debtor though has had an opportunity of obeying the decree has wilfully failed to obey it. Therefore, where the

executing Court ordered detention of the judgment debtor in civil prison on the finding that he had wilfully disobeyed the decree for injunction merely on the basis of rival arguments heard by it and not on the basis of any material placed before it by the parties, the order of detention would be invalid.

7. In KARIYAPPA VS. HALADAPPA - AIR 1989 KAR. 163, this Court was considering the meaning of the expression "wilful disobedience". It has been held as under:

Wilfulness connotes a "deliberate action", conduct moulded by an obstinacy to act consciously disregarding an injunction against such a conduct. For example, in the case of a right of way, the judgment debtor may plead that on a particular day, he had to put up a fence across it to avert a major disaster and not with a view to obstruct the decree holder. He may agree to the removal of the obstruction or agree to provide a convenient alternate pathway to the decree holder, when called upon to do so under O.21. R.32(1) CPC; in such a situation, disobedience cannot be termed as wilful. But the initial onus to place the relevant material for an action against the judgment debtor will be always on the decree holder.

8. It is thus clear that in order to detain the judgment debtor in the civil prison for the disobedience of the decree of injunction, the decree holder has to satisfy that the judgment debtor has wilfully failed to obey the decree despite having had an opportunity of obeying it. "Wilful" means deliberate or intentional and not accidental or by inadvertence. "Wilfulness" connotes a deliberate action, conduct, moulded by obstinacy to act consciously disregarding an injunction against such an order. If the disobedience is the result of some compelling circumstances under which it was not possible to comply with the order, it is not wilful disobedience. The Court under this provision is empowered to order to take away the liberty of an individual and order for detention of the person who violates the order in the civil prison. The said power of the Court is penal in nature. The Court cannot pass an order of detention on suspicion or as a matter of course. There should be a clear proof that the order of disobedience was clear, unambiguous and with full knowledge of the contents of the order, it was wilfully disobeyed. Therefore, the initial onus to place the relevant material for an action against the judgment debtor will always be on the decree holder.

9. The petitioner has not produced any materials to show that the respondents are fully aware of the terms of the decree and that they have consciously and deliberately disobeyed the said decree. After considering the materials on record, the court below has opined that no materials have been produced by the decree holder for grant of the relief claimed by him. I do not find any error in the order.

10. That brings me to the next question as to whether the petitioner is justified in seeking permission of the Executing Court to fence "A" schedule property marked in the sketch enclosed along with the Execution Petition, A further question as to whether Order 21 Rule 32(5) can be made applicable for execution

of prohibitory injunction also requires consideration because the decree in question is prohibitory in nature. Rule 32(5) of Order 21 provides for restitution in case an order of injunction has not been obeyed, in lieu of or in addition to the remedy available under Order 21 Rule 32(1). Under this provision the Court can direct the act required to be done by the judgment debtor may be done by the decree holder or some other person appointed by the Court at the cost of the judgment debtor. The word "injunction" was not controlled by its nature being mandatory or prohibitory. A question arose as to whether the words "the act requires to be done" contained in this provision covers the situation where a prohibitory injunction has been incorporated in the decree. Some of the High Courts have held that Order 21 Rule 32(5) is applicable for enforcement of mandatory as well as prohibitory injunctions. Some other High Courts have taken a view that the said provision is not applicable for enforcement of the terms of a prohibitory injunction. This Court in KARIYAPPA's case (supra) has taken a view that the said provision cannot be enforced to implement a prohibitory injunction. The controversy has been resolved by insertion of an Explanation to Order 21 Rule 32(5) by CPC amendment Act, 2002 (22 of 2002) with effect from 6.6.2002. which is as under:

Explanation: For the removal of doubts, it is hereby declared that the expression ""the act required to be done" covers prohibitory as well as mandatory injunctions.

After the insertion of the above Explanation, the Executing Court is authorized to direct the enforcement of mandatory as also prohibitory injunctions.

11. However, even after the amendment, the said Section has no application to this case. The court below while decreeing the suit has restrained the defendants from removing the earth from the channel or causing damage to the road leading to the house of the petitioner from Begane-Shringeri Road. When the Court has not granted a decree for fencing "A" schedule property, question of its enforcement by the decree holder or disobedience of (lie decree by the judgment debtor docs not arise. Disobedience of a decree of injunction is necessary for seeking restitution under Order 21 Rule 32(5). It is well established that an Executing Court cannot go outside or beyond the decree. The duty of the Executing Court is to give effect to the terms of the decree. Though it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation (See V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar, There is no merit in this writ petition. It is accordingly dismissed.