

(1938) 03 AHC CK 0006**Allahabad High Court****Case No:** None

Angad and Others

APPELLANT

Vs

Madho Ram and Others

RESPONDENT

Date of Decision: March 31, 1938**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47(2)

Citation: AIR 1938 All 416**Hon'ble Judges:** Ganga Nath, J**Bench:** Division Bench**Final Decision:** Disposed Of

Judgement

Ganga Nath, J.

This is a judgment-debtor's appeal from a decision of a learned single Judge of this Court in an execution case. The respondents decree-holders 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 this land. The decree which was ultimately passed by this Court did not allow the removal of two sheds on the land, but did allow an injunction against the defendants that they should not make any other use of the land beyond keeping those structures upon it and making use of a certain drain. According to the decree-holders, the judgment-debtors put up a new structure. The decree-holders made an application in the execution department for the removal of this structure. The judgment-debtors contended that the decree-holders were not entitled to any relief in the execution department. Their objection was dismissed. The order of the execution Court was affirmed by the lower Appellate Court and by the learned single Judge of this Court. The objection taken by the judgment, debtors was that Order 21, Rule 32, Clause (5) did not apply to prohibitory injunction and consequently the remedy of the decree-holders was not in the execution department, but was by a separate suit for the removal of the new construction. The Question that arises therefore for consideration is whether Order 21, Rule 32,

Clause (5) applies to the present case. There are two kinds of injunctions, namely (1) mandatory and (2) prohibitory. Under the mandatory injunction, certain acts are required to be done, while under the prohibitory injunction acts are restrained from being done. The words used in Clause (5), Rule 32 are:

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.

2. The act required to be done, in our opinion, refers to a positive act such as is required to be done under a mandatory injunction. The illustration given under the Rule is of a mandatory injunction under which a building was to be removed. The illustration says that the decree, holder may apply to the Court to remove the building. This illustration clearly shows that the acts required to be done under Clause (5) refer to a mandatory injunction. "The act required to be done" is not the same as "the act restrained from being done". As soon as an act which is restrained from being done under a prohibitory injunction is done, it passes the stage of restraint or prevention. The undoing of the act that has already been done is not the same thing as restraining the act from being done. If Clause (5), Rule 32 was made applicable to prohibitory injunctions, the relief that a decree holder ought to seek from the Court under it would be its assistance to provide measures necessary for the prevention of the doing of an act. Such a case arose in *Goswami Gordhan Lalji v. Goswami Maksudan Ballabh AIR (1918) All. 152*. There a decree was passed declaring the rights of certain parties to the suit to conduct certain religious ceremonies and enjoining on certain other parties to the suit to refrain from interfering with the celebration of the said ceremonies by the parties in whose favour the decree was passed. The decree-holder applied to the Court for assistance from the police to avoid interference on the part of the other party. The execution Court directed the Superintendent of police to order the Sub-Inspector to have the Arti performed by the applicant in the temple without interference on the part of the other party. It was observed:

It is lastly urged that the Court below was wrong in ordering the Superintendent of police of Muttra to see that the Arti was performed by Goswami Maksudan Ballabh and that the defendants offered no obstruction. So far as this part of the prayer in the application for execution is concerned we do not think that the Court below ought to have granted it. It had no power under the Code of Civil Procedure to order the police to interfere in the matter. There being a decree for a perpetual injunction against the defendants or those whom they represent, it was the duty of the defendants to carry out the injunction, that is to say, to refrain from offering any obstruction to the performance of the office which was decreed to the decree-holder. If they disobeyed the order of the Court, they were liable to the penalties mentioned in Order 21, Rule 32 of the Code, but the Court could not order the police to see that the decree-holders performed the duties of their office without interference on the part of the defendants.

3. It was further observed that Clause (5), Rule 32 did not authorise the Court to make these orders and provided for a different state of things. Reliance is placed on behalf of the respondents on Sachi Prasad Mukherjee v. Amarth Rai Chowdhuri AIR (1919) Cal. 674. This case was not approved of in a subsequent case, Hemchandra Naskar v. Narendranath Basu AIR (1834) Cal. 402. There it was observed:

At the outset, I may observe that I am not inclined to agree in the view expressed by Richardson J., (concurrence in which was withheld by Beachcroft J.) in Sachi Prasad Mukherjee v. Amarth Rai Chowdhuri AIR (1919) Cal. 674 that Clause 5 of Order 21, Rule 32, applies to prohibitory as well as mandatory injunctions. With all deference to the learned Judge, I am of opinion that notwithstanding that the word "injunction" is used in Clause (5) without any qualification or restriction, that clause cannot be read as embracing prohibitory injunctions. The clause as well as the illustration appended to it make it, to my mind, perfectly clear that it is the act required, to be done by the mandatory injunction, that is "the act required to be done" within the meaning of the clause.... I am of opinion that while Order 21, Rule 32, Clauses (1), (2) and (3) apply to both classes of injunctions and enable the decree-holder to put the judgment-debtor into civil prison and to attach the judgment-debtor's property and, by these means to compel him to obey the decree, Clause (5) has no application to the case of a simple prohibitory injunction.

4. It is significant that while the words used in Clauses (1) and (2) are "the decree may be enforced," the words used in Clause (5) are "the act required to be done may be done." Clause (5) does not provide for the enforcement of the decree or the injunction. On the other hand, it provides for the doing of the act required to be done under the injunction, which clearly means an act [required to be done under a mandatory injunction. We are therefore of the opinion that Clause (5), Rule 32 of Order 21 does not apply to prohibitory injunctions. We allow the appeal and set aside the order of the learned single Judge. Learned Counsel for the respondents has prayed that the proceedings may be treated as proceedings in a suit u/s 47, Clause (2). As the remedy of the plaintiff for the removal of the construction in dispute is by way of a suit, we allow the prayer of the respondents decree-holders to convert the proceedings into a suit. The learned Counsel has dropped the alternative relief of arrest of the judgment-debtors. The only relief that he now seeks is for the removal of the construction made by the judgment-debtors in defiance of the prohibitory injunction. The learned Counsel will apply for the necessary amendment. The execution application as amended by the decree-holders shall be treated as a plaint on payment of the necessary court-fee. The parties will bear their own costs.