

(1999) 04 KAR CK 0001

Karnataka High Court

Case No: Civil Revision Petition No. 2754 of 1994

The Corporation of the City of
Belgaum

APPELLANT

Vs

Smt. Vijayalaxmi Narayan
Wandre

RESPONDENT

Date of Decision: April 5, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 32, Order 39 Rule 2A, 115

Citation: (2000) 1 CivCC 63 : (1999) 5 KarLJ 43

Hon'ble Judges: Hari Nath Tilhari, J

Bench: Single Bench

Advocate: Sri V.M. Sheelavant for Sri Ravi B. Naik, for the Appellant; Sri R.U. Goulay, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. Heard Sri V.M. Sheelavant for Sri Ravi B. Naik, learned Counsel for the revision petitioner and Sri R.U. Goulay, learned Counsel for the respondent.

2. The application under Order 21, Rule 32 was made for execution of decree for injunction. According to the revision petitioner he had obtained a decree for permanent injunction in O.S. No. 624 of 1983 permanently restraining the defendant from obstructing the peaceful possession and enjoyment of the suit property either by dumping the material or by either other illegal modes. The decree-holder filed the application in execution against the present revision petitioner that on 4-11-1989 and 12-11-1989 officials of the judgment-debtor had come and put red soil and khadi stones on the open space belonging to the decree-holder and they have made the open space to the level of the tar road. The decree-holder alleged that the decree-holder and her husband had informed the workers of the judgment-debtor-Corporation about the permanent injunction and requested them

not to lay the road in the open space. But they purposely, wilfully and with mala fide intention spread out the soil and stone pieces (khadi) on decree-holder's open space and made it to the level of the tar road. So the decree-holder had made this application.

3. Two points have been framed by the Execution Court which were for consideration before it, they are as under:-

1. Does the decree-holder prove that the judgment-debtor had intentionally committed breach of the order of the permanent injunction issued against him and thereby committed the contempt of Court in respect of the decree dated 27-7-1985 passed in O.S. No. 624 of 1983 by this Court in favour of the decree-holder?

2. If so, the decree-holder further proves that the judgment-debtor is to be punished as under Order 39, Rule 2-A of the CPC for contempt of the breach of injunction and committed the contempt of Court for violating the decree passed in O.S. No. 624 of 1983, dated 27-7-1985 by this Court by way of punishing the judgment-debtor by attachment of his property and putting the judgment-debtor in civil prison for the period of three months?

4. The Execution Court dealt with Point No. 1 and evidence which had been led by the decree-holder believing that it observes, I hold that the decree-holder had established the prima facie allegations as against the judgment-debtor as judgment-debtor had entered into the open space belonging to the decree-holder and committed the contempt of Court order of the decree passed in O.S. No. 624 of 1983. In paragraph 9 the learned Court below observes:

"P.W. 1 who is decree-holder in her oral evidence had deposed as the judgment-debtor had entered into the open space belonging to the decree-holder. In the cross examination portion it is admitted as the land was dug whether it is for laying the pipelines or for making tar road is not clearly got enunciated in due course of the cross-examination. In spite of taking for the sake of logical reasoning even admitting as the judgment-debtor had undertaken the excavation of land for the purpose of laying the new water pipeline in lieu of old one. But at the same instance there is no denial on the part of judgment-debtor specifically taking admission on the part of judgment-debtor as the land before the house of the decree-holder is not dug for the purpose of making tar road etc. So in the absence of such non-admission on the part of the judgment-debtor as the land was not dug for the purpose of making tar road, strong inference of presumption is drawn as the judgment-debtor had dug the land in front of the decree-holder's house for making the tar road".

5. The findings which have been recorded by the Execution Court does not clearly show that though decree-holder had opportunity of obeying the decree, but he had wilfully failed to obey in performing its public obligation of providing water pipeline to the residents of the locality. There is no dispute that the pipeline was laid not on

the land belonging to the plaintiff, but on the road.

6. The learned Counsel for the respondent contended that dealing with Point No. 2, the Court has observed that there was intentional breach. He invited my attention to the observations at the bottom of page 35 (typewritten page) which reads as under.-

"So even after the decree of permanent injunction, the judgment-debtor had intentionally violated the Court order and thereby committed the contempt of Court".

7. This contention of the learned Counsel for the respondent has been contested by the learned Counsel for the petitioner that in Issue No. 1 nowhere it has been recorded that the judgment-debtor had an opportunity to obey the decree or he wilfully flouted the order of the Court.

8. There appears much substance in the contention of the learned Counsel for the petitioner. Order 21, Rule 32(1) reads as under.-

"Rule 32(1) Where the party against whom a decree for 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".

The sine qua non for exercise of jurisdiction under Rule 32(1) is establishing of fact "that the judgment-debtor has had an opportunity of obeying the decree and has wilfully failed to obey it". This is a jurisdictional fact which has to be established, before the Court would proceed to consider the merits of the case and questions involved. This question has to be determined keeping in view the obligation of the Corporation towards the public to make supply of the water and in performing that job, it had to consider whether that public job could be performed in such a manner that decree would also be obeyed and public job would also be performed. If for putting pipeline on the road the labourers put the soil dug from the land on the plaintiff's land while making drain, and whether the labourers put the soil with full knowledge of the decree and whether it was possible to put the soil at any other place for the time being; these are the material consideration which should affect the mind of the Court whether the revision petitioner had an opportunity to obey the decree and if he had an opportunity of obeying the decree, but wilfully committed breach of the decree. This jurisdictional fact not having been decided in the light of the law contained in Rule 32 and sine qua non condition not having been fulfilled, in my opinion, the Court below could not pass an order of attachment or of imprisonment against the petitioner. When I so opine, I find support for my view from the decision of the Hon"ble Allahabad High Court in the case of [Ram Autar and Others Vs. Kaushal Kishore](#), where Hon"ble Mr. Justice R.S. Pathak, the then Judge

of the Allahabad High Court, at page 45, has been pleased to lay down as under.-

"The jurisdiction conferred under Order 21, Rule 32 of the Code can be exercised only where a party against whom an injunction has been passed has wilfully failed to obey it".

This sine qua non for exercise of jurisdiction under Rule 32, that whether there is wilful default of the decree of injunction and if it is not and unless it is shown that the party had an opportunity for not disobeying the order and had disobeyed.

9. As I find in this case the Court below has not examined the matter in the light of the basic ingredients of Rule 32 upon which depended the jurisdiction of the Court, in my opinion, the Court below acted illegally and without jurisdiction in passing the order of attachment. The order impugned, as such, deserves to be set aside as the Court had acted illegally in passing the order without applying its mind to the question of jurisdictional fact and law as to whether judgment-debtor had an opportunity of obeying the decree and has wilfully failed to obey it.

In this view of the matter, in my opinion, the revision has got to be allowed. Revision u/s 115 is allowed. The order impugned, as such, is set aside as being without jurisdiction. The Court below is directed to reconsider the matter in the light of the law laid down by this Court.