

## Datchinamoorthy Vs Ravichandran <BR>Ravichandran Vs Datchinamoorthy

**Court:** Madras High Court (Madurai Bench)

**Date of Decision:** Feb. 7, 2011

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 21 Rule 32, Order 21 Rule 32(1), Order 21 Rule 40, Order 39 Rule 2A

**Hon'ble Judges:** M. Venugopal, J

**Bench:** Single Bench

**Advocate:** J. Anandhavalli, for the Appellant; Ravichandran, for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.

The Civil Revision Petitioner/Respondent/Defendant/ Judgment Debtor has filed the present Civil Revision Petition as against the order dated 22.01.2004 passed in E.P. No. 4 of 2002 in O.S. No. 180 of 1996 on the file of the learned Principal District Munsif,

Pudukkottai.

2. The Executing Court while passing the order in E.P. No. 4 of 2002 in O.S. No. 180 of 1996 on 22.01.2004, has among other things observed

that any act of the Respondent disturbing the possession and enjoyment of the Petitioner while decree is in force, amounts to contempt and

therefore the Respondent is liable for punishment and resultantly, ordered issuance of notice to the Respondent for appearing before it and explain

as to why he should not be sentenced to civil prison.

3. The learned Counsel for the Petitioner/judgment debtor submits that the order of the Executing Court in E.P. No. 4 of 2002 in O.S. No. 180 of

1996 dated 22.01.2004, is contrary to law and unsustainable and as a matter of fact, the procedures envisaged under Order 21 Rule 32(1) and

Order 21 Rule 40 of the CPC have not been adhered to by the Executing Court.

4. It is the contention of the learned Counsel for the Petitioner that the Respondent/decreed holder has not established that the revision

Petitioner/judgment debtor has violated the injunction decree and indeed, the decree being an ex-parte one, the Executing Court ought to have

waited for the disposal of the Civil Miscellaneous Appeal.

5. Advancing her arguments, it is the contention of the learned Counsel for the Petitioner/judgment debtor that Order 21 Rule 32 of the CPC

enjoins that the burden is on the Respondent/decreed holder to establish that the revision Petitioner/judgment debtor has violated the decree ad not

otherwise.

6. Lastly, it is the plea of the learned Counsel for the Petitioner that the Executing Court has not passed any order on merits on 13.03.2004 after

the notice has been issued under Order 21 Rule 40 of the Code of Civil Procedure. Therefore, the learned Counsel for the Petitioner prays for

allowing the Civil Revision Petition in furtherance of substantial cause of justice.

7. The learned Counsel for the revision Petitioner/ judgment debtor submits that after issuance of notice in E.P. No. 4 of 2002 no opportunity has

been given to the revision Petitioner/judgment debtor to adduce evidence in the matter in issue and before issuance of notice, the Executing Court

has come to a wrong conclusion while passing orders in E.P. No. 4 of 2002 to the effect that ""...any act of the Respondent disturbing the

possession and enjoyment of the Petitioner while decree is in force, amounts to contempt and therefore the Respondent is liable for punishment"

and in fact, the Executing Court has prejudged the issue and after issuance of notice in E.P. No. 4 of 2002, the trial Court has not conducted any

enquiry and as such, the order has not been passed on merits and also in the manner known to law.

8. It is not out of place for this Court to pertinently point out that in E.P. No. 4 of 2002 filed by the Respondent/decreed holder, the

Respondent/decreed holder has sought the relief of arresting the revision Petitioner/judgment debtor/Defendant for committing contempt in respect

of the decree in O.S. No. 180 of 1996 dated 20.06.2001 as per Order 21 Rule 32 of the Code of Civil Procedure.

9. The Respondent/decreed holder/Petitioner, before the Executing Court in E.P. No. 4 of 2002 has filed a sworn affidavit wherein he has

mentioned that in the suit properties, there are Karuvela trees and on 27.12.2001, he has entered into the suit property and has been cleaning the

same and at that time, the revision Petitioner/ Defendant/judgment debtor has come to the suit property and interfered with the enjoyment of the

suit property by causing obstruction, etc. and further, he has given a police complaint against the revision Petitioner/ Defendant because has

threatened the Respondent/decreed holder by uttering the words "what will the judgment of the Court do" and also that "only if the decreed holder is

alive, he can enter into the property" and that the police has informed that since it is a civil matter, they advised the Respondent/decreed holder to

seek redressed of his grievance through a Court of law.

10. The revision Petitioner/judgment debtor in his objection memo filed to the E.P. No. 4 of 200 has stated that the Respondent/decreed holder has

no right to file the present Execution Petition and to set aside the ex-parte decree, an application has been filed and the same is pending and only

with a view to cause hardship and inconvenience to the revision Petitioner, the decree holder has filed the present Execution Petition.

11. Before the Executing Court in E.P. No. 4 of 2002, the Respondent/decreed holder has been examined as P.W.1. P.W.1, in his evidence, has

deposed that in the suit filed before the trial Court in O.S. No. 180 of 1996 against the revision Petitioner/Defendant/judgment debtor for the relief

of injunction, the trial Court has passed an ex-parte decree (Ex.A.1) on 20.06.2001 in favour of the Respondent/decreed holder and the revision

Petitioner/judgment debtor/Defendant and his son have come to the suit property and asked as to who is cutting the Karuvela trees and he

informed them that he is cutting the same as per the decree and for that, the revision Petitioner/judgment debtor scolded him by uttering that "what

the decree holder can do with the Court order" and that the Respondent/decreed holder informed the revision Petitioner/judgment debtor that he

has to abide by the Court order and that the revision Petitioner instigated his sons to attack him and therefore, he has given a complaint before the

Karambakudi Police Station and the petition is Ex.A.2.

12. R.W.1/revision Petitioner/judgment debtor in his evidence has deposed that he is enjoying the suit property and that he has filed the petition to

set aside the ex-parte decree which has been dismissed and thereafter, he has filed the appeal on 08.10.2003 and the same has not been taken on

file and the appeal has been returned for want of lower Court's decree in O.S. No. 180 of 1996 and has also filed a copy application to obtain the

decree and that Exs.A.2 and A.3 namely, the copy of the complaint dated 27.12.2001 and receipt issued by the police, are all a false one.

13. R.W.1, to a suggestion in his cross-examination as to whether he will obstruct the Respondent/decreed holder/ Petitioner in E.P, when the latter

comes for putting the thatched shed, has stated that till date, he is enjoying the suit property and has patta and he enjoyed the same and moreover,

he is dumping the waste matters in the pit and therefore, no one can put a thatched shed by overlooking him. In respect of the Karuvela trees in S.

No. 113, the patta stands in the name of Dharmambal and that he will not grant permission to cut the said Karuvela trees and that the decree

holder has not obtained permanent injunction and to a specific question as to whether permanent injunction decree has been granted by the Court

against him in regard to the enjoyment of the Respondent/decreed holder, he answers that it is not so.

14. Based on the evidence of R.W.1 (in his cross-examination), the Executing Court has negated the contention of the revision

Petitioner/judgment debtor that he is in enjoyment and possession of the suit property inasmuch as the Respondent/decreed holder has obtained a

decree against the revision Petitioner/judgment debtor on 20.06.2001 from the trial Court. Further, the Executing Court has also held that any act

of the revision Petitioner in disturbing the possession and enjoyment of the decree holder, in regard to the suit property when the decree is in force,

amounts to contempt and as such, the revision Petitioner is liable for contempt and as such, has ordered issuance of notice to the revision Petitioner

for his appearance before the Court and to explain as to why he should not be sentenced to civil prison.

15. The Executing Court on 13.03.2004, has taken up the E.P. No. 4 of 2002 since 08.03.2004 has been declared as holiday, has inter alia

passed the following order:

Stay order not produced. Sufficient time given. The Respondent (revision Petitioner) appearing in person. No explanation is offered by him and

hence, keeping in mind the age of the Respondent (revision Petitioner), ordered the Respondent to undergo imprisonment for one month in civil

prison on payment of bail by the Petitioner and for payment of subsistence allowance, time has been given till 26.03.2004 and warrant has been

directed to be issued after payment of subsistence allowance.

16. It is to be noted that Order 21 Rule 32 speaks of the decree for specific performance for restitution of conjugal rights or for an injunction. The

Executing Court has to see that before directing execution to issue under Rule 32 of Order 21 of the CPC is whether an individual bound by the

decree has had an opportunity of obeying the decree or injunction and has willfully failed to obey it. If the party has had the opportunity and has

willfully failed to obey the decree, the Court may order the execution to issue under this rule without providing him any further opportunity, and it is

not obligatory upon the Court in such a case to serve a notice upon the party calling upon him to obey the decree or injunction as per the decision

in Durga Das v. Dewraj reported in (1906) 33 Cal 306.

17. That apart, this Court aptly points out that Order 21 Rule 32(1) of the CPC requires willful non-compliance and this requires deliberate and

conscious action. There ought to be, (a) deliberate action or conduct, molded by an obstinacy to act as per the decision in Shivamurthy

Mahalingappa Kuchanaur Vs. Dannamma devi Cycle Mart, Rabakavi, and (b) consciously disregarding of an injunction against such a conduct as

per the decision in Kariyappa Vs. Haladappa, . Where the disobedience is not willful, jurisdiction under Order 21 Rule 32 of the CPC cannot be

exercised. The term "willful failure" means want of bona fide as per the decision in Ram Nath Vs. Smt. Tapesara and Others, .

18. The issue of taking action under Order 21 Rule 32 of the CPC can arise only when there is a willful breach of the injunction and not when there

is a mere attempt to violate it as per the decision in Repayi Jose Vs. Chacko Lonappan and Another, .

19. This Court worth recalls the decision in Ram Autar and Others Vs. Kaushal Kishore, followed in Ram Nath Vs. Smt. Tapesara and Others, ,

wherein it is held that "if there is doubt in the mind of a party as to the true scope of the injunction which arises because of the vagueness of the

terms of the 11 order, it cannot be said that he has willfully disobeyed the injunction.Ã~Â¿Â½

20. Interestingly, the revision Petitioner/judgment debtor in his evidence (in cross-examination) has stated that he is enjoying the second item of the

suit property in S. No. 122/4 and has a patta and also has dug a pit for the purpose of dumping the waste matters and as such, overlooking him,

no one can erect or put a thatched shed and in regard to the first item, namely in S. No. 113, where the Karuvela trees are standing, the patta is in

the name of Dharmambal and he will not permit the cutting of Karuvela trees situated in that property, etc.

21. As a matter of fact, the Executing Court while passing the order in E.P. No. 4 of 2002 on 22.01.2004, has not rendered any categorical

finding as to whether there has been a willful failure on the part of the revision Petitioner/judgment debtor in not obeying the decree for injunction.

In short, whether the non-compliance of the injunction decree passed by the trial Court, is willful or want of bona fide to that extent, the order of

the Executing Court in E.P. No. 4 of 2002 is conspicuously silent.

22. Disobedience is not intentional or willful, then the jurisdiction under Order 21 Rule 32 of the CPC cannot be put into operative play, in the

considered opinion of this Court. Suffice it for this Court to point out that only when there is a deliberate or intentional or willful breach of injunction

decree, then only invoking the ingredients of Order 21 Rule 32 of the CPC will arise. To put it differently, if there is an endeavour or mere attempt

to violate the injunction decree, then Order 21 Rule 32 of the CPC will not apply.

23. Although the Respondent/decree holder has obtained an ex-parte decree from the trial Court on 20.06.2001 and this has been denied by the

revision Petitioner as R.W.1 in his cross-examination, yet it is the primordial duty of the Executing Court to arrive at a categorical finding as to

whether there has been willful failure on the part of the revision Petitioner in not obeying the decree for injunction.

24. There must be a clear and willful disobedience of the Court's injunction decree. One has to bear in mind that the proceedings under Order 21

Rule 32 of the CPC are not meant to punish the judgment debtor for the disobedience of the decree. If a judgment debtor renders himself

incapable of performing the decree, then, there is no impediment for drawing the proceedings under the Contempt of Courts Act, in the considered

opinion of this Court. Furthermore, a Court of law cannot refer the matter for implementation of decree to the police authorities for depriving the

rights of a judgment debtor. A willful failure to obey the decree is necessary for execution.

25. A decree for permanent injunction can be enforced under Order 21 Rule 32 of the CPC and not under Order 39 Rule 2-A of the Code of

Civil Procedure. Every time when there is a violation of injunction, it is an independent actionable one and on a fresh breach, a judgment debtor

can be sent to civil prison and the principles of constructive res judicata will not apply, as opined by this Court.

26. As far as the present case is concerned, the Executing Court without rendering a categorical finding as to whether there is a willful failure on the

part of the revision Petitioner/judgment debtor in obeying the injunction decree in O.S. No. 180 of 1996, has come to an incorrect conclusion by

ordering notice to be issued to the revision Petitioner/judgment debtor for appearing before the Court, etc. On that basis, the contention of the

revision Petitioner that he is in possession and enjoyment of the suit property cannot be taken into consideration at this stage, because the Court

has already passed a decree in favour of the Respondent/decreed holder holding that he is in possession and enjoyment of the suit property, etc. and

the same is a premature and otiose one, as opined by this Court.

27. Since the order of the Executing Court in E.P. No. 4 of 2002 dated 22.01.2004 is not in accordance with law and also as per the ingredients

of Order 21 Rule 32 of the Code of Civil Procedure, this Court is perforced to interfere with the said order and in the interest of justice, this Court

sets aside the same by allowing the present Civil Revision Petition. As a logical corollary, the subsequent order passed by the Executing Court on

13.03.2004 directing the revision Petitioner/judgment debtor to undergo imprisonment for one month in civil prison, etc, is not a valid and

justifiable one in the eye of law and as such, this Court also sets aside the same to prevent an aberration of justice.

28. To put it succinctly, the ingredients of Order 21 Rule 32 of the CPC have been clearly given a go-by by the Executing Court while passing the

order in E.P. No. 4 of 2002 dated 22.01.2004 and the subsequent order dated 13.03.2004 and as such, the said orders are not in conformity

with law.

29. In the result, the Civil Revision Petition is allowed leaving the parties to bear their own costs. Resultantly, the orders of the Executing Court in

E.P. No. 4 of 2002 dated 22.01.2004 and the subsequent order dated 13.03.2004, are set aside. Liberty is also granted to the

Respondent/decreed holder to project a fresh or another application as per Order 21 Rule 32 of the CPC before the Executing Court seeking arrest

of the revision Petitioner/judgment debtor and the Executing Court is to provide necessary opportunities to the parties concerned by filing counter

or objection and also permit them to adduce oral and documentary evidence in the manner known to law. Further, the Executing Court is directed

to dispose of the fresh application under Order 21 Rule 32 of the CPC if any filed by the Respondent/decreed holder in accordance with the

relevant provisions of the Code of Civil Procedure. Consequently, the connected Miscellaneous Petition is closed.