

in the subsequent sections of the Act will have to be taken.

For the reasons given above we allow this appeal, set aside the order of the court below and send the case back to that court with the direction that it shall re-admit it to its original number and shall proceed according to law.

Before Sir John Thom, Chief Justice, and Mr. Justice
Ganga Nath

ANGAD AND OTHERS (JUDGMENT-DEBTORS) v. MADHO RAM
AND OTHERS (DECREE-HOLDERS)*

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DAYAL
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AMEBA
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March, 31

Civil Procedure Code, order XXI, rule 32(5)—Not applicable to prohibitory injunctions—Remedy for breach of prohibitory injunction—Fresh suit—Civil Procedure Code, section 47(2)—Conversion of application for execution into a suit.

Order XXI, rule 32(5) of the Civil Procedure Code does not apply to prohibitory injunctions. The "act required to be done", mentioned in sub-rule (5), refers to a positive act such as is required to be done under a mandatory injunction and cannot refer to an act which is prohibited from being done.

Where a prohibitory injunction is disobeyed, e.g. a construction is made which was prohibited, the remedy of the plaintiff decree-holder for the removal of such construction is by way of a fresh suit and not by way of execution of decree.

In such a case the application for execution, which is misconceived, can be converted into a suit, under the provisions of section 47(2) of the Civil Procedure Code.

Mr. *Baleshwari Prasad*, for the appellants.

Mr. *Ram Narain Verma*, for the respondents.

THOM, C.J., and 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

*Appeal No. 99 of 1935, under section 10 of the Letters Patent.

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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 XXI, rule 32, clause (5) did not apply to prohibitory injunctions 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 XXI, 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 court may . . . direct that 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". 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* (1). 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 XXI, 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."

(1) (1918) I.L.R. 40 All. 648.

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It was further observed that clause (5) of 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. Amarnath Roy* (1). This case was not approved of in a subsequent case, *Hemchandra Naskar v. Narendranath Basu* (2). 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 the case of *Sachi Prasad Mukerjee v. Amarnath Roy* (1), that clause (5) of rule 32 of order XXI 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 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 XXI, 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.”

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 XXI does not apply to prohibitory injunctions.

(1) (1918) I.L.R. 46 Cal. 103.

(2) (1933) I.L.R. 61 Cal. 148.

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, under section 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 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.

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Before Mr. Justice Iqbal Ahmad and Mr. Justice Harries

INAYAT ULLAH (DECREE-HOLDER) *v.* KHALIL ULLAH
 KHAN AND ANOTHER (JUDGMENT-DEBTORS)*

 1938
 April, 1

U. P. Encumbered Estates Act (Local Act XXV of 1934), section 7(3)—Sale of his land by applicant landlord prohibited—Sale of such land by court in enforcement of a decree against the landlord for specific performance of a contract to sell, also prohibited—Sanction of Collector—Decree for specific performance of a contract to sell—When title to the property passes to the decree-holder—Civil Procedure Code, order XXI, rules 32, 34.

A decree for specific performance of a contract to sell property merely declares the right of the decree-holder to have a transfer of the property executed in his favour; the decree by itself does not transfer title. So long as a sale deed is not executed in favour of the decree-holder, either by the defendant himself or by the court, the title to the property continues in the defendant and does not pass to the decree-holder.

*First Appeal No. 99 of 1937, from a decree of Krishna Das, Civil Judge of Pilibhit, dated the 19th of December, 1936.