

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.07.2016

DELIVERED ON : 01.11.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Revision Petition (PD) No.1076 of 2016

and

C.M.P.No.5932 of 2016

K.Sampath (died)

Yasodha (died)

1.Rajendiran

S/o.Sampath Mandiri

2.Murthi

S/o.Sampath Mandiri

3.Ravi

S/o.Sampath Mandiri

4.Selvam

S/o.Sampath Mandiri

5.Kannagi

W/o.Suriya Prakash

6.Maliga

W/o.Ganesan

7.Sasikala

W/o.Ramesh

8.Maheswari

W/o.Lakshmanan

9.Kavitha
D/o.Late Lakshmanan

10.Sasikumar
S/o.Late Lakshmanan

11.Vijayakumar
S/o.Late Lakshmanan

... Petitioners

vs

Jayaraman
s/o.Late Ekambar Mudaliar

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the order of learned Additional District Munsif, Vellore, passed in I.A.No.697 of 2014 in O.S.No.330 of 2005 on 18.01.2016.

For Petitioners : Mr.V.Raghavachari

For Respondent : Mr.T.R.Rajaraman

ORDER

This revision arises against the order of learned Additional District Munsif, Vellore, passed in I.A.No.697 of 2014 in O.S.No.330 of 2005 on 18.01.2016.

2. Respondent has preferred O.S.No.330 of 2005 on the file of learned Additional District Munsif, Vellore, seeking declaration of title to property and permanent injunction against interference with possession and enjoyment. Respondent moved I.A.No.697 of 2014 in O.S.No.330 of 2005 towards amending the plaint. Under order dated 18.01.2016, Court below allowed such application giving rise to the preference of this revision by petitioners/defendants.

3. Heard learned counsel for petitioners and learned counsel for respondent.

4. Learned counsel for petitioners submitted that in the affidavit in support of I.A.No.697 of 2014 in O.S.No.330 of 2005, respondent/plaintiff merely had informed that certain extents of the suit property had been acquired for formation of a National Highway and therefore, it was necessary to amend the plaint towards informing the correct extent of property. The affidavit made no whisper of petitioners/defendants having put up any illegal structure on suit property. While so, in the petition filed under Or.6 R.17 CPC, the relief of 'mandatory injunction directing defendants, their men, agents, to

remove the illegal structure put up in the suit property' surreptitiously had been introduced and towards serving such end, an amendment in paragraph No.7 of the plaint had been introduced to the following effect:

“Add in Para:7 of the plaint. The defendants had encroached upon the suit property and had put up construction between February 2014 and March 2014, without approval or permission from Local Authority. Then entry and putting up construction are illegal and the same has to be removed by the grant of relief of mandatory injunction directing the defendants and their men to remove the illegal construction in the suit properties in default the plaintiff is entitled to remove the same through the process of this Honourable Court.”

5. Learned counsel submitted that in the written statement of the first defendant it had been contended that respondent/plaintiff had entered into an agreement of sale in respect of particular extents in four survey fields whereunder the sale consideration had been fixed at Rs.12,000/-. Respondent/plaintiff has received an advance of Rs.1,000/- on 11.09.1969, the date of agreement and put the first defendant in possession. Time, was not of the essence, but even within the agreement period, respondent/plaintiff had received the balance sale consideration. In the written statement, it was further contended that respondent/plaintiff had informed as unnecessary the

execution of sale deed and that he allowed first defendant to enjoy the suit property as a purchaser. It is the further contention of first defendant that being so in enjoyment and possession he had executed a Settlement Deed in favour of his wife, the second defendant on 26.08.1991 and had put her in possession. The amendment has been sought 12 years after the date of plaint. Revision petitioners had no objection in allowing the amendment insofar as the same was towards informing the correct extent of property. However, having spoken in the affidavit merely regards the change in extent, respondent/plaintiff had sought amendments otherwise through the petition. Court below in allowing the same has gone about in a mechanical manner resulting in grave prejudice to petitioners/defendants. Learned counsel contended that the following prayers in the petition filed under Or.6 R.17 CPC could not have been permitted:

“1. Add in Para:7 of the plaint. The defendants had encroached upon the suit property and had put up construction between February 2014 and March 2014, without approval or permission from Local Authority. Then entry and putting up construction are illegal and the same has to be removed by the grant of relief of mandatory injunction directing the defendants and their men to remove the illegal construction in the suit properties in default the plaintiff is entitled to remove the same

through the process of this Honourable Court.

2. Add in Para 10 of the plaint after clause (b)

(b-1) granting the relief of mandatory injunction directing the defendants, their men and agents to remove the illegal structure put up by the defendants in the suit property.

4. Add in the particulars of valuation.

The relief of mandatory injunction is incapable of valuation.

Hence the same is valued at Rs.1,000.00

Court fee paid U/sec.27(c) of TNCF Act Rs.75.50

Total value of the suit ... Rs.2,000.00

Total court fee paid is ... Rs. 151.00”

6. Learned counsel for petitioners relied on the decision of this Court in ***Bhagavatula Gopalakrishnamurthi and others v. Dhulipalla Sreedhara Rao and other [AIR 1950 Mad 32]*** to the effect that facts which were available to plaintiff and which, plaintiff had not chosen to mention in the original plaint could not be permitted to be introduced by way of amendment as the result would be to introduce a new element which was absent in the original plaint.

7. Learned counsel referred to the decision of the Apex Court in ***B.C.Chaturvedi v. Union of India and others [1995 (6) SCC 749]***, wherein it had been informed that the power to do complete justice inheres in every

Court, not to speak of a Court of plenary jurisdiction like a High Court. Learned counsel also referred to the decision of this Court in ***Annapoorni v. Janaki [1995-1-L.W.141]***, wherein it *inter alia* had been informed that “*When this Court finds that a decree suffers from an error of law apparent on the fact of the record owing to non-application of mind of the Court, to the relevant principles of law, this Court cannot keep silent and allow the decree to be in force, particularly, when it causes grave injustice.*”

8. Submitting that even in the written statement, first defendant had informed of being put in possession of property and the prayer for mandatory injunction now introduced hopelessly was barred by time, the suit being of the year 2005, learned counsel referred to decision in ***L.C.Hanumanthappa (since dead) represented by his legal representatives v. H.B.Shivakumar [2016 (1) SCC 332]*** to contend that the principle of doctrine of relation back i.e. relating back the amendment to the date on which the suit originally was filed would not apply in respect of a relief which was barred by limitation as on the date of grant of amendment.

9. Learned counsel for respondent/plaintiff submitted that in allowing

I.A.No.697 of 2014 in O.S.No.330 of 2005, Court below had imposed costs on respondent/plaintiff and payment thereof had been accepted by petitioners/defendants. Learned counsel contended that while so, it was not open to petitioners/defendants to challenge the order of Court below. Learned counsel relied on the decision of this Court in ***M/s.Fast Cool Services v. P.Shanthakumari* [2000 (2) L.W. 642]**, wherein it has been held thus:

“14. In one of the earlier decisions of our High Court reported in AIR 1927 Madras 1009 (2) = 26 L.W. 527 (Ramaswami v. Chidambaram), amendment application was allowed on condition of defendant paying plaintiff Rs.150/- by way of cost. Defendant paid the same which was taken by plaintiff's counsel under protest, whereby plaintiff intended to challenge the order before High Court. When the revision was filed against that order by plaintiff, a preliminary objection was raised contending that having received the cost, though under protest, revision cannot be maintained. Accepting the preliminary objection, learned Judge of this Court held thus,

“Respondent raises a preliminary point whether the plaintiff having taken the money although under protest is not estopped from questioning the order.

It has long been recognized that where a party accepts costs under a Judge's order which, but for the order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction. King v. Simmonds (1) and

Tinkler v. Hilder (2). This ruling was followed in Banku Chandra Bose v. Marium Begum (3) in circumstances similar to those of the present case. But the petitioner relies upon an obiter dictum in that case of the Chief Justice:

Personally I cannot help thinking that defendants would have been in a much better position if they had said: "We intend appealing against this order and we only accept this sum under protest.

The defendant's vakil himself in that case when questioned by the Court said that receipt under protest would have been of no avail, and cited Croft v. Lumley (4). I think, with all respect to the Chief Justice, that he was right, that ruling is based on the broad principle that what is done, not what is said, is the all-important matter. The petitioner obtained money which he could not otherwise have got, and although he protested he enjoyed that benefit, he must be taken to have admitted that the order was within jurisdiction."

10. Responding to the above submission, learned counsel for petitioners referred to the decision of the Apex Court in ***P.R.Deshpande v. Maruti Balaram Haibatti [1998 (6) SCC 507]***, wherein it had been held as follows:

"8. The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be

precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)

9. *It is now trite that the principle of estoppel has no application when statutory rights and liabilities are involved. It cannot impede right of appeal and particularly the constitutional remedy. The House of Lords has considered the same question in Evans v. Bartlam [1937 (2) ALL ER 646]. The House was dealing with an order of the court of appeal whereby Scott, L.J. approved the contention of a party to put the matter on the rule of election on the premise that the defendant knew or must be presumed to know that he had the right to apply to set the judgment aside and by asking for and obtaining time he irrevocably elected to abide by the judgment. Lord Atkin, reversing the above view, has observed thus:*

“My Lords, I do not find myself convinced by these judgments. I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment-debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election.”

10. Lord Russell of Killowen while concurring with the

aforesaid observations has stated thus:

“My Lords, I confess to a feeling of some bewilderment at the theory that a man (who, so long as it stands, must perforce acknowledge and bow to a judgment of the court regularly obtained), by seeking and obtaining a temporary suspension of its execution, thereby binds himself never to dispute its validity or its correctness, and never to seek to have it set aside or reversed. If this were right, no defeated litigant could safely ask his adversary for a stay of execution pending an appeal, for the grant of the request would end the right of appeal. The doctrine of election applies only to a man who elects with full knowledge of the facts.”

11. A party to a lis can be asked to give an undertaking to the court if he requires stay of operation of the judgment. It is done on the supposition that the order would remain unchanged. By directing the party to give such an undertaking, no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy. If the order is reversed or modified by the superior court or even the same court on a review, the undertaking given by the party will automatically cease to operate. Merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay, he cannot be presumed to communicate to the other party that he is thereby giving up his statutory remedies to challenge the order. No doubt he is bound to comply with his undertaking so long as the order remains alive and operative. However, it is open to such superior court to consider whether the operations

of the order or judgment challenged before it need be stayed or suspended having regard to the fact that the party concerned has given undertaking in the lower court to abide by the decree or order within the time fixed by that court.

12. We are, therefore, in agreement with the view of *Sahai and Venkatachala, JJ.*, that the appeal filed under Article 136 of the Constitution by special leave cannot be dismissed as not maintainable on the mere ground that the appellant has given an undertaking to the High Court on being so directed, in order to keep the High Court's order in abeyance for some time.”

11. Learned counsel for petitioners also placed reliance on the decision of the Apex Court in ***Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti [1995 Supp (2) SCC 539]***, wherein it had been held thus:

“3. None of these principles apply to an undertaking given by a tenant for vacating the premises within specified time. It is not a transfer of property by a person who has no right to transfer. The doctrine of election cannot be applied to deprive a person of his statutory right to appeal, much less a constitutional right of invoking extraordinary jurisdiction of this Court as he having undertaken to vacate the premises was precluded from exercising his right to approach higher court. It is not exercise of option between two remedies open to him but depriving him of his constitutional right which would be contrary to constitutional guarantee and against law. There is no estoppel

against statute.

4. *Even the equitable principle of “approbate and reprobate” cannot be applied. Taking time to vacate is appealing to the court to protect him so that he may make arrangements in the meantime. At the worst the intention might be to gain time to approach the higher court. Grant of time in either case is in the discretion of the court. Its violation may amount to disobedience of the order of court and the person may be proceeded against in contempt. But no other fetter arises. Otherwise in the system prevalent the tenant may be on the road by the time he is able to approach this Court. This would be rendering the tenant remediless. The equitable principle of estoppel thus cannot act inequitably against tenant.*

5. *Remedy under Article 136 is a constitutional right. It cannot be taken away by legislation much less by invoking principle of election or estoppel. The jurisdiction exercised by this Court under Article 136 is an extraordinary jurisdiction which empowers this Court to grant leave to appeal from any judgment, decree or determination in any cause or matter passed or made by any court or tribunal. The scope of this article has been settled in numerous decisions. It is not hedged with any restrictions or any exception as is normally found in the provisions conferring jurisdiction. The principle of “approbate and reprobate” or the law of election which is the basis of the decision in *R.N.Gosain* case [1992 (4) SCC 683] cannot, in our opinion, be applied appropriately to preclude this Court from*

exercising its jurisdiction under Article 136. The doctrine of election is founded on equitable principle that where a person persuades another to act in a manner to his prejudice and derives any advantage from that, then he cannot turn around and claim that he was not liable to perform his part as it was void. It applies where a vendor or a transferor of property tries to take advantage of his own wrong. This principle cannot, in our opinion, be extended to shut out or preclude a person from invoking the constitutional remedy provided to him under Article 136. The law that there is no estoppel against statute is well settled. Here it is a remedy under the Constitution and no law can be framed much less the principle of election which can stand in the way of the appellant from invoking the constitutional jurisdiction of this Court. The Court may, in the circumstances of the case, refuse to exercise its discretion but he cannot be precluded from invoking the jurisdiction by application of the principle of election. For these reasons we have some difficulty in agreeing with the ratio of R.N.Gosain case. We are of the opinion that papers of this appeal may be placed before Hon'ble the Chief Justice of India for directing it to be listed before a larger Bench.”

12. This Court has considered the rival submissions.

13. This Court cannot but consider the act of the respondent/plaintiff in

introducing prayers in the petition in I.A.No.697 of 2014 in O.S.No.330 of 2005 without making a whisper there regards in the affidavit in support thereof as clandestine and the act of the Court below in allowing such petition as most irresponsible. The decisions referred to above make clear that in such circumstances, this Court would exercise its jurisdiction under Article 227 of the Constitution of India to do justice. Where prayers in the petition have not been supported by pleadings/ contentions in the affidavit in support thereof and the petitioners have had no opportunity to counter the same, it would be unjust to allow the order under challenge to stand. In such view of the matter, it becomes unnecessary to consider the question of limitation and non-applicability of the doctrine of relation back viz-a-viz., the ill granted prayers 1, 2 and 4 in I.A.No.697 of 2014 in O.S.No.330 of 2005. On the question of the present revision not being maintainable owing to petitioners having accepted the costs awarded by the Court below in allowing the application, this Court is unable to subscribe to the view taken by the learned Single Judge of this Court in *M/s.Fast Cool Services v. P.Shanthakumari* [2000 (2) L.W. 642] to the effect that acceptance of costs would preclude a party challenging an order wherein costs in his favour has been ordered. The rationale of the decisions of the Apex Court in *P.R.Deshpande v. Maruti Balaram Haibatti* [1998 (6) SCC

507] and **[1995 Supp (2) SCC 539]** would impel this Court to hold the exact opposite. The acceptance of costs by a party would not amount to waiving his right to challenge an order. It is one thing to say that a party will pay costs as a condition for grant of a relief prayed for by him. It is quite another to say that the party, who accepts costs cannot challenge the order wherein the same is made payable. Courts cannot be seen as placing reliance on a price against their orders being tested.

In the result, the Civil Revision Petition shall stand allowed. The order of the Court below passed in I.A.No.697 of 2014 in O.S.No.330 of 2005 on 18.01.2016 in respect of prayers 1, 2 and 4 shall stand set aside. Such order insofar as it relates to prayer 3 shall hold good. No costs. Connected miscellaneous petition is closed.

01.11.2016

Index:yes/no
Internet:yes
gm

To

The Additional District Munsif,
Vellore.

C.T.SELVAM, J

gm

Pre-delivery order
in
Civil Revision Petition (PD) No.1076 of 2016

01.11.2016