

(1934) 10 MAD CK 0039
In the Madras High Court

Goli Ammiraju

APPELLANT

Vs

Goli Kondalarayudu and Others

RESPONDENT

Date of Decision : 25-10-1934

Acts Referred:

Citation : AIR 1935 Mad 465 : (1935) 41 LW 218 : (1935) 68 MLJ 255

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The plaintiff is the appellant. The plaintiff and the defendants are members of a joint Hindu family. A suit was instituted

by the plaintiff against the defendants for partition of the family properties and final decree was passed by the District Munsif awarding the plaintiff

a certain share in the properties. The plaintiff preferred an appeal against the decree passed by the District Munsif in which he raised two main

objections, namely, that there was no proper division of the properties and that necessary provision has not been made in regard to channels and

water rights. Subsequent to the passing of the final decree and before the filing of the appeal the plaintiff took possession of the plots allotted to him

under the decree. Before the appeal was heard an application was filed by the defendants praying that the Court should dismiss the appeal

summarily on the ground that the plaintiff has taken possession of the share allotted to him and that having thus taken the benefit under the decree

his appeal should not now be heard. In *Banku Chandra Bose v. Mariam Begum* (1916) 37 I.C. 804 and in *Ramaswami Chettiar v. Chidambaram*

Chettiar (1927) 26 L.W. 527 which followed it, it was held in the circumstances of those cases that:

a party who has adopted an order of the Court and acted under it cannot, after he has enjoyed a benefit under the order, contend that it is valid for

one purpose and invalid for another. He must be considered to have acquiesced in the order and afterwards cannot be allowed to impeach it.

2. Acting on the authority of those decisions the learned Sub-Judge accepted the contention of the defendants and dismissed the plaintiff's appeal

without hearing it on the merits.

3. In this second appeal the plaintiff-appellant contends that the cases relied on by the lower Court are distinguishable and that the principle

enunciated in them cannot be applied to the present case. In *Banku Chandra Bose v. Mariam Begum* (1916) 37 I.C. 804 a suit was dismissed for

want of prosecution and on the application of the plaintiff was ordered to be restored to its file on the plaintiff's paying to the defendants a sum of

money towards their costs of and incidental to the application. The defendants accepted the sum paid by the plaintiff without recording their

intention to appeal against the order. It was held that the defendants, after having accepted the money without protest, were precluded from

appealing against the order. This case was followed in *Ramaswami Chettiar v. Chidambaram Chettiar* (1927) 26 L.W. 527 where, after referring

to it and two English cases, *King v. Simmonds* (1845) 7 Q.B. 289 : 115 E.R. 498 and *Tinkler v. Hilder* (1849) 4 W.H. 154 E.R. 1176 it was held

that when the lower Court allowed an amendment of the written statement on condition of the defendants paying plaintiff Rs. 150 by way of costs

and the plaintiff's vakil under protest accepted it he cannot afterwards object that the order was made without jurisdiction. The decision was based

upon the long recognized principle 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.

4. Another case where a similar question arose is reported in *Venkatarayudu v. Chinna Ramakrishnayya* (1929) 58 M.L.J. 137. In that case a suit

which had been dismissed for default of appearance by the plaintiff was restored on the plaintiff paying costs of the defendant. The defendant after

receiving the costs filed a revision petition objecting to the order. The question was, was he entitled to be heard? This question was answered in

the negative after a consideration of the two Indian cases which I have mentioned and also of the English decisions bearing on the point. The

question" is whether the principle of these decisions can be applied to the present case. I think not. It is clear on the facts of these cases that the

party who later on sought to object to the order accepted costs which but for that order would not have been payable at that time. Having done so

he cannot be heard to object to the order. As stated in some of the cases, ""the cases are applications of the doctrine that a person may not

approve and reprobate"" - see 13 Halsbury, para. 508. The orders amending the plaint and the other orders were all conditional and the

conditions having been fulfilled by acceptance of costs the orders became effective and cannot be questioned. This is the sum and substance of the

principle enunciated in the above cases. In the present case the question of the acceptance of what is alleged to be a benefit, arises after decree.

The plaintiff in the present case is entitled to the properties which he took possession of under the decree. Whether the appeal is filed or not and

whether he succeeds in it or not, he is entitled to get the properties decreed to him. By filing the appeal he is only asking for more, and this he is

entitled to claim as a matter of right under law whether he will succeed or not. In these circumstances I cannot see how any question of estoppel or

acquiescence or taking benefit under an order can arise. The principle which I have stated above is not affected by the question whether

possession under the decree was taken before the appeal was filed or after the filing of the appeal; the result is the same, and the appeal must be

heard.

5. I shall now examine a few cases in support of the conclusion which I have stated above. In some of the cases the question seems to have arisen

with respect to the conduct of the appellant before the filing of the appeal, while in others the question arose with respect to his conduct after the

filing of the appeal. In Jogesh Chandra Ray Vs. Fazar Ali, the plaintiff claimed a decree for Rs. 17-12-0 being the value of 5 aris and 8 seers of

paddy at the market rate. The defendant contended that the plaintiff was not entitled to the amount claimed but admitted that he was entitled to a

lesser amount and the decree was made in accordance with the admission of the defendant. In appeal he claimed a larger amount than what was

decreed but he took out execution to realise the amount under the decree. It would seem from the facts - but it is not very clear - that the plaintiff

realised the decree amount before the filing of the appeal. The learned Judges after referring to the cases *Banku Chandra Bose v. Mariam Begum*

(1916) 37 I.C. 804 and *Manilal Guzrati v. Harendralal Rai Chowdhry* (1910) 12 C.L.J. 556 - another case of the same kind - held that the

plaintiff is not precluded from prosecuting the appeal on the ground that:

he has not derived any advantage or taken any benefit under the decree appealed against which was not available to him even on the admission of the defendant.

6. In *Saratkumari Dasi v. Amullyadhan Kundu* (1922) 17 L.W. 481 the appellant sought to set aside a compromise decree. Under that decree she

was entitled to a sum of Rs. 13,500, a portion of which had been paid into the Court. The appellant after having obtained leave to appeal to His

Majesty in Council applied to the Court for and obtained an order that Rs. 4,000 (portion of Rs. 13,500 paid into court) should be held as security

for the costs of the respondents in the appeal to the Privy Council. It will be observed that she obtained the benefit of the use of the Rs. 4,000 after

obtaining the leave to appeal but before the appeal was actually filed. It was contended before the Privy Council that:

this transaction amounted to an adoption by the appellant of the decree while at the same time she was impeaching it and was therefore estopped

from doing so.

7. The Privy Council overruled this argument with these remarks:

If the appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will

be returned to the respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. In

their Lordships' view the point is entirely unsustainable.

8. In *Subba Rao Garu v. Sri Balusu Buchi Sarvarayudu* ILR (1922) 47 Mad. 7 : 44 M.L.J. 534 a decree for redemption had been passed and

money had been deposited in Court. The defendants drew out the money deposited in Court after the decree of the lower Court and pending an

appeal to the High Court. It was argued that their appeal to the High Court was therefore incompetent. The argument was overruled with these

remarks:

Whatever they drew out themselves they seem to have drawn out in execution of the decree in this case. Execution of a decree has never been

held to estop the decree-holder from appealing from it so far as it is against him.

9. I think the same principle should apply in a case where the person gives effect to the decree with or without the help of the Court. In the case

before us, as the defendants did not cultivate the land that has been allotted to the plaintiff's share at the cultivation season, he cultivated the same,

as he says, for the mitigation of mesne profits. In the next two cases the question arose with respect to what the appellant had done after the filing

of the appeal. In *Jogendra Nath v. Khoda Buksha Biswas* (1922) 72 I.C. 554 it was held that where in a suit on a money bond payable with

compound interest the Court awards simple interest only, an appeal against the decree is not rendered incompetent where subsequent to the filing

of the appeal the decree-holder accepts costs deposited by the judgment-debtor on the basis of simple interest. *Banku Chandra Bose v. Mariam*

Begum (1916) 37 I.C. 804 and the English cases of that type *Tinkler v. Hilder* (1849) 4 W.H. and G. : 154 E.R. 1176 *Kennard v. Harris*, etc.

(1824) B. & C. 801 : 107 E.R. 580 were thus distinguished by the learned Judges from the case before them:

It will appear that in the English cases as also in the case in *Banku Chandra Bose v. Mariam Begum* (1916) 37 I.C. 804 the opposite party having

accepted the benefit which he would not have obtained otherwise than under such order, was held to be precluded from challenging the validity of

the order. In the case before us there was no such thing. The plaintiff appealed against the decree in so far as it disallowed compound interest.

After the appeal had been filed against that part of the decree which disallowed compound interest he accepted the costs (deposited by the

respondent) and which was decreed by the lower Court on the basis of simple interest as to which there was no dispute and which the plaintiff

would have got in any event, whether the appeal succeeded or failed. In these circumstances the principle of the cases referred to above does not

apply to the present case.

10. If I may say so respectfully, the distinction between the two classes of cases is here pointed out very clearly. In *Qudrat-un-nissa Bibi v. Abdul*

Rashid I.L.R.(1926) 48 Al. 616 the defendant-vendee took out of Court the amount of pre-emption money deposited by the plaintiff to her credit

after the filing of the appeal. It was argued that she was disqualified from proceeding with the appeal. The argument was overruled, the learned

Judges remarking that the learned vakil for the respondents has not been able to place before them any authority in support of this view. On the

other hand they relied on certain cases to show that such conduct on her part does not amount to estoppel. The result of these decisions clearly

shows that the appellant is not precluded from proceeding with the appeal as the result of his taking possession of the properties allotted to him

under the decree.

11. Mr. Lakshman, the learned Counsel for the respondent, has not been able to support the decision in the lower Court on any ground. He

suggested that the partition decree is peculiar and that it should be treated on a different basis and as the present case arises with respect to such a

decree the lower Court's decision is right. I am not able to appreciate this reasoning. In the result the second appeal is allowed and the appeal will

be remanded to the lower Appellate Court for disposal according to law. The appellant is entitled to his costs of this Court. The other costs will be

provided for by the lower Court. The court-fee will be refunded.