
(1957) 12 AP CK 0019

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 938 of 1954

Korvati Subbamma

APPELLANT

Vs

Pinnapudy Subbaiah

RESPONDENT

Date of Decision : 05-12-1957

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : AIR 1958 AP 483

Hon'ble Judges : K. Subba Rao, C.J.; Srinivasachari, J

Bench : Division Bench

Advocate : S. Narasinga Rao, for the Appellant; K. Sri Rao, for the Respondent

Judgement

Syed Qamar Hasan, J.—This application in revision on behalf of the plaintiff is directed against the order dated 15th March, 1954 of the District Munsif, Cuddapah setting aside an ex parte decree in Small Cause Suit No. 106 of 1953.

2. The learned advocate for the respondent raised the preliminary objection that as the counsel for the petitioner in the Court below has accepted the costs awarded by the Court below as a term for setting aside the ex parte decree, he cannot now challenge the propriety of the order under revision. In support of his contention, he placed reliance upon Gadde Venkatarayudu and Others Vs. Anumolu Chinna Ramakrishnayya and Others, . It has been held therein that where an order is made restoring a suit which has been dismissed for default on condition of paying certain sum as costs for defendant, the latter if he accepts costs unconditionally cannot afterwards question the order. Venkata Subba Rao, J. after reviewing a number of Indian and English decisions observed :

What is the principle underlying these decisions? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another.

Ramesam, J. elaborated the point by saying that the true basis of the rule is not estoppel by conduct but that a person cannot both approbate and reprobate. If

the authorities upon which these pronouncements are based are still good law, I have no choice but to follow them and pass an order in accordance therewith. But I find that the scope of the doctrine of "approve" and "reprove" was considered by the House of Lords in two cases. In *Evans v. Bartlam*, 1937 AC 473 (B), it has been held that a judgment-debtor, who asks for and obtains a stay of execution does not thereby approve the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise. In the case of *Lissenden v. C. A. V. Bosch, Ltd.*, 1940 AC 412 (C), Viscount Maugham discussed the expression "approve and reprove" and explained its scope. The learned Law Lord at page 418 of the report, after quoting Lord Cairns L. C. from *Cordington v. Cordington*, (1875) 7 HL 854 at p. 861 (D), observed :

In the light of these authorities it seems that the phrase "you may not approve or reprove" or the Latin "quod approbo non reprobo", as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law....

It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a Court of justice... My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal.

In this view of the law, with which, I with respect, agree, the preliminary objection ought to fail.

3. The portion of the judgment of the learned District Munsif which was strenuously challenged before me runs as follows:

The learned counsel for the petitioner has also relied upon *Sri Newas v. Durga Prasad*, 1947 All LJ 204 : (AIR 1947 All 125) (E), for the proposition that the filing of a draft bond as security is itself sufficient and it is not necessary under the provisions of S. 17 of the Provincial Small Cause Courts Act that the security should have been accepted in toto. In the above quoted decision, a reference is made to the Full Bench decision in *Ram Bharose Vs. Ganga Singh* , wherein it was held that the question whether the security is sufficient and satisfactory need not be finally determined during the period of thirty days and that the plaintiff-decree-holder may come in afterwards and challenge its sufficiency and that the mere fact that it is found afterwards that the security was insufficient would not make the deposit of the security within time in any way defective.

The learned advocate for the petitioner on the authority of *Kaliseti Penchalu Setti Vs. Potireddi Subbareddi*, argued that the view taken by the Court below was open to objection. In the case (sic)cited it was held by a Bench of the

Madras High Court that the mere filing of a draft bond was not sufficient compliance with the provisions of Sec. 17(1) proviso of the Provincial Small Cause Courts Act, in as much as such bond could not have the effect of a security bond until it was duly executed and registered. In the circumstances the security had not been furnished within the time allowed and hence the petition was not maintainable. The learned Advocate, obligingly enough, referred me to a decision of the same Court reported in Marimuthu Goundar v. Ponnammal, AIR 1956 Mad 422 (H) in which a contrary view has been held.

That view is that what Sec. 17 Provincial Small Cause Courts Act. requires is that within the period of 30 days security should be placed in the hands of the Court by the applicant of such a nature that if ultimately accented it should be sufficient to enforce the obligation, upon him and make the money assured in its payment or more readily recoverable. Judged by this test, a duly executed unregistered security bond would be sufficient compliance with the law though not registered but subsequently registered. In coming to that collusion the learned Judges Govinda Menon and Ramaswami were of the view that the previous decisions of the Madras High Court had placed too narrow a construction upon the security that is required under Sec. 17 of the said Act and they preferred the Patna view as enunciated in Rajeshwari Prasad Singh v. Brahmanand Lal, AIR 1933 Pat 279 (I). The learned advocate urges me to overlook the latter authority and follow the previous one because I am bound to do so in view of the decision of the Full Bench in Subbarayudu v. The State, (S) AIR 1955 And 87 (J). But I do not look at the matter in that way. What I find is that there are two conflicting decisions of the same High Court and no binding authority of the Andhra High Court has been placed before me to resolve the conflict.

4. In these circumstances, I deem it advisable to refer the case to a Division Bench for the determination of the two questions, which have been raised and mooted before me. I, therefore, direct that the case may be place before a Division Bench in accordance with law.

5. This petition coming on for hearin yesterday and this day before this Court in pursuance of the order of Hon"ble Mr. Justice Syed Qamar Hasan, dated 30-11-1956 and made herein, the Court delivered the following judgment.

ORDER

K. Subba Rao, C.J.

6. This revision has been referred to Division Bench by our learned brother Syed Qamar Hasan, J.

7. The facts are not in dispute and the may be briefly stated. The petitioner filed suit S. C. S. No. 106 of 1953, on the file of the District Munsif's Court, Cuddapah, against the respondent and obtained an ex parte decree. The respondent filed I.A. No. 360 of 1953, for settle aside that decree. The learned

District Mun(sic) found that the respondent was not aware of the filing of the suit and, in that view, he set asi(sic) the ex parte decree subject to the respondent paying a sum of Rs. 15/- as costs to the petitioner as a condition precedent. The petitioner : received that money, but preferred a revision questioning the correctness of that order. The respondent took a preliminary objection, namely having received the benefit under the conditional order, could not maintain the revision the principle of "approbate and reprobate."""

8. Under similar circumstances, a Division Bench of the Madras High Court, in Mad L. J. 137 Gadde Venkatarayudu and Others Vs. Anumolu Chinna Ramakrishnayya and Others,) that the party receiving the costs cannot afterwards object to the order by way of appeal revision; Venkatasubba Rao J., who deliver the leading judgment, has considered the case law on the subject and observed at p. 141 ML J) : (at p. 270 of AIR) thus :

What is the principle underlying these decisions? When an order shows plainly that is intended to take effect in its entirety; that several parts of it depend upon each o(sic) a person cannot adopt one part and repud(sic) another. For instance, if the Court directs (sic) the suit shall be restored on the plaintiff pay the costs of the opposing party, there is intention to benefit the latter, except on terms mentioned in the order itself. If the p(sic) receives the costs, his act is tantamount adopting the order. In other words payment of costs is. as it were, consideration for the being restored; so that the defendant ca(sic) accept the costs and still object to the or(sic) This principle has been accepted and follow by the learned Judges of the Madras High Court in subsequent decisions. (See Bonagiri Sreeramulu Vs. Karumuri Venkatanarasimham and Others, : Satyanaray(sic) murthy v. Sundara Rao, AIR 1938 Mad. (L) G.V. Narayanaswami Ayyar and Others Vs. Subramania Pillai, and Ramaswami Chettiar v. Chidambar Chettiar, 26 Mad L. W. 527 : (AIR 1927 1009 (2) (N))

9. Learned Counsel for the petitioner while conceding that there is no conflict (sic) in Madras or in the Andhra Pradesh High Court on the aforesaid question and that the pri(sic) laid down by Venkata Subba Rao, J. has followed without any dissent, areues that view of the latter judgments of the Hou(sic) Lords, the basis on which Venkatasubba J sustained the principle disappeared. In port of this contention he relied upon the ments of the House of Lords in 1937 A. C. 473 (B) and 1940 A. C. 412 (C).

Learned Counsel has taken us through the aforesaid two decisions and contends that the doctrine of "approbate and reprobate" is only branch of the law of election, that, apart (sic)m it, it has no legal basis in England and that (sic)e doctrine as a branch of the law of election should be confined only to transactions inter (sic)vos but not to orders made by Courts. While (sic)e appreciate the force of the argument, we (sic)d that the Supreme Court, as late as 1956, (sic) Nagubai Ammal and Others Vs. B. Shama Rao and Others, , accepted the same principle and, indeed, (sic)ted the same passage from Halsbury's Laws (sic) England on the basis of which the Madras (sic)ew was built

In the circumstances, we do (sic)t see any justification to deviate from the (sic)rrent of judicial opinion. It follows that the (sic)der of the learned District Munsif is correct.

10. The civil revision petition fails and is dismissed with costs.