

(1946) 01 AHC CK 0029
In the Allahabad High Court

Udrej Singh and Another

APPELLANT

Vs

Ram Bahal Singh and Others

RESPONDENT

Date of Decision : 16-01-1946

Acts Referred:

Citation : AIR 1946 All 436 : (1946) 16 AWR 209

Hon'ble Judges : Pathak, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Pathak, J.—This is a revision u/s 115,. Civil P.C, against an order of the District Judge, Azamgarh, dated 2nd January 1913. The facts, which are admitted by the parties, are as follows: In the course of proceedings under the Encumbered Estates Act initiated on an application u/s 4 of that Act made by the opposite parties to this revision, the learned Special Judge, Second Grade, on 18th. August 1941, passed an order on the objection filed by the applicants in this revision u/s 11 of that Act. By that order, the learned Special Judge extended the time for filing the objection on payment of Rs. 40 as costs within a week from that date and directed that in default of payment, the objection was to stand dismissed. On 25th August 1941 counsel for the parties made a statement before the learned Special Judge, to the effect that the question of the payment of costs might be postponed until the disposal of the appeal filed against the order, dated 18th August 1941. On 22nd December 1941, this appeal, which had been filed by the opposite parties to the revision, was dismissed by the learned District Judge. On 30th April 1942 the record was received by the Special, Judge, and thereupon, he directed that the costs of Rs. 40 payable in accordance with the aforesaid order, dated 18th August 1941 should be paid within two weeks and that in default of payment, the objection u/s 11, was to stand dismissed. In compliance with this order, the applicants paid the amount of costs within the time fixed by the Courts with the result that on 27th July 1942 the learned Special Judge passed an order admitting the objection. From the order, dated

30th April 1942 by which two weeks" time was fixed for the payment of costs, an appeal was taken to the learned District Judge, who on 2nd January 1943, allowed the same and set aside the order appealed against.

2. In the course of his judgment, the learned District Judge made the following observations:

By an appellate order a party was ordered to pay certain costs. When the record of the case was received back by the lower Court, it allowed that party two weeks" time for payment, although no such provision was made in the appellate Court"s order.

3. Learned Counsel for the applicant urges that the appellate order never directed the payment of costs. This contention of learned counsel is correct. I have examined the appellate order, dated 22nd December 1941. It is clear that it was the Special Judge and not the appellate Court which had imposed the condition of payment of Rs. 40 as costs. The appellate order, which merely dismissed the appeal, was not concerned with the question of time for payment of the aforesaid sum of Rs. 40 as by consent of the parties, this matter had been postponed until the disposal of the appeal. Learned Counsel for the applicants raised two points in support of this revision. The first point is that no appeal lay to the District Judge inasmuch as the order appealed against was not one finally disposing of the case before the Special Judge. The question what is meant by the expression "the case" is a difficult one. It has been argued on behalf of the opposite parties that the proceeding relating to the question as to whether there was sufficient cause for extension of time for filing the objection u/s 11, U.P. Encumbered Estates Act, was in itself "a case" and the order which disposed of this question was final. On the other hand, learned Counsel for the applicants contends that "the case" before the Special Judge was the entire proceedings under the Encumbered Estates Act and not simply the matter relating to the extension of time for filing objection u/s 11 of that Act. In the view which I am disposed to take on the merits of the revision before me, it is not necessary to consider this question.

4. The second point urged by learned Counsel for the applicants is that after the statement made by the parties on 25th August 1941 it was not open to the opposite parties to take up the position that the learned. Special Judge had no power to fix, afresh, time for the payment of costs. I agree with this contention. The statement made by the parties on 25th August 1941, does not seem to have been brought to the notice of the learned District Judge and he has not taken into consideration the effect of that statement. In my opinion, its legal effect was that that part of the order, dated 18th August 1941, by which the Special Judge fixed time for payment of costs was, by agreement of parties, ceased to be operative and the learned Special Judge was competent to fix time afresh after receipt of the record from the Court of the District Judge on disposal of the appeal before him. It appears that this statement made by counsel for the parties was acted upon and nothing further was done by the learned Special

Judge. The question whether it was open to the learned Special Judge, after the disposal of the appeal before the learned District Judge, to extend the time or not, is a matter relating to the law of procedure. If the parties have taken up a particular position before the Court at one stage of the litigation, it is not open to them to approbate and reprobate and to resile from that position. This principle has been laid down in a number of cases, and was discussed in the ruling of the Calcutta High Court reported in *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, in which Sir Asutosh Mookerjee at p. 52, made the following observations:

It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grow3 out of the judgment in the first.

5. The principle has been applied in this Court even in cases where the question involved was one of jurisdiction. See the case in *Ram Khelawan Singh and Others Vs. Maharajah of Benares*, where a Bench consisting of Sulaiman J. (as he then was) and Pullan J. ruled that the party upon whose objection an appeal was returned by the commissioner for presentation to the proper Court was estopped from raising the question of jurisdiction later as, by his objection before the commissioner, he had accepted the jurisdiction of the High Court as the proper forum of appeal, In the case before me it can be said that by the statement referred to above the parties agreed that it would be the Special Judge, and not the District Judge, who would extend the time after the disposal of the appeal by the latter and that it was in consequence of this statement that no attempt was made in the Court of the District Judge to obtain a direction from him with regard to the extension of time. It may be urged on behalf of the opposite parties that the doctrine mentioned above cannot be allowed to override the law of procedure, There is high authority for the proposition that this fundamental principle cannot be disturbed merely by the rules of the Court or by the law of procedure. In *Bartlam v. Evans* (1936) 1 K.B. 202 Slesser L.J. made the following observations:

The power of the Court to set aside a judgment properly obtained, albeit by default, is one conferred upon it by rules of Court. I do not read that power as having disturbed the fundamental principle on which the Court has always acted, that a person cannot approbate and reprobate. The same broad principle, that a man shall not be allowed to blow hot and cold - to affirm at one time and deny at another - making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion.

6. Applying this doctrine to the facts of the case, I am of opinion that the judgment of the learned District Judge is wrong and he should not have allowed the opposite parties to this revision to take up the position inconsistent with the

statement made by them on 25th August 1941 before the Special Judge. The result is that I allow this revision, set aside the order of the District Judge, dated 2nd January 1943 and restore the order of the Special Judge, dated 30th April 1942. The applicants are entitled to their costs of this revision in this Court and the costs incurred by them in the Court of the District Judge.