RAJASTHAN HIGH COURT

Mani Ram

Vs.

Beharidas

Civil Revn. No. 4 of 1953
(Wanchoo, C.J. and Modi, J.)

15.04.1955

JUDGMENT

Wanchoo, C.J.

1. This is a revision by Maniram who was defendant in a suit pending in the court of the Civil Judge, Ganganagar, and has arisen in the following circumstances:

2. The suit was filed by Beharidas and issues were framed on 25-7-1951. Thereafter, there were a number of hearings on many of which the plaintiff and his witnesses were present but the evidence could not be recorded for various reasons. Eventually, on 21-7-1952, the plaintiff and his witnesses were not present. His counsel was called, but he stated that he had no instructions. Thereupon, the court closed the case for the plaintiff as he had been given many opportunities to produce his evidence. The court then proceeded to examine the defendant, and thereafter heard arguments of defendant's counsel, and dismissed the suit. Then followed an application by the plaintiff for restoration. This application was allowed on 17-12-1952, and the present revision is against that order.

3. The main argument on behalf of the defendant applicant is that the court had decided the suit on merits under Order 17 Rule 3 on 21-7-1952, and therefore it had no jurisdiction to allow the application for restoration and set aside the order dismissing the suit. It was urged that the only remedy open to the plaintiff in the circumstances was to file an appeal, and this Court should, therefore, set aside the order of the Civil Judge restoring the suit.

4. A preliminary objection has, however, been raised on behalf of the plaintiff,

opposite party. It is said that the defendant applicant accepted the costs awarded by the court by its order of 17-12-1952, as the condition for the restoration of the suit, and therefore it was no longer open to the defendant to maintain the present revision in as much as the defendant could not approbate and reprobate the order of 17-12-1952, at the same time.

5. We may in this connection mention what happened after 17-12-1952. The case was fixed for hearing on the 22-12-1952, and on that date the plaintiff was prepared to pay the costs, but the counsel for the defendant stated that a revision would be filed in the High Court, and he was therefore not prepared to accept the costs. It was also prayed that time might be allowed to file a revision. The counsel concerned was Sri Brijlal whose signature appears on the order-sheet of 22-12-1952. Thereupon, the case was adjourned to 19-1-1953, and the order-sheet of that date says that no revision had been filed, and Rs.25/- as costs had been paid to defendant's counsel, and the suit was restored. This order-sheet is also signed by Sri Brijlal, and it is on the acceptance of the costs on this date that the opposite party bases his preliminary objection. It may be added that the revision was filed in this Court on 2-2-1953.

6. There is authority for the view that if a party accepts the benefit of one part of an order, which consists of various parts dependant on each other, he must be held to have accepted the entire order on the principle that the order being one cannot be approbated and reprobated at the same time.

7. The first case on the point to which we may refer is - *'Venkatarayudu v. Ram Krishnayya',* [1] The judgment of Venkatasubba Rao, J. in that case, if we may say so with respect, is very illuminating and traces the history of the principle behind the rule. It appears that in England the point is settled beyond doubt, and there is a string of authorities in favour of it, of which two may be mentioned here, namely - *'Pearce v. Chaplain',* [2] and *'Tinkler v. Hilder',* [3] The principle behind the rule is given in these words by Venkatasubba Rao, J. at page 270:

> "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. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposite party, there is no intention to benefit the latter,

except on the terms mentioned in the order itself.

If the party receives the costs, his act is tantamount to adopting the order. In other words, payment of costs is, as it were, consideration for the suit being restored; so that the defendant cannot accept the costs and still object to the order. According to Halsbury, this rule is an application of the doctrine "that a person may not approbate and reprobate." The other learned Judge concurred with the principle laid down though he said that if the facts show that receipt of the money was not inconsistent with the reservation of the right to question the order by way of appeal or otherwise, the party receiving the money would not be barred from questioning the order.

8. The next case, to which reference may be made, is - *Tutta Singh v. Vidya Ram',*[3] In that case also, the principle that if a party accepts costs for restoration, it cannot maintain an application in revision against the order was accepted, but it was said that there was nothing on the record to show that the costs were taken by the plaintiffs' pleader in token of accept once of the validity of the order, and that the conduct of the plaintiff in filing a revision as soon as the High Court re-opened showed that he never desired to acquiesce in the order.
With all respect we must say that this is accepting the principle in one breath and denying it in the next. If the principle is that if a party accepts the costs, he cannot challenge the thing for which the costs were made payable, it would be wrong to take into account the subsequent action of the party after accepting the costs as showing his intention at the time the costs were accepted.

9. The next case to which reference may be made is - *'Narayanaswami Ayyar v. Subramania Pillal',*[4] There a distinction was drawn between 'Venkatarayudu's case, and the facts of that case, though the principle was accepted that a party who accepts the costs ordered for restoration or for setting aside an ex parte decree cannot challenge that order later. The distinction that was drawn was based on the Limitation Act. In that case, the court held that the application for setting aside the ex parte decree was filed beyond time, but in spite of that it set aside the decree on the ground that the defendant was calming that he had a good defense. It was held that, in such a case, the court had no jurisdiction to set aside the ex parte decree, and merely because costs were accepted by the party that would not preclude him from challenging an order without jurisdiction.
This case is, in our opinion, of a peculiar nature, inasmuch as the court was

disregarding the mandatory provisions contained in Section 3, Limitation Act which specifically provides inter alia that an application made after the period of limitation shall be dismissed even though limitation has not been set up as a defense. The duty of the court under this section is clear, and that was the reason why the principle was not applied in this particular case. The court had found as a fact that the application was made beyond time and in spite of that did not dismiss it. The facts of the case before us are different. Here the question whether the court had jurisdiction or not to restore the suit is a very complicated one, and in the circumstances this authority cannot help the applicant.

10. The next case is - *'Kunjilal Manakchandji v. Shankar Nanuram',* [5] The principle was accepted in that case also, namely that if costs are ordered as consideration for restoration or for setting aside an ex parte decree, and are accepted, the order cannot be challenged there after. But in view of the peculiar circumstances of that case, it was held that the order would not apply to it. Those facts were that the costs were ordered to be paid on 10-4-1942, and were actually received by defendant's counsel on 22-6-1942. On that very day, namely 22-6-1942, a revision was filed in the High Court. The court was also satisfied that counsel in the High Court had been instructed in May, 1942, to file the revision, and the delay in filing the revision was due to the fact that the High Court re-opened after the vacation on 22-6-1942. In those circumstances, it was held that the costs were accepted behind the back of the defendant, and therefore the defendant was not bound by the principle. That case, therefore depends upon its own peculiar facts, but recognises the principle.

11. The last case to which reference may be made is - *'Federal India Assurance Co., Ltd. v. Anandrao',* [6] This is a Single Judge decision. In that case costs were accepted by counsel on 23-12-1942. Evidence was however produced to show that counsel was not authorized to accept costs. The principle was accepted in that case also, though it was not applied on the ground that the facts were different. Learned counsel for the applicant however relies on certain observations in that case to this effect

> "Unless a conscious decision to abandon the plaintiff company's right of filing the application for revision had been taken by Mr. Deshmukh (this was the gentleman who had accepted the costs) after a full comprehension of all the facts, the mere fact of his receiving costs mechanically would not have the effect of concluding the plaintiff company."

With all respect, we must say that it is difficult to understand what the learned Judge meant by this sentence. Having come to the conclusion that Mr. Deshmukh had no authority to accept the costs, the learned Judge could have decided the case in favor of the company. But we find it very difficult to draw a distinction between receiving costs mechanically and receiving them after a full comprehension of all the facts.

12. A consideration therefore of these authorities establishes that where there is a conditional order and a party accepts one part of the order which benefits him, as for example about costs, he cannot reprobate the other part of the order which is against him, and maintain a revision or an appeal to get it set aside. It is, of course, always open to the party, where the benefit has been accepted by counsel, to show that the counsel was not authorized to do so.
In such a case, the party will not be bound by the act of the counsel in accepting the benefit, and would be entitled to maintain an appeal or revision against the order.

13. Let us now turn to the facts of this case, and see whether the principle applies, and the applicant is barred from maintaining this revision. We have already set out above what happened after 17-12-1952, when the conditional order restoring the suit was passed, the condition being that the suit would be restored on payment of Rs.25/-as costs. On the 22nd of December the plaintiff was ready to pay the costs, but the defendant's counsel did not accept it because he stated that a revision would be filed against the order in the High Court. It is clear therefore that the defendant's counsel knew that if he wanted to challenge the order he should not accept the costs. Then we come to 19-1-1953. The same counsel, who had stated on the 22nd of December that a revision would be filed and he would therefore not accept the costs, was present on this date. The order-sheet shows that the information given to the court was that no revision had been filed, and further the counsel accepted the costs; thereupon the court restored the suit. The costs having been accepted, and the benefit having been taken by the defendant through his counsel, he could not maintain the revision against the order, unless he showed that the counsel, who accepted the costs on 19-1-1953, had no authority to do so. It is enough to say that there is no evidence before us to show that the counsel who accepted the costs on 19-1-1953, had no such authority. His Vakalatnama shows that he had ample authority to accept the costs on behalf of the defendant, and when he did so he knew full well that the defendant would thereafter not be able to file a revision.
If, on 19-1-1953, the intention still was to file a revision, there was no reason why the

counsel should not have declined to accept costs on that day also as he had done earlier on 22-12-1952.

14. Learned counsel for the applicant appearing before us has told us that he was instructed in January, 1953, to file this revision, and it was actually filed on the 2-2-1953. Learned counsel, however, was not sure on what date he received instructions, and whether this was on 19-1-1953, or sometime thereafter. He certainly did not receive instructions before 19-1-1953. He also showed us a letter, dated 17-1-1953, written by some counsel in Ganganagar other than Shri Brijlal who had accepted the money on 19th of January, instructing him to file the revision. But we are not satisfied that Sri Brijlal's authority had been withdrawn before 19-1-1953; nor do we know how this other counsel came to instruct the learned counsel appearing in this Court. Nor can we be sure that the letter was not antedated in order to avoid the application of the principle, which appears to have been known in Ganganagar. The fact remains that the revision was not filed till 2-2-1953, well after the money had been accepted by Shri Brijlal.

15. We are, therefore, of opinion that on the facts of this case the principle applies, and the defendant having accepted the costs through his counsel cannot maintain this revision.

16. We, therefore, uphold the preliminary objection, and dismiss the revision. Considering the circumstances of the case, we order parties to bear their own costs.

Revision dismissed.

Cases Referred.

1. AIR 1930 Mad 268
2. (1846) 9 QB 802
3. AIR 1934 All 10
4. AIR 1936 Mad 49
5. AIR 1943 Nag 289
6. AIR 1944 Nag 161