property required to be attached and the estimated value thereof, Sub-rule (3) further directs that the Court may order that the conditional attachment of the whole or any portion of the property so specified. Sub-rule (4) further provides that if attachment is made in contravention of the provisions of sub-rule (1), the same shall be void. Under these circumstances, in a suit for recovery of some money on an application under the provisions of Order 38 Rule 5 of the Code of Civil Procedure, the Civil Court could have either attached the property of the defendant proportionate to the amount of decree or obtained a requisite security for complying with the decree ultimately to be passed, but strange enough the trial Court has gone against the mandatory provisions of Sub-rule (4) of Rule 5 of Order 38 of the Code of Civil Procedure, in restraining the defendant from alienating his property.

(5) In view of the factum that the order of the trial Court being *void abinitio*, its wilful violation would not amount to contempt of the Court. Thus, there being no merit in this petition, it is hereby dismissed.

S.C.K.

Before S. S. Kang and A. L. Bahri, JJ.

AMAR SINGH,—*Petitioner.*

versus

PERHLAD AND OTHERS,—*Respondents.*

Civil Revision No. 845 *of* 1987.

October 4, 1988.

Code of Civil Procedure (V of 1908)—Ss. 35, 115 *and O.* 6, *Rule* 17 *—Evidence Act (I of* 1872)—*S.* 115—*Amendment of plaint allowed subject to costs—Defendant accepting costs awarded under protest—Act of acceptance of costs—Whether estops defendant from challenging order allowing amendment.*

Held, that the petitioner having accepted costs awarded in the order while allowing amendment of the plaint further mentioned that he was accepting the amount under protest. This was a unilateral act on the part of the petitioner. Even if he had not accepted

the costs, the same would have been deposited in the court by the plaintiff. If the petitioner had withdrawn the costs from the Court unilaterally stating that the withdrawal would be under protest, he could not approbate and reprobate, that is accepting benefit of the order and at the same time objecting to the passing of the order. He had to accept the order as a whole. What he did was that he accepted the costs and thereby acquiesced in the correctness of the order passed. Although at the time of acceptance of the costs the petitioner stated that he was doing so under protest, that will not make any difference as the opposite party had not consented to the statement of the petitioner in this respect. If in fact the petitioner wanted to challenge the order of amendment of the plaint, there was no compulsion for him to accept the costs. The costs would have remained deposited in the Court. The right of the petitioner to the costs imposed by the Court on the plaintiff while allowing amendment of the plaint was not based on any right of the petitioner in the suit. The costs were ordered by the Court to compensate the petitioner for the inconvenience caused during the pendency of the suit till the plaint was amended. Such an order regarding costs was made on terms or conditions for amendment of the plaint in view of Order 6 Rule 17, Civil Procedure Code, 1908. Such an order could not be accepted in part by either of the party while denouncing the other part. The plaintiff could not file amended plaint stating that he could pay costs at the time of final decision of the suit. Likewise the defendant could not say while accepting the costs that he would challenge the order in appeal or revision or that he would return the costs withdrawn if the order of amendment of plaint is set aside. The crux of the matter to be seen is as to what the petitioner did and not what he said. By acceptance of costs, he accepted the order as correct. He has taken benefit of the order. He cannot now turn around and say he will also challenge the order. By allowing him to challenge the order would amount to nullifying the effect of acceptance of costs. In such circumstances, he cannot approbate and reprobate. His own act would estop him. At the most it can be said that the petitioner had two options, one to accept the costs and to treat the order as correct, the other not to accept the costs and to challenge the same in revision. He having elected to accept the costs, he exercised his choice in accepting the order as correct. His lodging the protest in such circumstances is meaningless. (Para 6).

Randhir Singh *v.* Kamlesh & others, A.I.R. 1980 Pb. & Hry. 70 (Overruled).

This case was admitted to D.B. by Hon'ble Mr. Justice S. S. Kang, —vide *order dated 27th July, 1987, as the Learned Counsel for the parties, cited two decisions of divergent views expressed in two cases by this Court on the point. There is irreconcilable conflict between the ratio of the two. The case was fixed before the Hon'ble 4th Bench (as ordered by Hon'ble The Chief Justice) consisting of Hon'ble Mr. Justice S. S. Kang and Hon'ble Mr. Justice A. L. Bahri.*

Petition under Section 115 of C.P.C. for the revision of the Order of the Court of Sh. A. K. Rajan, HCS, Sub-Judge 1st Class, Mohindergarh, dated 6th March, 1987, allowing the application for amendment of the plaint subject to payment of Rs. 500 as costs.

V. K. Bali, Sr. Advocate, with Mr. Ranjit Sharma, Advocate, *for the petitioner.*

D. V. Gupta, Advocate, *for the respondents.*

JUDGMENT

A. L. Bahri, J.

(1) This revision petition was admitted to D.B. in view of divergent views expressed in two cases by this Court on the point. The revision petition was filed challenging order dated March 6, 1987, passed by Subordinate Judge 1st Class, Mohindergarh, whereby an application filed under Order VI, Rule 17 of the Code of Civil Procedure, for amendment of the plaint was allowed subject to payment of Rs. 500 as costs. The suit was filed by Perhlad for the grant of injunction restraining Gopal from alienating land measuring 112 Kanals 15 Marlas, which was joint Hindu family property as well as co-parcenary property, without consideration or legal necessity. When notice of motion in the revision petition was issued, on behalf of the respondent it was pointed out that the costs imposed by the impugned order were accepted, though under protest, on behalf of the petitioner and thus the petitioner after accepting the correctness of the impugned order could not file the revision petition. J. V. Gupta, J., in *Baba Padam Gir Chela (disciple) of Baba Chaudish Gir* v. *Murti (Diety) Shri Paras Nath Digamber Jain installed in Digamber Jain Manair, Jind* (1), held in similar circumstances where the appellant had accepted the costs under protest, that he could not be allowed to agitate against the order allowing amendment of the plaint. C. S. Tiwana, J., in *Randhir Singh* v. *Kamlesh and others* (2), held that when costs were accepted under protest it showed that the person concerned had not acquiesced in the order and thus he could challenge at the subsequent stage such an order. It was not required of the lawyer for such party to make specific statement that he was reserving his right to challenge the order of amendment of the plaint in appeal or revision. Thus, the question for determination in this revision petition is as to whether

(1) 1981 C.L.J. (Civil) 411.

(2) A.I.R. 1980 Pb. & Hy. 70

the petitioner after he accepted costs as awarded by the Court while allowing application for amendment of the plaint under protest, could challenge such an order.

(2) The question involved relates to estoppel, that is, when the party had accepted a benefit under the order he could not subsequently challenge the same. Section 115 of the Indian Evidence Act deals with the question of estoppel and reads as under

> "115. *Estoppel.*—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

Such a matter was considered as early as 1916 in *Banku Chandra Bose and another* v. *Marium Begum and another* (3). In that case the suit was dismissed for want of prosecution but subsequently ordered to be restored on payment of costs. The defendants accepted the cost paid by the plaintiff and it was held that they were precluded from appealing against such an order. The reason was given that they had accepted the costs without recording intention to appeal against the said order. Reliance was placed on the decision *Tinkler* v. *Hilder* (4), wherein it was observed that :—

> "the defendants cannot adopt the order for one purpose and then claim to have it set aside for another purpose."

In S.P.S.A.L. *Ramaswami Chettiar* v. *V.C.T.N. Chidambaram Chettiar* (5), the matter was considered by the Madras High Court. In that case the party accepted the costs under protest. It was held that he could not afterwards object that the order was made without jurisdiction.

The amendment of written statement was allowed on the defendant's paying plaintiff Rs. 150 as costs. The defendant paid the money which was accepted by the plaintiff's counsel "under protest". When the order was challenged, objection was taken. The

(3) XXXVII Indian cases 804.
(4) (1849) 4 Exch. 187.
(5) A.I.R. 1927 Madras 1009(2).

decisoins in *Tinkler* v. *Hilder* and *Banku Chandra Bose* v. *Mariam Begum* were referred to. The following observations in *Banku Chandra Bose's case* were relied upon on behalf of the petitioner :—

> "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."

With respect to the aforesaid observations, the Madras High Court held as under :—

> "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."

It was further held as under :—

> "there is no question of compulsion which distinguishes it from an otherwise similar case, in *Manilal* v. *Harendra Lal* (1910) 12 C.L.J. 556-8 I.C. 79; the money might easily have lain in deposit. Nor do I think that the authorities quoted above are shaken by *Oliver* v. *Nautilus Steam Shipping* Co. (1903) 2 K.B. 639-72 L.J.K.B. 857, a special case under the Workmen's Compensation Act."

The aforesaid decision of the Madras High Court in *Ramaswami Chettiar* v. *Chidambaram Chettiar*, was considered by a Division Bench of the Madras High Court in *Venkatarayudu and others* v. *Rama Krishanyya and others* (6), and was not followed. After referring to certain decisions on the subject, it was observed as under :—

> "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

(6) A.I.R. 1930 Madras 268.

shall be restored on the plaintiff paying the costs of the opposing 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 cost 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'. (13 Halsbury. Para 508). In Broom's Legal Maxims, it is treated as an illustration of the maxim :

'that no man shall be permitted to blow hot and cold with reference to the same transaction. (Edn. 9, p. 118).'

In other words, to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith. From this statement, it is clear that if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it. It is in regard to this that I dissent with respect from the observations of Jackson, J., in *Ramaswami* v. *Chidambaram*, already referred to. That learned Judge thinks that it makes no difference that the party accepts the benefits under protest. In this connection, of course, the significance of the expression 'under protest' must be clearly borne in mind."

(3) Reference may be made to two other cases wherein costs were accepted but without reserving any right to challenge such orders. It was held that after acceptance of costs without reserving such rights, orders could not be challenged. Those cases are *Abdul Rahmankhan and another* v. *Failkus Mohamadkhan and others*, (7) and *Mani Ram* v. *Beharidas* (8), *H. G. Krishna Reddy and Co.* v. *M. M. Thimmiah and another* (9), was a case where in a suit for specific performance of contract, the vendor-defendant refunded the earnest money, which was accepted by the plaintiff

(7) A.I.R. 1934 Nagpur 163(1).
(8) A.I.R. 1955 Raj. 145.
(9) A.I.R. 1983 Madras 169.

"without prejudice" to his rights, the Division Bench held that the plaintiff waived his right to contract. It was observed as under :—

> "In the context, therefore, the mere conditional acceptance by the use of the words 'without prejudice' to his rights under the contract for sale cannot in any manner derogate from the fact that he had acquiesced in the breach of the contract committed by the second respondent. As was observed in *Doe d. Morecraft* v. *Meux*, (1824) 1 Car and p 347, what was of importance was what the first respondent did and not what he said. The first respondent had received the money back and the effect of it cannot be taken away by the words 'without prejudice' which he said."

The matter was also considered by the Lahore High Court in *Sohan Lal and others* v. *Dhari Mal-Ishar Das and another* (10). The suit for rendition of accounts was dismissed. However, on appeal the plaint was ordered to be amended on payment of Rs. 150 as costs. The case was remanded to the trial Court for retrial. The defendant accepted the costs but filed a second appeal against the order of remand. The decisions in *Banku Chandra Bose* v. *Marium Begum's case* and *Ramaswami Chettiar* v. *Chidambaram Chettiar's case*, as referred to above, were relied upon. It was held that the appeal was not competent as the defendants acquiesced in the order passed by the trial Court by accepting the costs awarded to them. In *Mewa Singh and others* v. *Brahma Nand and others* (11), the matter was again considered and *Sohan Lal* v. *Dhari Mal-Ishar Das's* case was relied upon holding that after the acceptance of the costs without protest, a party was estopped from challenging the order. At this stage, it may be stated that in the said case costs were simply accepted without lodging any protest. The case of *Abdul Rahmankhan* v. *Failkus Mohamadkhan* of Nagpur High Court was also noticed. In *Randhir Singh* v. *Kamlesh and others*, which has already been noticed above, after making reference to the decision of the Madras High Court in *Venkatarayudu* v. *Rama Krishnayya's case* (supra), it was observed as under with respect to reserving right to challenge orders after acceptance of the costs :—

> "Whenever costs are accepted under protest, "it always shows that the person concerned has not acquiesced

(10) A.I.R. 1928 Lahore 813(2).

(11) A.I.R. 1972 P&H 321.

in the order. His non-acquiescence is only for showing that the order could be challenged at a subsequent stage as otherwise there can be hardly any purpose for raising a protest before receiving the payment."

While referring to the merits of the said case, it was observed that the party may have uttered something more than what was shown by the words "under protest" and further it was observed as under:—

"It cannot be considered to be the requirement of law that the lawyer concerned should also get his statement recorded to the effect that he was reserving his right to challenge the order of amendment of the plaint in appeal or revision. Thus, my conclusion is that in the circumstances of the present case, the petitioner is not debarred from challenging the order of amendment in spite of the fact that his counsel in the lower Court accepted the costs."

(4) In *Baba Padam Gir Chela's case,* which has also been noticed above, case law was not discussed. However, the view was formed that even acceptance of the costs under protest would preclude the party from challenging the said order.

(5) The view expressed by the Madras High Court in *Ramaswami Chettiar* v. *Chidambaram Chettiar's case* was not accepted by the same High Court in *Venkatarayudu* v. *Rama Krishnayya's case.* However, in the latter decision of the Madras High Court in *H. G. Krishna Reddy* v. *M. M. Thimmiah's case,* the said view was approved, that is, what was done and not what was said was important. After acceptance of the money even *without prejudice to his rights,* it would be deemed that the party had acquiesced in the correctness of the order and waived his rights. In *Mewa Singh* v. *Brahma Nand's case,* as already noticed above, the costs were accepted without lodging any protest. However, observations were made that if protest had been lodged the position would have been different. These observations cannot be treated as a decision in that case being *obiter.* These observations were followed in the case of *Randhir Singh* v. *Kamlesh* (supra).

(6) In the present case, the petitioner having accepted costs awarded in the order while allowing amendment of the plaint further mentioned that he was accepting the amount under protest. This was a unilateral act on the part of the petitioner. Even if he had not accepted the costs, the same would have been deposited in the Court by the plaintiff. If the petitioner had withdrawn the costs from the Court unilaterally stating that the withdrawal would be under protest, he could not approbate and reprobate, that is accepting benefit of the order and at the same time objecting to the passing of the order. He had to accept the order as a whole. What he did was that he accepted the costs and thereby acquiesced in the correctness of the order passed. Although at the time of acceptance of the costs the petitioner stated that he was doing so under protest, that will not make any difference as the opposite party had not consented to the statement of the petitioner in this respect. If in fact the petitioner wanted to challenge the order of amendment of the plaint, there was no compulsion for him to accept the costs. The costs would have remained deposited in the Court. The right of the petitioner to the costs imposed by the Court on the plaintiff while allowing amendment of the plaint was not based on any right of the petitioner in the suit. The costs were ordered by the Court to compensate the petitioner for the inconvenience caused during the pendency of the suit till the plaint was amended. Such an order regarding costs was made on term or condition for amendment of the plaint in view of Order 6 Rule 17, Civil Procedure Code. Such an order could not be accepted in part by either of the party while denouncing the other part. The plaintiff could not file amended plaint stating that he could pay costs at the time of final decision of the suit. Likewise the defendant could not say while accepting the costs that he would challenge the order in appeal or revision or that he would return the costs withdrawn if the order of amendment of plaint is set aside. The crux of the matter to be seen is as to what the petitioner did and not what he said. By acceptance of costs, he accepted the order as correct. He has taken benefit of the order. He cannot now turn around and say he will also challenge the order. By allowing him to challenge the order would amount to nullifying the effect of acceptance of costs. In such circumstances, he cannot approbate and reprobate. His own act would estop him. At the most it can be said that the petitioner had two options, one to accept the costs and to treat the order as correct, the other not to accept the costs and to challenge the same in revision. He having elected to accept the costs, he exercised his

choice in accepting the order as correct. His lodging the protest in such circumstances is meaningless. Reference here may be made to the decision of Madras High Court in *R. Samudra Vijayam Chettiar* v. *Srinivasa Alwar and others* (12) laying down the following principle :—

> "Where a man is entitled to one of two inconsistent rights and he had with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards pursue the other which after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application."

Similar view was taken by the Madras High Court in *K. Shanmugham Pillai and others* v. *S. Shanmugham Pillai and others* (13). The view expressed by the Madras High Court in *Ramaswami Chettiar* v. *Chidambaram Chettiar's case* appears to be correct. The said High Court reiterated the view subsequently in *H. G. Krishna Reddy* v. *M. M. Thimmiah's case*. The view expressed in *Randhir Singh* v. *Kamlesh's case*, thus, cannot be accepted.

(7) Learned counsel for the petitioner also referred to the Full Bench decision of this Court in *Sher Singh* v. *Union of India* (14). That was a case under sections 18 and 31(2) of the Land Acquisition Act. In that case reference under section 18 of the said Act was moved and thereafter the amount of compensation deposited with the Collector was withdrawn. It was held that receipt of compensation could not be deemed as a waiver or withdrawal of his earlier clear cut claim of compensation. Making of reference application under section 18 of the Land Acquisition Act was itself a recorded

(12) A.I.R. 1956 Madras 301
(13) A.I.R. 1968 Madras 207
(14) 1923 Revenue Law Reporter I.

protest. Counsel for the petitioner cannot get any benefit from this decision. Claim of compensation is itself right of the owner of the property and if part of it is accepted by him the same cannot be held to be a waiver of his right to the remaining amount of compensation for which he had made the application under section 18 before withdrawal of the amount of compensation lying with the Collector.

For the reasons recorded above, this revision petition is dismissed with no order as to costs.

R.N.R.

32352/HC—Govt. Press, U.T., Chd.