PETITIONER:
P.R. DESHPANDE

Vs.

RESPONDENT:
MARUTI BALARAM HAIBATTI

DATE OF JUDGMENT: 11/08/1998

BENCH:
K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

THOMAS, J.

When this appeal came up for consideration on 7-4-1995 before R. M. Sahai and N. Venaktachala, JJ, learned Judges ordered this to be listed before a larger Bench, in view of the preliminary objections raised by the landlord - respondent regarding maintainability of the appeal (the reference order is reported in 1995 Supple, (2) SCC 539).

This appeal by special leave is against the order of the High Court of Karnataka dismissing a revision petition filed by the appellant-tenant under Section 50 of the karnataka Rent Control Act, 1961 (for short "the Act") challenging an order of eviction passed against the appellant. While dismissing the revision petition on 25-7-1994, learned Judge of the High Court granted six months' time to appellant-tenant for vacating the premises in question and directed him to file an undertaking within 4 weeks. Appellant-tenant has pursuant to the said direction, filed the undertaking that he would vacate the premises within six months.

The preliminary objection raised by the learned counsel for the respondent is that the tenant is precluded from approaching this Court under Article 136 of the Constitution of India after giving the aforesaid undertaking before the High Court. In support of the said objection learned counsel cited the decision of a two Judge Bench of this Court (K. Jayachandra Reddy and S. C. Agrawal, JJ) in R. N. Gosain v. Yashpal Dhir (1992 4 SCC 683) wherein it was held as follows:

> " By furnishing the said undertaking the petitioner elected to avail the protection from eviction from the premises and he enjoyed the said protection till the passing of the order by the Supreme Court on March 26, 1992, staying dispossession of the Petitioner. Having done so, the petitioner cannot be permitted to invoke the jurisdiction of the

Supreme Court under Article 136 of the Constitution and assail the said judgment of the High Court."

Learned Judges found support to the said view from three decisions of this Court rendered by two member Benches in Vidhi Shanker vs. Heera Lal (1987 supple, SCC 200) Ramchandra Jai Ram Randive (since deceased) vs. Chandanmal Rupchand & ors. (1987 supple. SCC 254) and Thacker Hariram Motiram vs. Balkrishan Chatrabhu Thacker & Ors. (1989 supple SCC 655). In all those three decisions Sabyasachi Mukherjee, J. (as he then was), speaking for the Bench, adopted a uniform approach that "whatever be the merits of the case ..... it would not be proper, after such an undertaking was given in the High Court and time was taken on the basis of such undertaking, to interfere with the finding made by the High Court," Appeals were dismissed on that score alone.

Relying on those decisions Agrawal, J., speaking for the two Judge Bench in R. N. Gosain vs. Yashpal Dhir (supra) has observed thus:

" Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which the could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

A passage from Halsbury's Laws of England was cited by the learned Judges (vide para 1508 in Vol. 16 of the 4th Edn.).

Learned Judges who referred this matter have expressed in the reference order that remedy under Article 136 is a Constitutional right which cannot be taken away by legislation, much less by invoking the principles of election or estoppel. The following observations made in the reference order are worthy of quotation here:

" The principle of 'approbate and reprobate' or the law of election which is the basis of the decision in R. N. Gosain's case (supra) cannot, in our opinion, be applied appropriately to preclude this Court from exercising its jurisdiction under Article 136. The doctrine of election is founded on equitable principle that where a person persuades another one to act in a manner to his prejudice and derives any advantage from that then he cannot turn around the claim that he was not liable to perform his part as it was void. It applies where a vendor or a transferor of property tries to take advantage of his own wrong. this principle cannot, in our opinion, be extended to shut out or preclude a person from invoking the

> constitutional remedy provided to him under Article 136. The law that there is no estoppel against statute is well settled. Here it is a remedy under the Constitution and no law can be framed much less the principle of election which can stand in the way of the appellant from invoking the constitutional jurisdiction of this Court."

The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. Doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had, (vide Black's Law Dictionary, 5th Edn.).

It is now trite that the principle of estoppel has no application when statutory rights and liabilities are involved. It cannot imped right of appeal and particularly the constitutional remedy. The House of Lords has considered the same question in Evans vs. Bartlam (1937 2 All E.R. 646). The House was dealing with an order of the Court of Appeal whereby Scott L.J. approved the contention of a party to put the matter on the rule of election on the premise that the defendant knew or must be presumed to know that he had the right to apply to set the judgment aside and by asking for and obtaining time he irrevocably elected to abide by the judgment. Lord Atkin, reversing the above view, has observed thus:

> " My Lords, I do not find myself convinced by these judgments. I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election."

Lord Russell of Killowen while concurring with the aforesaid observations has stated thus:

> "My lord, I confess to a feeling of some bewilderment at the theory that a man who, so long as it stands, must perforce acknowledge and bow to a judgment of the court regularly obtained), by seeking and obtaining a temporary suspension of its execution, thereby binds himself never to dispute its validity or its correctness, and never to seek to have it set aside or reversed. If this were right, no defeated litigant could safely ask his adversary for a stay of

> execution pending an appeal, for the grant of the request would end the right of appeal. The doctrine of election applies only to a man who elects with full knowledge of the facts."

A party to a lis can be asked to give an undertaking to the court if he requires stay of operation of the judgment. It is done on the supposition that the order would remain unchanged. By directing the party to give such an undertaking no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy. If the order is reversed or modified by the superior court or even the same court on a review the undertaking given by the party will automatically cease to operate. merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay he cannot be presumed to communicate to the other party that he is thereby giving up his statutory remedies to challenge the order. No doubt he is bound to comply with his undertaking so long a s the order remains alive and operative. However, it is open to such superior court to consider whether the operation of the order or judgment challenged before it need be stayed or suspended having regard to the fact that the concerned party has given undertaking in the lower court to abide by the decree or order within the time fixed by that court.

We are, therefore, in agreement with the view of Sahai and Venkatachala, JJ, that the appeal filed under Article 136 of the Constitution by special leave cannot be dismissed as not maintainable on the more ground that appellant has given an undertaking to the High Court on being so directed, in order to keep the High Court's order in abeyance for some time.

On the merits it was contended that dismissal of the revision petition filed by the tenant, without considering it on merits, was bad in law. The revision petition was held not maintainable as it was not accompanied by deposit of arrears of rent. It was a condition for preferring a revision under the Act that the tenant should deposit the entire arrears of rent.

Section 29 of the Act reads thus:

> "29. Deposit and payment of rent during the pendency of proceedings for eviction. - (1) No tenant against whom an application for eviction has been made by a landlord under Section 21, shall be entitled to contest the application before the Court under that Section or to prefer or prosecute a revision petition under Section 50 against an order made by the Court on application under Section 21 unless he has paid or pays to the landlord or deposits with the Court or the District Judge or the High Court, as the case may be, all arrears of rent due in respect of the premises upto the date of payment or deposits and continues to pay or to deposit any rent which may subsequently become due in respect of the premises at the rate at which it was last paid or agreed

to be paid, until the termination of the proceedings before the court or the District Judge or the High Court, as the case may be.

(2) The deposit of the rent under sub-section (1) shall be made within the time and in the manner prescribed and shall be accompanied by such fee as may be prescribed for the service of the notice referred to in sub-section (5).

(3) Where there is any dispute as to the amount of rent to be paid or deposited under sub-section (1), the Court shall, on application made to it either by the tenant or the landlord and after making such enquiry as it deems necessary determine summarily the rent tot be so paid or deposited.

(4) If any tenant fails to pay or deposit the rent as aforesaid, the Court, the District Judge or the High Court, as the case may be, shall unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the premises or dismiss the appeal or revision petition, as the case may be.

(5) When any deposit is made under sub-section (1), the court, the Court, the District Judge or the High Court, as the case may be, shall cause notice of the deposit to be served on the landlord in the prescribed manner and the amount deposited may, subject to such conditions as may be prescribed, be withdrawn by the landlord on application made by him to the Court in this behalf."

The words in sub-section (1) "or to prefer or prosecute a revision petition under Section 50" encompass two stages. First is at the threshold when tenant files the petition for revision. Second is a stage when he prosecutes his revision. On the first stage when his revision petition is not maintainable unless it is accompanied by either payment or deposit of "all the arrears of rent due up to the date of payment or deposit". If the revision is validly preferred then in the next stage of prosecution of revision the tenant has to continue to pay or deposit "any rent which may subsequently become due" until termination of the proceedings.

Learned counsel for the appellant contended that the liability of the tenant under Section 29(1) of the Act would come into operation only after the court determines the amount to be paid. This argument is based on sub-section (3) but the contingency under that sub-section would arise only where there is a dispute as to the amount of rent to be paid or to be deposited. In this case the appellant filed revision petition on 20.4.1991. High Court has noticed that "admittedly, the tenant did not deposit the rent on 20-4-

1991 when the revision petition was filed before the learned District Judge."

The admitted position being as above, it is not open to the appellant now to contend that he did not make the deposit along with filing of revision petition due to want of an order from the Court.

Learned counsel for the appellant made an attempt to raise a contention that though the appellant did not deposit the arrears of rent along with filing the revision petition he has subsequently paid rent arrears on 27-5-1991 and hence the revision must be treated as preferred on that date. We are not disposed to countenance the said contention in this particular case for two reasons. Firstly, that the landlord-respondent filed an application under Section 29(4) of the Act before the District Court and the tenant has not taken up such a ground in the petition filed by him thereto. Secondly, even in the Special Leave Petition he has not adopted any such contention and hence the landlord, has no occasion to meet the factual situation on the basis of which the aforesaid contention is raised.

In the result, we dismiss this appeal.