

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11381 of 2011

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1. M/s Pine Builders Private Limited, a Company incorporated under the provisions of the Companies Act,1956, having its office at G-8,Tara Tower, Behind Republic Hotel, Exhibition Road, Patna-800 001 through its duly authorized Director
 2. The Director, Pince Builders Private Limited, G-8, Tara Tower, Behind Republic Hotel, Exhibition Road, Patna-800 001

.... Petitioner/s

Versus

1. The Bihar State Credit and Investment Corporation Limited, a statutory Corporation of the Government of Bihar having its office situate at Indira Bhawan, R.C.Singh Path,Patna-800 001 represented through its Managing Director.
2. The Managing Director, Bihar State Credit and Investment Corporation Limited, Indira Bhawan, R.C.Singh Path, Patna 800 001.

.... Respondent/s

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Appearance :

For the Petitioners	:	Mr. Kamal Nayan Choubey, Sr. Advocate Mr. Ajay Kumar Singh, Advocate Mr. Raj Kumar, Advocate Mr. Rajnish Kumar, Advocate Mr. Vijay Kumar, Advocate
For Respondent-BICICO	:	Mr. Anjani Kumar, Sr. Advocate Mr. Nirmal Kumar, Advocate Mr. Latesh, Advocate

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA
CAV JUDGMENT
Date: 16-10-2017

In the present writ application, the petitioners have invoked the extraordinary jurisdiction of this Court, seeking a writ of *certiorari* by which a challenge has been placed to the letter dated 10.06.2011,vide Ref. No.Recov/U/77/81-88/278, (Annexure 8), issued by the Managing Director of the respondent-Corporation to the Director of M/s Pine Builders Private Limited,



communicating the decision of the Board of Directors of the Bihar State Credit and Investment Corporation Limited, to hand over the assets of M/s Neeraj Newspapers Associates Private Limited to BICICO, so as to make the same available for its auction through advertisement.

The further prayer of the petitioner is to quash the letter dated 07.07.2011 (Annexure 9) by which the petitioners were directed to hand over the assets to the BICICO within seven days, failing which legal action would be taken against them.

The petitioners have also sought to challenge the decision taken by the Board of Directors in its meeting dated 30.05.2011, pursuant to which the letter dated 10.06.2011 had been issued, resolving that a sum of Rs.85 lacs as received from M/s Pine Builders Private Limited be refunded to them and the assets of M/S Neeraj Newspapers Associates Private Limited may be auctioned through advertisement.

2. A brief sketch of the facts giving rise to the present application can be detailed hereunder as follows:

(i) The petitioner is a registered Company with the petitioner no.1 as the Director of the Company. They are reputed Builders in the State of Bihar and are engaged in designing, construction and consultancy, having their field of building



construction and the registered office is situated at G-8, Tara Tower, Exhibition Road, Patna - 800001.

(ii) M/s Neeraj Newspapers Associates Private Limited had taken a loan in the year 1982-83 from the respondent-BICICO to the tune of Rs.32.44 lacs. However, the borrower company failed to repay its loan for reasons best known to itself. The assets of the borrower Company were then notified in the newspapers in 2002 for sale on successive occasions, although the respondent-Corporation had taken possession of the property hypothecated to it.

(iii) In pursuance of the sale notice issued by BICICO, one M/s Choudhary Kumar Consultants made an offer of Rs.84 lacs, but the same was not finally accepted by the BICICO.

(iv) On 15.07.2002, the BICICO published a settlement policy for its entrepreneurs, known as the OTS, in the daily newspaper "Hindustan" and set up its exit policy which has been detailed in Annexure 1. The said policy had two formulas, either of which could be availed of by the entrepreneurs.

(v) It is important to mention that prior to the issuance of the OTS scheme, contained in Annexure 1, one M/s Badrika Construction Private Limited had also made payment of a



substantial amount to BICICO to the tune of Rs 50 lacs, but pursuant to the exit policy dated 15.07.2002, the original promoter M/s Neeraj Newspapers Associates Private Limited and M/s Badrika Constructions Private Limited brought the petitioners on the scene before the BICICO.

(vi) On 31.07.2002, in pursuance of the OTS scheme, contained in Annexure 1, all the four parties, namely M/s Neeraj Newspapers Associates Private Limited, M/s Badrika Constructions Private Limited, the petitioner-M/s Pine Builders Private Limited and the BICICO, entered into a four party agreement which was reduced in writing by way of the execution of “Agreement of Settlement”. The said agreement incorporated certain terms and conditions.

(vii) The said agreement was duly acted upon and the petitioners made full and final payment and in response thereto, the Deputy Manager of BICICO passed an order dated 23.09.2002 (Annexure 3), handing over possession to the petitioners which contained the inventory of the property and thereafter the petitioner came into possession of the property of M/s Neeraj Newspapers Associates Private Limited.

(viii) It is important to note here that earlier the BICICO had instituted certificate proceedings against the



promoters and guarantors of the borrower Company, namely, M/s Neeraj Newspapers Associates Private Limited. The certificate debtors of the said case came before this Court in a writ application, which was heard and disposed of on 29.11.2002 (Annexure 4) holding that since the controversy stood concluded in terms of the agreement dated 31.07.2002, which contained a clause regarding withdrawal of certificate cases instituted by the Corporation against the borrowers, guarantors and others, hence the proceedings in all those cases shall abate and the properties put under attachment in those proceedings shall be released from attachment forthwith. The Court further observed that since the dispute stood resolved and concluded between the parties, no further order need be passed.

(ix) Another writ application, bearing CWJC No.11067 of 2002, challenging the action of the BICICO was filed by M/s Choudhary Kumar Consultants. The petitioners therein, challenged the actions of the BICICO, whereby the assets of M/s Neeraj Newspapers Associates Private Limited was sold on the basis of four party agreement. The said writ application was strongly contested by the BICICO in which they took the stand that the BICICO was justified in making the sale in favour of petitioner M/s Pine Builders Private Limited, on the basis of



the four party agreement dated 31.07.2002. The said writ application was dismissed on 20.02.2003 (Annexure 5). Thus, this Court declined to interfere in the sale made in favour of the petitioner.

(x) Thereafter, the petitioners made several representations to the MD, BICICO for the registry of the aforementioned property, but to no avail. The registry of the property remains yet to be done. Even though the entire consideration amount had been paid, the BICICO failed to accede to the request for the registration of the sale deed between itself and the petitioners.

(xi) The Deputy Manager, BICICO, vide its letter dated 30.08.2007, addressed to the Advocate of the petitioner, stated therein with regard to the execution of the sale deed in favour of the petitioners, that the matter had been placed before the Board of Directors for approval. The Board after perusal of the four party agreement observed and directed to re-examine the affairs relating to the sale deed and also for the settlement of dues of the borrower company and that the final decision would be communicated to the petitioners only after getting the final nod from the Board. The Board after another perusal of the four party agreement took a decision to re-examine the affairs of the



borrower Company and that further development in the matter will be communicated the final outcome of the Board.

(xii) However, the BICICO remained silent thereafter and when the petitioners insisted on the registration of the sale deed, then all of a sudden by its letter dated 10.06.2011, the BICICO came out with a direction to the petitioners to hand over the assets of the borrower Company and to take back the sum of Rs.85 lacs. The said letter dated 10.06.2011 was issued without any notice or without providing any opportunity of hearing to the petitioner before passing such a harsh and arbitrary order which sought to negate the rights of the present petitioners.

(xiii) On 07.07.2011, the respondent BICICO came out with another letter asking the petitioners to hand over the assets of the unit of the M/s Neeraj Newspapers Associates Private Limited immediately and take back the sum of Rs.85 lacs within seven days, failing which appropriate punitive legal action would be taken against the petitioner. Hence, the present writ application.

3. Challenging the order dated 10.06.2011 (Annexure 8), learned Senior Counsel appearing for the petitioners contended that from a very perusal of the reasons stated in the same, there is no indication that the four party



agreement was based on any fraud practised by the petitioners. Further, it was submitted that the respondents can thus be called upon to justify the impugned order only on the basis of the reasoning assigned in the impugned order itself and they cannot take support of any material, which may be brought on the record by way of counter affidavit or even that which has been contended orally. Thus, the contention of the respondents that the petitioners had practised fraud on the respondents in executing the four party agreement is wholly untenable and cannot be sustained in any Court of Law. In support of their contentions, learned counsel appearing on behalf of the petitioners has placed reliance on the ratio laid down by the Hon'ble Supreme Court in the case of **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others**, reported in **AIR 1978 S.C. 851** (paragraph 8):

“When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned”

4. A similar view has also been taken by the Hon'ble Supreme Court in the case of **East Coast Railway v. Mahadev Appa Rao**, reported in **AIR 2010 S.C. 2794**. Paragraphs 8, 9 and



10 of the said judgment are reproduced hereunder:

“8. There is no quarrel with the well-settled proposition of law that an order passed by a public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained. It follows that the infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit filed before the Court where the validity of any such order is under challenge. The legal position in this regard is settled by the decisions of this Court in Commissioner of Police, Bombay v. Gordhandas Bhanji (AIR 1952 SC 16) wherein this Court observed:

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”



9. Reference may also be made to the decision of this Court in Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors. (1978) 1 SCC 405 : (AIR 1978 SC 851) where this Court reiterated the above principle in the following words:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.”

10. Later decision of this Court in R. Vishwanatha Pillai v. State of Kerala and Ors. (2004) 2 SCC 105 : (AIR 2004 SC 1469: 2004 AIR SCW 419) and Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai and Ors. (2005) 7 SCC 627 : (AIR 2005 SC 3520:2005 AIR SCW 4796) have re-stated the legal position settled by the earlier two decisions noticed above.”

5. The further ground urged by the petitioners is that the BICICO, having acted on the agreement for sale and having accepted the offer and money paid by the petitioners and in



consequence thereof, having handed over the possession of the property, had concluded the contract and it was now not open to the respondent-Corporation to go back on the same. It was contended that the Corporation being the State under Article 12 of the Constitution of India cannot unilaterally act violating Article 14 of the Constitution of India. In this context, learned counsel for the petitioners has placed reliance on an identical case in the case of *M/s. Lakshminarayana Industries v. Karnataka State Financial Corporation, Vidhana Soudha, Bangalore and Ors., reported in AIR 2009 Karnataka 65 (Paras 16, 17 and 20)*, wherein it has been held that in the given facts of the case, when the Financial Company has accepted the money from even third party, who is not the original borrower, even then the Company being a State under Article 12 of the Constitution of India is bound by the terms of the agreement and a Writ of mandamus can be issued to the Financial Corporation to execute the sale deed for the property mentioned in the agreement.

6. Learned counsel appearing on behalf of the petitioners has further urged that the BICICO having once taken the benefit of a transaction, i.e. the four party agreement dated 31.07.2002 (Annexure 2, Page 34) cannot resile from the same and say that another part of that transaction is not valid. In order



to buttress this leg of argument, the petitioners have placed reliance on paragraph 10 the judgment of the Apex Court in the case of ***R.N. Gosain v. Yashpal Dhir***, reported in ***AIR 1993 SC 352***, which is quoted hereunder:

“10. 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 he 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’. (See: *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*, (1921) 2 KB 608, at p. 612, Scrutton, L.J.). According to *Halsbury’s Laws of England*, 4th Edn., Vol.16, *“after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside”* (para 1508).”

7. It was thus contended that in the given facts and circumstances of the case, the doctrine of election will apply against them and they are estopped from taking such a plea. Thus, in support of such doctrine of election, the petitioners have



elucidated their point by referring to **AIR 2011 SC 2220 (J.A.C. of Airlines Pilots Associations of India v. Director General of Civil Aviation)** (Para 14) and also **(2011) 10 SCC 420, (Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.)**, which postulates as such:

“the “Doctrine of Election by conduct” comes into play when a party who could have raised his grievance but did not raise at that point of time, then subsequently he cannot approbate and reprobate rather he will be precluded from taking such stand.”

8. In this case, admitted fact is that the respondent-Corporation has taken benefit of transaction i.e. the agreement for sale dated 31.07.2002 and enjoyed that money for such a long period now after 8-9 years they cannot take stand that the said transaction was not valid more particularly when the contract stood concluded, therefore, the principle of estoppel by election will come into play against them because they have opted not to raise objection for such a long time.

9. Thus, it appears that from the aforesaid decisions that the “doctrine of election by conduct” comes into play when the party could have raised his grievance but did not raise at that point of time, then subsequently he cannot approbate and



reprobate, rather he will be precluded from taking such stand.

10. In the instant case, the all pervasive facts is that the respondent-Corporation took the benefit of the transaction, i.e., the four party agreement for sale dated 31.07.2002 and accepted the money to the tune of Rs.85 lacs and enjoyed the same. Their action now, after 8-9 years, for returning the money cannot sustain as they cannot be permitted to take the stand that the transaction was not valid, more particularly when the contract stood concluded. Therefore, the principle of estoppel by election will come into play against them because they have opted not to raise such objection for such a long time. Furthermore, in a collateral proceeding where the sale was challenged by other interested buyers, the Corporation supported the sale made in favour of the petitioners.

11. Learned counsel for the petitioners further contended that apart from estoppel by election, the instant case will also be hit by the principle of estoppel by deed and the respondent-BICICO is bound by the statement made in the deed, i.e. the four party agreement (Annexure 2). Accordingly, it was submitted that the BICICO is precluded from taking the stand with respect to the non-enforceability of Annexure 2. For the reasons aforementioned, the writ application is wholly



maintainable and warrants interference by this Court under Article 226 of the Constitution of India.

12. Learned counsel for the petitioners further strongly opposed the stand taken by the respondents that there was a fraud practised by the petitioner which contention cannot be accepted as nowhere the respondents have taken such plea in their counter affidavit filed before this Court.

13. In neither of the affidavits, the respondents have ever urged that the petitioners had been instrumental in succeeding to execute the four party agreement by playing fraud and, therefore, such submissions at the stage of argument and that too by oral submissions, are to be wholly deprecated and fit to be rejected. As such, the writ application is fit to be allowed as the impugned order is wholly illegal and arbitrary and a direction should be issued for executing the sale deed in favour of the petitioners.

14. Responding to the contentions of the petitioners, learned counsel for BICICO has justified the impugned order dated 10.06.2011 stating that the said decision is in the light of the decision of the Board of Directors, which is the supreme authority of the BICICO and is fully competent to take the same. It was stated that the Board of Directors of BICICO had not approved



the four party agreement for sale dated 31.07.2002 and for the said reason, the BICICO is ready to refund a sum of Rs.85,00,000/- to the petitioners, for which the petitioners must hand over the assets so taken over by the petitioners. It was further submitted that once such hand over is effected, the assets of M/s Neeraj Newspapers and Associates Pvt. Ltd. may then be auctioned through open advertisement.

15. It was submitted that M/s Neeraj Newspapers and Associates Pvt. Ltd. had availed a term loan of Rs.32.44 lacs from the BICICO which was not repaid by them. When several letters for payment of the said dues did not receive any response, the BICICO in order to realize their dues, took over the assets of the units under the provisions of the Bihar State Financial Corporation Act, 1951 on 21.03.2002. The assets of the unit was advertised for sale in the newspaper on 31.01.2002 and one M/s. Chaudhary Kumar Consultant (P) Ltd. submitted an offer of Rs.84 lacs to purchase the assets of the borrowing company. The sale was, however, not finalized and though the tenderer went to Hon'ble High Court, vide CWJC No.11067 of 2002, the same was disposed of vide Annexure-5 as the Court had failed to accept the case of the tenderer.

16. Learned counsel for the respondent-BICICO



contended that the OTS was advertised in the newspaper on 15.07.2002, but the same was not availed by M/s Neeraj Newspapers and Associates Pvt. Ltd. Clarifying the position, learned counsel for the BICICO submitted that M/s Neeraj Newspapers and Associates Pvt. Ltd. took loan from the Bank with interest, which it has to repay along with interest to the concerned Bank. It is further submitted that the BICICO provides loan to establish the industry but never sanctions the working capital for running the industry. The BICICO also announces the One-Time Settlement Policy(OTS Policy) only to entrepreneurs to recover the due amount as per the criteria fixed by the OTS, which involves that the borrowers Units have to pay only OTS amount, after which the BICICO releases the 'No Dues Certificate' to the concerned Units and the rest amount is exonerated as per the OTS Policy to the old borrowers. Alternatively, in the case of sale, the BICICO puts the Unit to auction and the highest bidder is considered by the Tender Committee. The rest of the dues of the entrepreneurs are recovered through the process of Court initiated against the borrower and the guarantor. The recommendation in favour of the tenderer by the Tender Committee is to be placed before the Board of Directors, which is the only final authority to take the



decision regarding sale, after which the BICICO will execute the sale deed to the auction purchaser. Thus, there is a radical difference between the OTS and the sale of the BICICO. In the case of sale, approval of the Board is mandatory, which indicates that the Board is above the Managing Director as per the Articles of Association of the BICICO.

17. It was argued further that so far as the OTS is concerned, its benefits are available only to an old promoter and he can avail the same facility, but it is not as a matter of right. In the said Scheme, there is no provision for sale and it is only for a settlement in terms of the OTS Policy.

18. Referring to Annexure 1, which was the exit policy announced by the BICICO, learned counsel for the BICICO urged that the policy, as stated therein, was available only to the borrowing units in the form of the settlement policy so that they may get an opportunity to clear all the balance outstanding (BOS). It was the exit policy which could be availed of by the defaulters to meet their exit from the list of defaulters. It was contended that the borrowing units could settle their accounts as per the following formula:

“(For units more than 10 years old as on 31-03-02)

Pay=[Cash Principal disbursed x 2.5]-[Cash



repayments received till 31.03.02]

(For units less than 10 years old)

**Pay=[Cash Principal disbursedx2.0]-[Cash
repayments received till 31.03.02]**

The above is MINIMUM and in no case the account will be settled for less than the Outstanding Principal even if a particular unit already satisfies the above formula. The above settlement policy cannot be claimed as a matter of right and the BICICO retains the discretion to refuse any company the benefits under the policy.

Mode of payment shall be preferably one DOWN payment of 100% through DD. In case of instalments in the form of post dated cheques, they should not be of a date beyond **20-09-2002** in which case the down payment should be at least 50%.....”

19. It was thus averred by the counsel for the BICICO that from a bare perusal of the scheme, it appears that the said exit policy was available only to the borrowers and not to any ‘stranger’. However, neither of the original promoters M/s Neeraj Newspapers and Associates Pvt. Ltd. nor M/s Badrika Constructions Pvt. Ltd. paid the amounts to the BICICO towards the settlement of the dues under the One-Time Settlement Scheme and thus, it could not be said that they had opted for the OTS



Policy. However, an arrangement was made by them for deposit of the money by entering into the four party agreement with one of the functionaries of the BICICO by the two borrowers along with one M/s Pine Builders Pvt. Ltd., petitioner herein. Accordingly, a sum of Rs.85 lacs was given by the petitioners. But when the matter came up before the Board of Directors, the said four party agreement was not approved by the Board of Directors and hence, the terms and conditions are not binding upon the parties.

20. Furthermore, at no stage, was the Board of Directors apprised of any proposal regarding handing over the possession of the property in question and thus, the Board of Directors has rightly disapproved the sale as it is the only authority for taking a suitable decision in the matter. Thus, the question of execution of the sale deed in favour of the petitioners does not arise. It is under the background of such facts and circumstances that the Board has directed the petitioners to take back its money by means of the impugned order and any handing over of possession to the petitioners does not bind the BICICO as the four party agreement dated 31.07.2002 has no legal sanction. Thus, it is proposed that the assets of M/s Neeraj Newspapers and Associates Pvt. Ltd. have been decided to be auctioned through



advertisement and the decision of the Board of Directors was communicated to the petitioners on the address disclosed by them, vide Annexures 8 and 8/1.

21. It was further argued by the learned counsel appearing for the BICICO that the writ application was also not maintainable as the petitioners had approached this Court after ten years of the agreement. It clearly indicates the weak right attached to the petitioners. Hence, no transfer title deed can be executed on the basis of the four party agreement, which was purported to have been executed on 31.07.2002 between M/s Badrika Constructions Pvt. Ltd., M/s Neeraj Newspapers and Associates Pvt. Ltd. , respondent BICICO and the present petitioners-M/s Pine Builders Private Limited. It was also contended that the two original builders having not been made party in the present writ application, the writ application was fit to be dismissed for non-joinder of necessary party.

22. It was contended that the entire power is vested with the Board of Directors as per Articles 13 and 18 of the Articles of Association of the BICICO. It was also contended by the BICICO that the promoter and the guarantor were liable to pay a total amount of dues of Rs.399.88 lacs as on 31.03.2002, which was public money as the BICICO is also liable to pay back



interest to the Bank from which it has taken loan under the Refinance Scheme.

23. During the course of arguments, it was further contended that there was an element of “fraud” in the agreement executed between the parties as the BICICO did not recognize strangers. The agreement was, in fact, executed by the Deputy Manager but could be given effect to only on approval having been received to the same by the Board of Directors. Since the One Time Settlement Scheme was available to only borrowers, it cannot be comprehended as to how a total outsider was brought on the scene. However, when such fact was brought to the notice of the Board, the matter was considered at length and an appropriate decision was taken by the Board of Directors to return the money so received by the BICICO to the petitioners and to proceed further in the auction matter for putting the Unit of the vendor of the petitioners on sale and/or auction. Thus, the impugned order clearly reveals that the agreement was patently bad and was not executable and the parties, particularly the BICICO, was not bound by it.

24. Referring to the fraud committed by the petitioners in approaching this Court on the basis of a four party agreement, it was submitted that the predecessor-in-interest of the



petitioners had never approached this Court and the four party agreement which was executed between the parties was but a fraud upon the BICICO as such a document could not sustain as it having been executed in pursuance of the one time settlement scheme/exit policy, contained in Annexure 1.

25. Referring to a decision of the Apex Court in the case of *S.P. Chengalvaraya Naidu v. Jagannath*, reported in *AIR 1994 S.C. 853*, it was averred that one who comes to the Court, must come with clean hands.....He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation.

26. Thus, it was urged by the learned counsel for the BICICO that the petitioners have cleverly withheld the basic facts that the petitioners could not have participated in the “one time settlement scheme” as the said scheme was available only to borrowers and not to strangers. As such, if at all the petitioners had any grievance, it was open to them to move for specific performance of agreement so made between the parties and for having the same executed, it was necessary for them to lead evidence. The agreement made between the parties was not enforceable under law as the writ being bad for non-joinder of



necessary party and also for non-ratification of such agreement by the Board of Directors.

27. Referring to the case of **S.P. Chengalvaraya Naidu** (supra), learned counsel for the BICICO submitted that

"Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

28. It was further contended that similar issue has been decided by the Apex Court in the case of **Kerala Financial Corporation v. Vincent Paul**, reported in (2011) 4 SCC 171. At paragraphs 16 and 17 of the said judgment, it has been stated as hereunder:

"16. The stand taken by the learned Senior Counsel for Vincent Paul was totally denied by KFC by submitting that the communication dated 31-10-1988 is not absolute but subject to confirmation by Vincent Paul within a week. Admittedly on receipt of the



communication dated 31-10-1988 from KFC, the plaintiff had not sent any reply in the form of confirmation of the said transaction as provided in Clause (1) of Ext. A-2. In such circumstance, it cannot be contended that there is a concluded contract between KFC and Vincent Paul. After 31-10-1988, KFC sent another letter on 5-11-1988 intimating the plaintiff that further proceedings can be finalized only after vacating of the temporary injunction ordered by the Munsif Court, Thrissur. The said letter has not been disputed by Vincent Paul. Inasmuch as KFC has agreed to sell the property in question for Rs.8.25 lakhs subject to compliance with three conditions mentioned in Ext.A-2, unless the other party to the contract, namely, Vincent Paul conveys his willingness within a week with regard to the terms stipulated therein, he cannot take advantage of mere remittance of a sum of Rs.10,000/- towards earnest money deposit as stipulated in Ext.B-1.

17. These aspects have been correctly appreciated by the trial court and it rightly dismissed the suit filed by Vincent Paul. On the other hand, the High Court, on an erroneous assumption as to the communication dated 31-10-1988 concluded that there was a valid contract and granted a decree for specific performance. We are unable to accept the



reasoning of the High Court for granting decree for specific performance in favour of Vincent Paul.”

29. Thus, if the petitioners took possession of the property on the basis of the contract, which was not valid in view of the exit policy and which was yet to be ratified by the Board of Directors, the respondent-BICICO contended that such an act was wholly fraudulent and collusive and would not bind the BICICO, in view of the ratio of the aforementioned judgment. Thus, the writ application was devoid of any merit and was fit to be dismissed.

30. In order to dispel the arguments advanced by the BICICO, Mr. Kamal Nayan Chaubey, learned Senior Counsel appearing on behalf of the petitioners has strongly disputed the allegations of fraud and has submitted that the issue of fraud was never raised by the respondent-BICICO in any of their counter affidavits and so as to allege, at this stage, that the four party agreement had been executed by playing fraud is wholly untenable and fit to be rejected. Even the impugned order does not whisper anything to the said effect. As such, as submitted earlier, the impugned order can alone be tested on the reasons assigned therein and it is not open to them to raise fresh ground of fraud as indicated by the Counsel in their arguments.



Learned Senior Counsel, while bringing forth the legal maxim “QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS” as stated in Broome’s Law of Contract, submitted that *“he who derives the advantage ought to sustain the burthen.*

The said maxim has been designated a principle of “universal application” that where a person who allows his agent to appear in the character of principal must take the consequences of the agent being dealt with on the footing that he was really the principal.

31. Referring to the Scottish doctrine of “approbate and reprobate” it was submitted that the same is against the doctrine of election in our own law. The principle on which this doctrine depends is that a person shall not be allowed at once to benefit by and to repudiate an instrument, but that, if he chose to take the benefit which it confers, he shall likewise discharge the obligation where the onus it imposes. In this context, learned Senior Counsel for the petitioners submitted that the respondent-BICICO had agreed to the acceptance of Rs.85,00,000/-(eighty five lacs) as was stipulated in the contract under reference and after retaining it for several number of years was now seeking to resile from the deed and return the money to the disadvantage of the petitioners. It is submitted that the respondents are bound by



...estoppel and deed of record as explained in Halsbury's Laws of England (4th Edition, Volume 16, Paragraph 1504).

EFFECT OF A DEED (Vol-12 Paras 1353, 1354)

1353. General effect. By executing a deed in accordance with all the requirements for such execution, the party whose act and deed it becomes, as a general rule, conclusively bound by what he is stated in the deed to be effecting, undertaking or permitting. He is, in general, so bound even though another party has not executed the deed, or he has himself executed it in a false name. He is, as a rule, estopped from averring and proving by extrinsic evidence that the contents of the deed did not in truth express his intentions or did not correctly express them, or that there are reasons why he should not be obliged to give effect to the deed. This is equally the case whether the deed is expressed to operate as a conveyance of property or as a contract or otherwise. In an action founded on the deed, an executing party is also in general estopped from denying the truth of a precise and unambiguous representation of fact contained in the deed where the representation is material to the transaction effected by the deed and appears clearly enough to have been made or adopted by him with a view to the other party's relying on it. But to all these general principles there are exceptions,



cases where the deed may be a nullity or may be avoided or corrected.

1354. Rule against derogation. It is a well-established rule that a grantor cannot be permitted to derogate from his grant. Hence, on the grant by the owner of a tenement or part of that tenement there will pass to the grantee all those easements which are necessary in order that the property may be enjoyed reasonably for the purpose for which it was granted. On the other hand, if the grantor intends to reserve any right over the tenement granted, he must do so expressly, though to this rule there are certain exceptions, notably in cases of what are known as ways of necessity.

Elaborating his arguments, learned Senior Counsel has further referred to Article 16 of Halsbury's Laws of England to explain the meaning of "estoppel". He has referred to Paras 1501 and 1504, which are quoted hereunder:

"1501. Meaning of "estoppel". There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel, or "conclusion" as it was frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings



that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Estoppel is often described as a rule of evidence, but the whole concept is more correctly viewed as a substantive rule of law.”

“1504. Estoppel by deed. Where there is a statement of fact in a deed made between parties and verified by their seals, an estoppel results, and is called “estoppel by deed”. If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is only binding on the party making it. It seems that an estoppel also arises upon a deed poll, the mode of its execution being equally solemn with that of a deed made inter partes.”

32. In support of this contention, learned counsel for the petitioners has referred to the case of **MARTIN CASHIN v. PETER J. CASHIN**, reported in **A.I.R. 1938 Privy Council 103**, wherein at page 109, the “estoppel by deed” has been held to be final. It is relevant to quote *from the said judgment as follows:*

“Their Lordships wish to add that in a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial



whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him—not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed. There remains for consideration as a factor in the case the matter of the fairness of the transaction embodied in the deed.”

33. Referring to Section 115 of the Evidence Act, learned counsel further contended that a recital in the deed agreed to by all the parties, is estoppel on all. This issue was settled by a Bench of this Court in the case of **Lachman Lal v. Munshi Mahton**, reported in **AI.R. 1933 Patna 708(2)**, wherein it was stated at page 711 of the said judgment C 1, 2 [Stronghill v. Buck], (1885) 14 Q B 781, relying on Queen’s Bench, held as follows :

“When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party and the intention is to be gathered from construing the instrument.”



Thus, it was contended that even in view of Section 115 of the Evidence Act, the “Doctrine of Estoppel” can well be explained in the languages as spelt out in the decision of the Madras High Court, in the case of ***Depuru Veeraraghava Reddi v. Depuru Kamalamma***, reported in ***AIR 1951 Madras 403***, in paragraph 7 of the said judgment it has been held as follows :-

“Estoppel through a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine. It involves a combination of several essential elements; the representation or statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting. To invoke the doctrine of estoppel by representation it is necessary that in acting upon it, the party to whom it was made, should have altered his position to his prejudice. It may be that when prejudice or damage is made out and the other circumstances are such as to create an estoppel, it is unnecessary to measure the quantum or extent of the prejudice or damage or arrive at the result that it is irreparable.”

34. Similarly, in the case of ***Afzal Husain v. Chhedi***



Lal, reported in *AIR 1935 Allahabad 792*, at Page 798 placitum C 1, it was held that a document acted upon and possession transferred and money received, the parties so having acted upon by virtue of the said deed, was estopped from denying the validity subsequently.

35. Having heard learned counsel for the petitioners and the learned counsel for the BICICO, the main issue which is to be decided is as to whether the petitioner-M/s Pine Builders Private Ltd. has acquired any right by virtue of the Agreement of Settlement dated 31.07.2002, which was entered into by the petitioners and one M/s Neeraj Newspapers and Associates Private Limited and M/S Badrika Constructions Private Limited and also the Bihar State Credit and Investment Corporation Limited (BICICO), which is the contesting respondent in the present case. The respondent-BICICO, apparently, do not recognize the right of the petitioners for the following reason:

The petitioner M/s Pine Builders Private Limited is not a “borrower” who can avail the benefit of the OTS Scheme on the basis of the said four party agreement between the original borrowers, namely, M/s Neeraj Newspapers and Associates Private Limited and M/s Badrika Constructions Private Limited (borrowers) and the BICICO. However, The petitioner was



described as the person, who had made the offer (Fourth Part) to purchase the assets and to pay the sum of Rs.85 lacs, which had been willingly accepted by the First and Third Part of the Agreement, towards liquidation of the dues of the borrower Company to the creditor-BICICO. The terms as enunciated in the Agreement at para 4 are stated to be in the following terms :

“4. In view of the offer made by the FOURTH PART to purchase the assets and to pay the sum of Rs.85 lacs and the willingness of FIRST and THIRD that the same may be accepted towards liquidation of dues of the borrower company to the Creditor and the creditor hereby agrees to accept the consideration money of Rs.85 lacs and also agrees to transfer the land, buildings, plant and machinery as mentioned in schedule-1 to this agreement and to execute the Sale Deed in favour of buyer as and when the buyer so desires at their cost but subject to payment and credit amount of Rs.85.00 lacs as set out above. The buyer shall thereafter enjoy right, title and possession free from all encumbrances of the assets of Borrower Company.”

(Emphasis added)

36. Thus, from a perusal of this paragraph of the Agreement, it is apparent that the creditor agreed with open eyes



to accept the consideration money of Rs.85 lacs and also agreed to transfer the land, buildings, plant and machinery as was mentioned in Schedule-1 of the Agreement and to execute the sale deed in favour of the buyer and when the buyer so desires at their own cost but subject to the payment and credit amount of Rs.85 lacs. Thus, the recital in the deed clearly enunciates that thereafter, the buyer, being the present petitioner, would enjoy right, title and possession free from all encumbrances of the assets of the borrower Company. At para 5(iii) of the said Agreement it has been further clearly stated that:

“5 (iii) The creditor will execute the necessary Sale Deed in favour of the buyer on receipt and credit of the amount of Rs.85 lakhs in its account as mentioned in para-3 above at the risk and cost of the buyer and the buyer will become entitle to enjoy the property from the date of actual realization of the full consideration amount and written letter of possession thereafter will be issued by the creditor forthwith in favour of the buyer.”

On careful consideration of such recitals, this Court clearly finds that the respondents were now estopped from resiling from the Agreement to the detriment of the petitioners. As argued, this Court also holds that the respondents have no justification for



issuing the impugned order directing refund of Rs.85 lacs and also refusing to register the sale deed.

37. It appears from the record of the case (Annexure 3) that the entire amount of Rs.85 lacs was handed over to M/s Pine Builders Private Limited on 23.09.2002 by and on behalf of the BICICO. The signatory Shri S.P. Singh has been described as the Deputy Manager of the BICICO. It further appears from the record of the case that in a collateral proceeding which came before this Court in CWJC No.11067 of 2002, which was filed by a party who had agreed to purchase, in response to a sale notice issued by the BICICO, the petitioner, namely, one M/s Choudhary Kumar Consultants had been declared as the highest bidder in a proceeding under Section 29 of the Bihar State Financial Corporation Act, 1951. Nevertheless, the unit of the defaulting borrower, namely, M/s Neeraj Newspapers and Associates Private Limited, was not sold to him but was settled by the BICICO on the basis of the four party agreement to another buyer, namely, M/s Pine Builders Private Limited, which came to be under challenge.

38. It appears that prior to the agreement entered into between the present petitioner, the sale offered to the petitioner of CWJC No.11067 of 2002 was recalled and the amount of Rs.84 lacs was returned to him. Thereafter, came a new One Time



Settlement Scheme dated 15.07.2002. The contents of the Scheme have already been described in the earlier paragraphs.

39. The Court after considering the entire facts and circumstances dismissed the said writ application (CWJC No.11067 of 2002) in view of the submission of the BICICO that a settlement had already been made in favour of M/s Pine Builders Private Limited, as the loan was settled in terms of the OTS Scheme which had come into operation with effect from 15.07.2002. In the said case, it was observed that once the Scheme had come into force, the original borrower like any other loanee is free to take advantage of the Scheme and get its loan settled under the said scheme.

40. Thus, the BICICO had categorically taken the plea that the petitioner-M/S Pine Builders Private Limited, who had joined the borrowers as 4th party to give effect to the OTS to be made in their favour, could not in the present writ application be derecognized at this stage and treated as a 'stranger', particularly because the BICICO had entered into the four-party agreement with open eyes and had taken advantage of the same in a collateral proceeding. The petitioners had also deposited a sum of Rs.85 lacs and taking notice of the said fact that the petitioners had deposited the entire amount, the respondent-BICICO had given possession of the entire properties of the original borrower to the petitioners and



all that remained was execution of the sale deed which was kept in abeyance for a considerable length of time. Furthermore, there is not a whisper in the Agreement that the same was subject to the approval of the Board of Directors. On the contrary, it was said to be binding on the “assigns” of the parties.

41. This Court thus finds that the petitioners could not be penalized and the respondent-BICICO having enjoyed and availed the said Rs.85 lacs for a period of almost six years from the date of its deposit could not make a *volte face* and reject the plea of the petitioners for registering the sale deed by merely stating that the agreement lacked sanction from the concerned authority, namely, the Board of Directors.

42. Having examined the records of the case and on consideration of the principle of law, which has been sought to be applied, it is the considered opinion of the Court that the “doctrine of election” will apply against all the parties to the Agreement; more so against the BICICO as they have acted upon it and have handed over the physical possession of the properties after accepting the entire amount of Rs.85 lacs. The principle has well been incorporated in the decision of the Apex Court cited by the petitioners in **(2011) 10 SCC 420** (supra). The respondents having enjoyed the amount of Rs.85 lacs for such a long period of over



eight to nine years, they cannot take the stand at this stage that the transaction was not valid when the contract stood concluded and the property had changed hands. Therefore, “the principle of estoppel by election” will come into play against them because not only they have opted not to raise such objection for a considerable length of time, but have also permitted the petitioners to come into possession of the property. Thus, they cannot approbate and reprobate and are precluded from taking stand with respect to non-enforceability of Annexure 2.

43. This Court further finds force in the submission of the learned Senior Counsel appearing for the petitioners that the element of fraud, which has been raised during the course of arguments by the respondent-BICICO, is meant to purely mislead this Court as at no point of time did the respondents take such a plea during the course of eight to nine years, when they retained the money of the petitioners. Their contention is that the case must be decided on the basis of the reasons stated in the impugned order (Annexure 8). From a bare perusal of the same, it emanates that even in the said letter, no element of fraud has been alleged against the petitioners; even remotely, nor was such a stance taken by them down the years as being the reason for passing of the impugned order. The respondents will have to justify their action by passing



the impugned order only on the basis of the reasons assigned therein and they cannot take recourse to any other material being brought on record by way of counter affidavit.

44. The reliance on the ratio laid down by the Hon'ble Apex Court in the case of **Mohinder Singh Gill** and also in the case of *East Coast Railway*, already referred to in the preceding paragraphs, stands fully justified and persuades this Court to accept such a plea. Thus, the argument of the respondents in raising the plea of fraud is also not tenable on both facts and law and is fit to be dispelled.

45. The plea taken by the respondents that the agreement was subject to the decision of the Board of Directors of the BICICO is also not tenable as the four party agreement did not say so and a bare perusal of the One-Time Settlement Policy clearly shows that the Managing Director was empowered and had the sanction to proceed with the OTS as per 2004 Policy but in 2002 Policy, there was a difference and in the same, the Managing Director was not authorized. The petitioners' agreement was executed on 31.07.2002. Therefore, to take any contrary stand at a stage when the BICICO has already enjoyed the money deposited by the petitioners for eight-nine years cannot find favour with this Court. Thus, for that reason also, the impugned order cannot be



sustained.

46. Though it has been argued by the learned counsel for the BICICO that the 2002 Policy was different from the 2004 Policy, which has been brought on the record as Annexure 10 by the petitioners in their reply to the counter affidavit, it appears from a perusal thereof that there was provision for joint finances, which is evident from page 4 of the OTS Policy, 2004. It further appears that the OTS Scheme, 2004 sought to adopt the 2002 OTS Policy. The Corporation had earlier announced OTS Policy on 15.07.2002, which was forwarded and extended till 31.05.2003 and has been re-adopted again with effect from 01.10.2004 without changing any parameters. The footnote also states that the OTS was approved by the Board of Directors of the BICICO, vide Agenda Item No.189/8 in the meeting held on 15.10.2004. Thus, the OTS itself having been approved by the Board of Directors of the BICICO, it could well be deemed that any action under authority of the Board of Directors by the signatory to the Agreement would be an act of the Corporation binding them to it. For such reason also, the plea taken by the Corporation that the four party Agreement did not have the approval of the Board do not hold good ground for accepting their submissions and are also, thus, rejected.

47. In the result, as stated above and for the



foregoing reasons, this Court does not uphold the sanctity of the order impugned in the present writ application. Thus, the order dated 10.06.2011, vide Ref. No.Recov/U/77/81-88/278, (Annexure 8) is quashed. Consequently, the letter dated 07.07.2011, vide Ref. No.Recov/U/77/81-88/566, (Annexure 9) is also set aside. The respondents are directed to execute the sale deed in favour of the petitioners in furtherance of the Agreement arrived at between the parties, vide Annexure 2.

48. The writ application is allowed. No costs.

(Anjana Mishra, J)

PNM

AFR/NAFR	AFR
CAV DATE	10.03.2017
Uploading Date	17.10.2017
Transmission Date	NA

